

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE DISTRICT COUNCIL 48
and AFSCME LOCAL 587, AFL-CIO**

and

MILWAUKEE AREA TECHNICAL COLLEGE

Case 471
No. 55977
MA-10136

(Grievance of Jose-Ortiz Coss)

Appearances:

Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, by **Ms. Carolyn H. Delery**, on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliate, AFSCME Local 587.

Mr. William J. Roden, Vice-President and General Counsel, on behalf of Milwaukee Area Technical College.

ARBITRATION AWARD

Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliate, AFSCME, Local 587, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Milwaukee Area Technical College, hereinafter the College, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The College subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 24, 1998, in Milwaukee, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by June 2, 1998. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there are no procedural issues and that the substantive issue to be decided is:

Was the Grievant (Jose-Ortiz Coss) disciplined for just cause?

CONTRACT PROVISIONS

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

The Employer maintains and operates the Milwaukee Area Technical College (College) with campuses located at a number of locations, including its South Campus at Oak Creek, Wisconsin. The Grievant, Jose-Ortiz Coss, has been employed by the College for approximately 14 years, and at the time of the incident in question, held the position of Building Service Worker (BSW) II at the College's South Campus. The Grievant's immediate supervisor is Clyde Rymer, the head of the Operations Department at the South Campus. Richard Dries is the College's Director of Operations.

Also employed at the South Campus is Margaret Damrow, who has been employed at the College for 14 years. Damrow is an Educational Assistant and for the past two years has worked in the Computer Center (Room A206) at the South Campus. In March of 1997, Damrow co-managed the Center with two other Educational Assistants, Martha Miller and Dorothy Veal. Miller's work shift finishes at 4:00 p.m. and Damrow's shift is from 1:30 p.m. to 10:00 p.m. Students utilize the Computer Center to do their homework, to scan the Internet, or to read their e-mail. In addition to Damrow, Miller and Veal, the Computer Center is also staffed by student helpers and part-time staff, although Damrow at times works alone during the evening hours. The number of students at the Center at any time varies from 10 to 20. The closest students are approximately five feet from Damrow's desk and there is a counter

separating Damrow's and Miller's area from the rest of the room. The Center is partitioned into three sections by glass panels so as to have a front, center and back room.

Damrow has a hearing impairment, in that she cannot hear high-pitched sounds, however, it is not necessary to raise one's voice for her to hear the person. Damrow and the Grievant are acquainted through their both working at the South Campus. The Grievant has taken classes at the College and had the permission of his supervisor to use the Computer Center during his lunch and break times, and has done so. As a BSW, the Grievant is required to carry a two-way radio with him at all times on the job, so that he can be contacted. The Grievant's assigned work area is nearby, but does not include the Computer Center.

Damrow testified that in early 1997, the Grievant was in the Computer Center with his radio turned on, and that a student complained to Damrow that the Grievant's radio was too loud. According to Damrow, she spoke to the Grievant about it, but as he was finishing his break at that point, the Grievant left the area. The Grievant denies this occurred. There is also a dispute as to whether this again occurred soon thereafter. Damrow testified that it happened again and a student complained to her, whereupon she spoke to the Grievant, who then angrily left the Center. The Grievant testified that Damrow had never told him to turn off his radio when he was in the Center, and that if she had, he would have done so.

On March 6, 1997, Rymer called the Grievant to his office and showed him the following anonymous note Rymer had received:

March 5, 1997

To Clyde:

I've noticed that Jose was often in the computer lab for sometime. Was there any special reason or project that he was doing that requires him to use the computer? Please investigate this and find out why he is often in the computer lab.

Thanks.

The Grievant testified that when Rymer gave him the note, he asked who sent it and Rymer said something to the effect, "You know how Margaret is," and that the Grievant responded to the effect, "So Margaret sent this memo," and Rymer did not say anything. The Grievant testified he asked if it was okay for him to go talk to her about it, and that Rymer said okay and gave him the memo. The Grievant then went immediately to the Computer Center and confronted Damrow about the memorandum.

With regard to the confrontation, there is a considerable dispute as to what the Grievant said to Damrow, his demeanor and the tone of his voice. Damrow testified that she was at her desk talking to a part-time instructor who was on the other side of the counter when the Grievant entered the Center and interrupted their conversation. According to Damrow, the Grievant began yelling and waving a piece of paper at her while leaning over the counter toward her, and that he stated, "Did you write this? Did you write this?", and then said, "What I do is my own business and it's nobody else's fucking business." Damrow testified that the Grievant was very upset, and appeared tense and angry and that she felt threatened by his behavior and still is afraid.

