BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANITOWOC COUNTY HEALTH CARE CENTER EMPLOYEES LOCAL 1288, AFSCME, AFL-CIO

and

PERSONNEL COMMITTEE OF THE MANITOWOC COUNTY BOARD OF SUPERVISORS

Case 345
No. 57197
MA-10547

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220-0370, appearing on behalf of Manitowoc County Health Care Center Employees Local 1288, AFSCME, AFL-CIO.

von Briesen, Purtell & Roper, S.C., by **Attorney James R. Korom,** 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, appearing on behalf of the Personnel Committee of Manitowoc County.

ARBITRATION AWARD

Manitowoc County Health Care Center Employees Local 1288, AFSCME, AFL-CIO, hereinafter Union, and Personnel Committee of the Manitowoc County Board of Supervisors, hereinafter County, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on January 15, 1999, requested that the Commission appoint either a staff member or a Commissioner to serve as Arbitrator. The Commission appointed Edmond J. Bielarczyk as Arbitrator on January 28, 1999. The hearing was originally scheduled for Friday, March 26, 1999 in the Manitowoc County Courthouse, Manitowoc, Wisconsin. After several postponements the hearing was scheduled for July 7, 1999, in the Health Care Center, Manitowoc, Wisconsin. Due to a scheduling conflict, the arbitration was transferred to Paul A. Hahn on June 29, 1999. The hearing was then scheduled and held on August 26, 1999, in the Health Care Center, Manitowoc, Wisconsin. The hearing was transcribed. The

transcript was received by the Arbitrator on September 10, 1999. The parties filed post hearing briefs which were received by the Arbitrator on October 12 (County) and October 18 (Union). The parties were given the opportunity and filed reply briefs, which were received by the Arbitrator on November 15 (County) and November 18 (Union). The record was closed on November 23, 1999.

ISSUE

Union

> Did the Employer violate the Collective Bargaining Agreement when it suspended Arnie Opichka, required him to see a psychologist of their choosing, did not compensate him for all time spent attending the examination and for all out-of-pocket expenses? If so, what is the remedy?

County

The County did not separately set forth an issue but on page 6 of its post-hearing brief refers to the issue as "was there just cause to suspend Grievant for threatening to kill his supervisor?" and on page 14 of its post-hearing brief frames the basic question as "within the just cause framework, did the Health Care Center properly discipline the Grievant for threatening to 'assassinate' or 'eliminate' his supervisor?

Arbitrator

Based on the record in this matter, including the briefs of the parties, and the original statement of the grievance, I frame the