Martha Miller, who was near Damrow at her own desk, testified she first noticed the Grievant when he raised his voice, and that he was leaning over the counter toward Damrow waving a piece of paper in his hand. Miller testified that all she recalled the Grievant saying was, "Did you write this?", and that he repeated this several times. She described the Grievant as being "very loud and disruptive" and that he spoke to Damrow in a "loud, angry voice". Miller testified that Damrow looked "stunned" and afterward was "very white, shaking" and that she still appeared upset by the incident the next day.

The Grievant testified that although he told Dries he was "angry" when asked about his mood at the time of the incident, what he meant was that he was "disappointed", because he had been friendly to her and had helped Damrow in the past. He testified that he entered the Center and confronted Damrow and spoke to Damrow in a loud voice, as he always does because she is deaf. According to the Grievant, he then said to Damrow, showing her the anonymous memo, "What is this?", and then said, "This is not right. Why you do it to me? Why don't you talk to me?" Damrow said she did not know anything about it. The Grievant then said, "What goes around comes around," and left the Center. He testified that their conversation lasted two to three minutes and that when Damrow said she did not know anything about it and was trying to read the memo, he realized she did not know about it and that he should look for more information. The Grievant denied using the word "fuck" or any obscene or abusive language to Damrow. He further testified that he went to the cafeteria for coffee right after confronting Damrow in the Center, that five to ten minutes later Damrow came through the cafeteria, and that he stopped her and told her he had made a "bad judgment" and apologized to her. According to the Grievant, Damrow then told him that all she had said to Clyde (Rymer) was to tell the Grievant to not bring his radio to the Center, and that the Grievant asked her why she had not spoken to him instead. He testified Damrow then said they should shake hands and told him not to worry. Damrow testified she has not spoken to the Grievant about the matter and that he has never apologized to her.

Damrow did not attempt to contact the security guard the evening of the incident, but did ask if someone could stay and walk her to her car when she was done with work, and a student did both that night and the next. Damrow did tell Karen Switzer about the incident

later that same day. Switzer is the Campus Chair of the School's Business Division, who signs Damrow's time sheets and to whom Damrow calls in if she is ill. Switzer told Damrow to report the matter to the Grievant's supervisor, Rymer. The day after the incident Damrow reported the matter to Rymer who said he would talk to the Grievant about it. Damrow testified she told Rymer that she would not tolerate such language and that she would like to have someone walk her to her car in the evenings, and that he said it could probably be arranged with security. Damrow did utilize security in that regard a few times after the incident. Rymer spoke to the Grievant about the matter, but did not take further action or notify anyone higher up in management of the matter.

On or about March 24, 1997, the President of the College received the following anonymous letter:

DR. JOHN BIRKHOLZ

I AM A STUDENT AT MATC AND I AM WRITING THIS NOTE FOR ME AND THE OTHER PUPILS IN MY CLASS. MY TEACHER IS MARGARET, WHO IS AN INSTRUCTOR AT SOUTH CAMPUS, IN A206 NITE SCHOOL. I BELIEVE SHE IS A COMPUTER TECHNICIAN ON NITE SCHOOL.

ABOUT 2 OR 3 WEEKS AGO, JOSE ORTIZ FROM OPERATIONS DEPARTMENT CAME INTO THE COMPUTER LAB WITH HIS RADIO ON DISTURBING THE CLASS WITH HIS RADIO ON WITH OUTSIDE STATIC AND CONVERSATION FROM THE RADIO DISTURBING THE CLASS WHILE MARGARET WAS GIVING THE CLASS. JOSE ORTIZ WAS USING COMPUTER THEN.

MARGARET ASKED HIM KINDLY TO LEAVE THE CLASS TILL SHE WAS DONE WITH HER CLASS. HE WAS VERY UPSET AND SAID HE HAD PERMISSION TO USE THE COMPUTER. THIS IS OUR COMPLAINT.

(1) WE PAY FOR OUR SCHOOLING AND WISH NOT TO BE DISTURBED IN OUR CLASS.

(2) TWO DAYS LATER JOSE ORTIZ CAME IN THE MIDDLE OF THE ENTIRE CLASSROOM WITH A PIECE OF PAPER, WAVING IT IN FRONT OF MARGARET'S FACE AND TOLD HER IN A LOUD AND BOISTEROUS TONE "TO KEEP YOU'RE FUCKING NOSE OUT OF MY BUSINESS AND IT WAS NONE OF HER BUSINESS WHAT HE DOES" HE

USED THE WORD FUCKING AT LEAST THREE TIMES IN A ABUSIVE MANNER WHICH IS UNBECOMING TO ANY EMPLOYEE OF MATC AND ESPECIALLY FROM THE OPERATION DEPARTMENT.

(3) WE WOULD LIKE TO KNOW WHY HE SPENDS ONE TO TWO HOURS A DAY ON THE COMPUTER AND ESPECIALLY ON THE INTERNET?

(4) WITH ALL THE TIME HE SPENDS ON THE COMPUTER DURING HIS WORKING HOURS SHOULD BE LOOKED INTO - DOES'NT HE HAVE A JOB LIKE THE REST OF THE EMPLOYEES IN THE OPERATION DEPARTMENT?

(5) DR. BIRKHOLZ WE REQUEST YOU LOOK INTO THIS MATTER PERSONALLY.

SIGNED

STUDENTS OF A206 COMPUTER LAB SOUTH CAMPUS

Dr. Birkholz turned the matter over to the College's Director of Operations, Richard Dries. Dries then began investigating the matter and interviewed Damrow, Miller and met with the Union and the Grievant to obtain his version of what had occurred. Damrow told Dries the Grievant had used the word "fuck", while the Grievant denied doing so, and Miller did not recall hearing him use that word. The Grievant did state to Dries that he was "angry". Dries testified that as a result of his investigation, he felt the evidence as to whether the Grievant used obscene language was inconclusive and that element was not considered as a part of the basis for his discipline. Dries concluded that the Grievant had otherwise done what was alleged and that his actions merited a three-day suspension without pay and made that recommendation to the College's Labor Relations Department. Dries also testified that when he asked Rymer why he had not reported this matter to him, that Rymer stated he thought it had been resolved between Damrow and the Grievant.

On April 16, 1997, Dries issued the following letter of suspension to the Grievant:

M E M O R A N D U M

DATE: April 16, 1997
TO: Jose Ortiz-Coss
FROM: Richard Dries
RE: Suspension Notice – Inappropriate Conduct

On March 31, 1997 a fact finding meeting was held at the South Campus to review an allegation that you had disrupted students in Room A206 on March 6, 1997. Specifically, you were reported to have, in a loud voice, angrily confronted a District employee in this room. Union representation was present for this meeting.

As a result of this meeting, it has been determined that you did confront an A206 staff member on March 6, 1997. This confrontation was in response to your assumption that an anonymous complaint about your presence in that computer lab had been sent by the above noted staff member. This confrontation was witnessed by students who were using this facility and a faculty member.

Your conduct, as noted above is inappropriate and inconsistent with the mission of the District. Specifically, your actions constitute a serious violation of Department Work Rule XIV, item A (attachment). In confronting the staff member in Room A206 you disrupted the work of District staff and the students who were utilizing this facility. This type of disruptive behavior will not be tolerated. In consideration of your actions, you are being placed on a three (3) day unpaid suspension. During this period, you may not utilize any accumulated sick, holiday or vacation pay. During this period, you are not to be present in the workplace. You are to return to duty on April 21, 1997 at 4:00 P.M. Future incidents of this nature will result in further disciplinary actions up to and including termination of your employment.

MATC has a fully confidential Employee Assistance Program (EAP). You may contact the EAP by calling the EAP Coordinator at 342-4559 or the Manager, Compensation and Benefits at 297-6204.

Work Rule XIV, A, reads as follows:

XIV. GENERAL RULES OF CONDUCT

Commonly accepted rules of conduct help maintain good relationships between people. They promote co-operation, responsibility and a good working environment. It is important that you practice courtesy, respect, and maintain an effective working relationship with your supervisors, co-workers, staff, faculty, students, and the general public. Conduct which is inappropriate and which may result in disciplinary actions include but are not limited to:

A. Actions or conduct that disrupts the work force such as profane, obscene, abusive, or harassing language. Fighting, threatening, intimidating, or coercing others on MATC premises or carrying weapons.

A grievance was filed on the suspension and in the course of the grievance procedure the suspension was reduced to two days in an attempt to resolve the matter. The attempt was unsuccessful, and the parties proceeded to arbitration of their dispute before the undersigned.

POSITIONS OF THE PARTIES

Employer

The Employer takes the position that it had just cause to impose a two-day suspension without pay upon the Grievant based upon the incident of March 6, 1997. The Grievant verbally abused and threatened a co-worker in response to an anonymous memorandum. As an Educational Assistant, Damrow has the responsibility for maintaining a learning atmosphere in the Computer Center and accomplishes that task by requiring individuals to lower their voices or turn down the volume on their radios. On two occasions prior to March 6, Damrow was required to speak to the Grievant about the volume on the radio he is required to wear as part of his job. Based upon complaints from the students about the volume of the radio, Damrow had told the Grievant to turn off his radio while using the Center. On the second occasion, when Damrow approached the Grievant, he became upset and left the Center in an angry manner.

According to the Employer, on March 6, 1997, the Grievant stormed into the Center and confronted Damrow in the presence of approximately 30 students and staff members, and while Damrow was conversing with an instructor. The Grievant interrupted their conversation and began waving a piece of paper and shouting at Damrow in a threatening tone of voice and concluded by shouting, "What I do is my own business and it's nobody else's fucking business!" The Grievant's actions were so loud and abusive and disruptive that Damrow's conversation with the instructor ceased, the students fell silent, and all eyes were directed upon

the Grievant. Damrow froze in response to the Grievant's abusive behavior and became fearful of what further action he might take. The incident was such that it instilled continuing fear in Damrow that affected her ability to perform her job and students who had witnessed the incident were concerned for her safety. Damrow relied on the students to walk her to her car after the incident and had a security guard frequent the Center at her request. The paper the Grievant was waving was an anonymous memorandum addressed to Rymer, which questioned the amount of time the Grievant was spending in the Center. The Grievant assumed that Damrow had written the memorandum and confronted her with it minutes after Rymer showed it to him. Damrow testified that she did not write the memorandum and the Grievant testified that he subsequently also did not think she wrote it.

During the month it took to investigate the matter, the Grievant never offered an apology for his behavior, and instead denied the severity of the incident. It is also only now that the Grievant claims he only spoke loud because of Damrow's hearing impairment, however, Damrow testified that she consistently tells people that it is not necessary to speak to her in a loud voice and that she had explained that to the Grievant, who thereafter spoke in a normal tone to her. Also, while the Grievant denied using obscene language, he did not deny the incident itself. In investigating the matter, Dries determined that Damrow was a more credible witness, as third party witnesses corroborated her story.

The Employer asserts that given the disruptive and confrontational nature of the Grievant's conduct, a two-day suspension is appropriate.

The Employer cites the Daugherty seven tests of just cause, and asserts that it has satisfied all of the elements of that test. The Grievant was adequately warned of the consequences of his conduct. The evidence indicates that he had received a copy of the Operations Department Work Rules that specifically forbids "actions or conduct that disrupts the workforce such as profane, obscene, abusive, or harassing language." That work rule is reasonably related to the efficient and safe operation of the College. The Employer has not only the right, but the duty to create a working environment free of harassment and threatening behavior. This is especially so given the national rise in workplace violence and harassment. The Employer, through the Director of Operations, conducted a complete investigation before administering the discipline. An experienced manager, Dries interviewed the parties involved, including the Grievant and Damrow, as well as Martha Miller, a third party witness. While Dries was unable to identify the person who had drafted the anonymous memorandum to Rymer, that has no relevance, since the Grievant was not disciplined for the conduct cited in that memorandum. On completing the investigation, Dries issued the suspension letter detailing the Grievant's misconduct and the department work rule that was violated. Also addressed was the rationale for not tolerating the Grievant's conduct. As to the fairness and objectivity of the investigation, there is no evidence that management exhibited any biases with regard to the manner in which the investigation was conducted. With regard to whether there was sufficient

evidence of guilt, through the investigation Dries accumulated sufficient evidence upon which to base his disciplinary decision. The Grievant admitted to Dries that he became angry after reading the memorandum and that he confronted Damrow because he assumed she had written the memorandum. The Grievant essentially admits the incident occurred, but characterizes it differently than other witnesses. However, Damrow described the confrontation and her version was corroborated by Miller, who was approximately five feet from Damrow and the Grievant when it occurred. With regard to whether the work rule in the discipline was applied in a discriminatory fashion, Dries testified that an employe in the department was recently suspended for a hostile confrontation with another employe that was similar to this case. A grievance was not filed challenging that matter. Finally, as to whether the penalty reasonably relates to the seriousness of the offense and the Grievant's past record, Dries testified he considered three factors in making his decision: 1) whether there was a violation of a specific work rule; 2) how egregious was the conduct; and 3) what is the past practice. Dries testified the past practice usually is to follow progressive discipline, but he does not do so when the conduct is so abrasive and serious that progressive discipline is not warranted. The Employer cites an award where an arbitrator rejected the assertion that an employe who had threatened his co-workers deserved a written warning, rather than discharge. *B & B POULTRY*, 81 LA 553 (Nelson, 1983).

Next, the Employer asserts that the Grievant created a hostile environment in confronting a co-worker. Damrow has the right to work in an environment free from threats and intimidation and the Employer has recognized this right and taken steps to make sure employes are aware of its policy against harassment. Further, arbitrators have been overturned by courts when they have criticized employers for implementing discipline in cases such as this. The Grievant was not provoked into his outburst at Damrow. The evidence indicates Damrow was engaged in a conversation with an instructor when the Grievant approached her, and that she neither looked at him, nor spoke to him prior to his outburst. The memorandum that supposedly incited the Grievant was unsigned. Rymer showed the memorandum to the Grievant, who then went straight to the Center to confront Damrow. If anything provoked the Grievant, it was his own inappropriate conduct cited in the anonymous memorandum.

A two-day suspension is reasonable. Under the Management Rights provision of the Agreement, the Employer retains the right to suspend, discharge, demote, or take other disciplinary action for just cause. When an employe violates a rule or engages in conduct meriting discipline, it is primarily the function of management to decide on the proper penalty. *HESS OIL VIRGIN AIRLINES CORPORATION*, 93 LA 580 (Chandler, 1989). The arbitrator is only to intervene when the Grievant proves discriminatory unfairness or arbitrary or capricious action. In this case, the department adopted rules of conduct alerting its employes as to what is considered inappropriate conduct. The Union provided input and approval of these rules, and the Grievant received a copy of the rules when he started his employment with the College. Dries conducted a thorough investigation of the incident, and based on the facts, the Grievant

was suspended for inappropriate conduct listed in those work rules. The Grievant's threatening and abusive behavior, coupled with profane language, is unacceptable under those rules. Further, the Grievant displayed his unprovoked anger and threats in front of a room full of students and staff members. Thus, a two-day suspension is appropriate.

The Employer notes that it reduced the original three-day suspension to a two-day suspension, and asserts that stiffer penalties have been upheld for similar degrees of harassment, such as disparaging remarks toward a co-worker, or using racial epithets and vulgar language. Further, the evidence has shown that a suspension is a common penalty for similar conduct in the Building Operations Department and it would be inappropriate to deviate from that practice in this case.

With regard to credibility issues in the case, the Grievant's claim that he did not say "fucking" or that he raised his voice to compensate for Damrow's deafness, cannot be credited. Considering motive and bias, there is a presumption that Damrow and Miller were credible and that the Grievant was not. The Grievant, being the recipient of the discipline, and thus having the most to lose or gain from the proceeding, is presumed to have a strong incentive to not tell the truth. When the Grievant's testimony is contradicted by disinterested third party witnesses, the testimony of the third-party witnesses should be credited. Citing, *Fairweather's Practice and Procedure in Labor Arbitration*, Third Edition, at 238 (1991). In this case, Damrow and Miller had no reason to fabricate the charges against the Grievant. Miller was seated approximately five feet from Damrow at the time of the incident and was able to both see and hear the Grievant and her testimony supports that of Damrow. Having nothing to gain from her testimony, Miller is more credible than the Grievant. Damrow was obviously in the best position to witness the language and actions of the Grievant and although she has a hearing impairment, she can hear a normal conversation and is proficient at reading lips. She is also capable of witnessing a person's demeanor and testified that the Grievant was upset and tense. The conflicting testimony as to what the Grievant said during the incident must be resolved against the Grievant and the Union's third party witnesses. Joanne Haglund, who investigated the matter for the Union, and testified on behalf of the Grievant, agreed with the statement on cross-examination that it is a rare occurrence when management tells the truth. Similarly, Ronald Krutzka testifying for the Grievant, testified that he believed the Grievant because he was in the Union. Thus, neither witness was able to offer unbiased testimony.

The Employer concludes that given the serious issue of harassment in the workplace, and the College's attempt to deal with that issue, a modification of the Grievant's discipline in this case sends a message to him, the victim, and the students who observed the incident, that harassment is acceptable at the College.

Union

The Union takes the position that the two-day suspension was unduly harsh, and that therefore the Employer did not have just cause to impose that discipline upon the Grievant. The Union notes that in the Grievant's 14 years with the College, he has no recorded disciplinary actions in his personnel file. With regard to the incident in question, the Union asserts that when Rymer showed the Grievant the anonymous note referencing the Grievant's using computers at the Center, the Grievant then asked Rymer whom he thought might have sent it and Rymer suggested that Damrow might have been the author. The Grievant received permission from Rymer to speak to Damrow about the matter, and gave him the anonymous memo. The Grievant admits that he was very disappointed with Damrow, since he had known her since her first day at the South Campus and had helped her at times, including walking her to her car. The Grievant testified that he took the original memo to Damrow and questioned her about it, and wanted to know if she had sent it. The encounter lasted only two or three minutes and when the Grievant saw Damrow later in the hall, he apologized to her and admitted that he had used bad judgment. While Damrow testified that the Grievant used vulgar language and testified she was fearful for her life, the incident occurred on Wednesday, March 5, but she did not contact security until the following Monday. When she did contact security, she just asked the security officer to check on her every once in a while, and did not report the incident. Further, Damrow admitted that when she did talk to Rymer about the matter, she did not tell him that she felt threatened, but only that she would not tolerate that kind of language. Damrow testified that she wanted Rymer to approach the Grievant and explain the situation, and hopefully prevent it from occurring again. Damrow also testified that the only action she wanted was an apology from the Grievant. As to abusive language, Miller, who was sitting to the right of Damrow when the incident occurred, testified that the only words were heard were, "Did you write this?", and that she did not hear any abusive language. Miller admitted that no one called security, even though a security officer was available.

With regard to management's action in the matter, Dries testified that he became involved at the request of his supervisor, and that neither the Grievant's supervisor, Rymer, or Damrow, requested that the Grievant be disciplined. Further, while incident reports are used for reporting complaints, no report was ever made by any employee regarding this incident. Dries testified that had the anonymous letter to the College not been received, he would not have taken any action. Dries testified that the Grievant admitted that the note upset him, and that it was wrong for him to have confronted Damrow in an angry manner. Dries also admitted that had he received such a note, he too would have been upset by it. Dries further confirmed with Miller that no obscenity was used by the Grievant. When Dries questioned Damrow about the matter, she had no further complaint about how it had been initially resolved, and did not express any hostility toward the Grievant, nor did she request that any security measures be taken.

Dries testified that the Grievant should have resolved the issue with his supervisor, Rymer, but he also admitted that Rymer believed the matter between the Grievant and Damrow had been resolved and was not in need of further action. Dries further admitted that there have been confrontations between employees and that many resulted only in warnings or counseling. An example of a similar situation where an employee was disciplined for a confrontation involved a physical confrontation. Dries also acknowledged that, although he was aware of the Grievant's long and clean record, he did not consider those factors in reaching his decision.

The Union asserts that the issue to be determined in this case is whether the Grievant was suspended for reasonable and proper cause under the circumstances. In making that determination, it is essential to consider whether there was a system of progressive discipline in effect, and if so, whether the Employer was obligated to follow those procedures under the circumstances. Even where individuals have been guilty of excessive wrongdoing, arbitrators have not hesitated to set aside or reduce penalties where the employer failed to follow an established system of corrective discipline. Progressive discipline is a well-accepted concept, the intent of which is to correct the problem, if possible, by the use of progressively severe penalties. The undisputed evidence shows that the Employer has in effect a system of progressive discipline. Thus, the remaining question is whether or not the Employer properly applied progressive discipline to the Grievant in accord with its policy. The great weight of arbitral authority holds that if there is such an established system of providing progressive discipline, it must be followed except in unusual circumstances. The Union cites a number of arbitration awards where the arbitrator set aside the discipline because the Employer failed to follow the established progressive discipline procedures. While an Employer has the right to expect that reasonable work rules will be followed, employees have the right to expect that reasonable policy and established procedures will be followed.

In this case, it is undisputed that the Grievant had no prior discipline in his 14 years of employment. The Union asserts that while it maintains the Grievant did not use abusive language, even if he did, the penalty assessed in this case was excessive. The established disciplinary procedures of the Employer would first call for a verbal reprimand, and then proceed through a written warning before going to a suspension or greater discipline. Here, the Grievant had not received as much as a counseling letter prior to this incident. Having embraced the principle of progressive discipline, the parties are bound by its application.

The Union asserts that in this case the Employer applied unequal treatment to the Grievant. The Employer must enforce its rules and maintain discipline in a consistent and fair manner. Within this basic responsibility, the Employer has the obligation to evaluate the nature of the offense, the past history of the employee, the degree of fault, and whatever mitigating factors influenced the incident. It is upon the evaluation of all of those factors that the Employer must make its decision. Dries testified that there have been incidents where

employees have had confrontations and that many of those employees only received a warning or counseling. He admitted that the example he used was different from this incident in that it involved a physical confrontation. Here, the Grievant only used words. While they may have been inappropriate, they were not obscene or abusive. Principles of fairness and equity dictate that disparate treatment must be remedied. As it has been shown that the Employer's penalty in this case was not similar to those assessed in the past, it must be concluded that the Grievant's suspension was disparate, and therefore improper.

The Union concludes that the contractual just cause standard involves certain requirements that must be met, the most widely recognized criteria being those articulated by Arbitrator Daugherty, i.e., the "Daugherty Standards". All seven of those criteria must be met in order for there to be just cause. As they were not all met in this case, and the contractual obligation of the Employer to deal impartially with its employees in accord with fairness and due process was not met, it must be found that the penalty imposed was unduly harsh. Thus, the grievance should be sustained and the Grievant made whole.

DISCUSSION

Where, as here, the issue is whether there was just cause for the discipline imposed, there are two prongs to the inquiry: Did the employe engage in the misconduct alleged, and if the answer is yes, is the level of discipline imposed reasonable relative to that misconduct and the circumstances.

With regard to the first question, it is necessary to review the basis offered by management for its decision to suspend the Grievant. The suspension letter stated that the Grievant "did confront an A206 (Computer Center) staff member on March 6, 1997", and that "This confrontation was witnessed by students who were using this facility and a faculty member." The letter goes on to state, in relevant part,

Specifically, your actions constitute a serious violation of Department Work Rule XIV, item A (attachment). In confronting the staff member in Room A206 you disrupted the work of District staff and the students who were utilizing this facility. This type of disruptive behavior will not be tolerated. In consideration of your actions, you are being placed on a three (3) day unpaid suspension.

Although the District is now asserting that the Grievant used obscene language in confronting Damrow, that allegation does not appear in the Grievant's suspension letter. Moreover, Dries testified that he felt the evidence in that regard was inconclusive and that the decision to suspend the Grievant was not based on his having used profanity, but upon his display of hostility in "his confrontation with Damrow" (Tr. 141-142). Given Dries' testimony and the

lack of mention of the use of profane or obscene language as a basis for the decision to suspend the Grievant, that allegation is not further considered or addressed.

With regard to the Grievant's demeanor when he confronted Damrow, both Miller and Damrow described him as appearing to be angry and upset. Damrow described the Grievant as "yelling" and Miller testified he was "very loud" and "disruptive". Damrow testified that when this occurred the room went silent and Miller testified that the students in the Center stopped what they were doing and watched the Grievant. While the Grievant testified he was not "angry", and only spoke "loud" due to Damrow's hearing impairment, that appears to be an attempt to diminish the extent of his behavior, rather than an accurate description of it. In the face of his initial admission to Dries that he was angry and upset at the time, and the congruent testimony of Damrow and Miller in those regards, it is concluded that the Grievant was visibly angry and speaking in a voice so loud as to be heard above everyone else and so as to quiet the room. The Grievant does not deny waving the paper at Damrow or interrupting her conversation with the instructor, nor does he deny that his behavior disrupted the students and others that were in the Computer Center at the time.

The College asserts that such conduct constitutes a serious violation of Work Rule XIV,
A:

Actions or conduct that disrupts the work force such as profane, obscene, abusive, or harassing language. Fighting, threatening, intimidating, or coercing others on MATC premises or carrying weapons.

The evidence indicates that the Grievant received a copy of the work rules. As the Grievant's actions on March 6th disrupted the work of Damrow and others in the Computer Center, as well as that of the students, and had the effect of intimidating Damrow, the Arbitrator agrees.

In considering the second question under the just cause standard, it is necessary to consider the level of the misconduct, how other employees who have engaged in such conduct have been treated, and whether there were any mitigating circumstances.

The Arbitrator is not convinced by the evidence that Damrow feared she would actually be physically harmed by the Grievant, nor that the Grievant intended any physical harm to her. Damrow testified that she expected Rymer to speak to the Grievant and have the Grievant apologize to her. While she also testified she feared for her life, that she asked Rymer about having security walk her to her car at night and asked security to check on the Computer Center once in awhile, it appears her real concern was avoiding having the Grievant confront her again. However, the Grievant's actions not only disrupted Damrow's work, but that of everyone else in the room, which included other employees and the students using the

Computer Center. Further, this was not just a quick remark or angry comment. By the Grievant's own admission, his confrontation lasted two or three minutes. While that may not seem like a long time, it is a very long time to have someone yelling angrily at you and is also more disruptive for everyone present. Miller, an apparently unbiased co-employee, testified that Damrow was white and shaking after the confrontation and still appeared to be upset the next day. The Union's assertion that Damrow could not have taken the incident that seriously since it happened on Wednesday, March 5th and she waited until the following Monday to contact security, is not supported by the record. The incident occurred on Thursday, March 6th and Damrow's unrebutted testimony is that she reported it to Switzer that evening and to Rymer the next day. The Grievant's testimony that he talked to Damrow in the cafeteria minutes later and apologized to her is credibly refuted by Damrow. It is also improbable that Damrow would tell the Grievant not to worry about it, given the degree to which she appeared to be upset, her reporting the matter to Switzer that evening, and asking that someone walk her to her car.

The Union also asserts that Dries conceded he would not have taken any action in this matter had it not been for the second anonymous memo received by the College and that Rymer believed the matter to have been resolved between the Grievant and Damrow. Dries testified as follows in those regards:

Q. So it was over two weeks before you got involved in this?

A. Before I was aware of it, yes.

Q. And if you had not, or the president had not received that particular anonymous letter, this matter would have never been addressed by you; is that correct?

A. I don't think that's fair to presume that.

Q. Well, Clyde never reported it to you, correct?

A. He hadn't at that point.

(Tr. 70)

...

MS. DELERY: I'll rephrase the question. Did you question Clyde Rymer on why he did not report this to you?

A. Yes.

Q. And what was his response?

A. His response was that he thought the matter was resolved between Jose and Margaret. My response to him was this is not merely a matter between Jose and Margaret, this is a matter which strikes to the heart of what we are trying to do at south campus and that is to provide an educational experience and a work environment where people feel secure from actions of intimidation in the work pace, and that he erred in that approach. The fact that he thought it was resolved between Jose and Margaret does not address the issue that there still was a hostile confrontation that day, and that institution has a wider interest than that.

(Tr. 78)

The College may appropriately consider its institutional interests in discouraging and preventing conduct such as the Grievant's and may appropriately consider the impact the incident had on others besides Damrow, such as the students who were present at the time. While the reaction of the victim of the confrontation is relevant, the propriety of the Employer's disciplinary decision is not dependent upon whether that individual is sensitive or has a "thick skin" and is able to shrug off such things.

The record regarding how other employes have been treated after engaging in similar misconduct is limited to two incidents. One was an incident involving a physical confrontation between two employes resulting in a suspension, and the other involved an instructor speaking to mail room employes in an abusive and insulting manner using obscene language, and who apparently was not disciplined. While there was also testimony regarding a witnesses' understanding that an employe used abusive language with other employes in the College's bookstore and was not disciplined, there is too little information to utilize it for comparison purposes. Clearly, a confrontation involving physical contact is distinguishable from this case in that such misconduct is more egregious. On the other hand, the instructor's abusive manner in dealing with two mailroom employes did not involve disrupting students as well, nor was it intimidating, as in this case. This case falls somewhere between the two other incidents. The duration of the confrontation and the anger that was directed at Damrow personally made it more intimidating and disruptive placing it closer on the spectrum to the physical confrontation than to the abusive remarks.

The Grievant had approximately fourteen years of service with the College with a clean work record at the time of this incident. The record also indicates that the Grievant had previously been harassed by a co-employee. The Grievant testified that he thought the anonymous note was more of the same and that Rymer had suggested that Damrow had authored it. While the Grievant was understandably upset by the anonymous memo, especially in light of his prior problems with another co-employee, that does not justify his conduct.

As far as Rymer's being satisfied that the matter had been resolved between the Grievant and Damrow, it appears this was based on his presumption that the two had discussed the matter and the Grievant had apologized to Damrow. Damrow credibly testified that neither had occurred. As noted previously, the Grievant's version that they spoke amiably minutes after the confrontation and that Damrow told him not to worry about it after he apologized is not plausible, given the degree to which Damrow was upset by the Grievant's actions, according to her testimony and Miller's.

Given the duration and emotional level of the Grievant's confronting Damrow, the setting in which it occurred, the disruptive impact it had on the students in the Computer Center, as well as on Damrow and the other employees, and the Grievant's attempts to avoid responsibility for his conduct, it is concluded that the Employer had just cause to depart from progressive discipline and impose a two-day suspension in this instance.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 26th day of October, 1998.

David E. Shaw /s/

David E. Shaw, Arbitrator

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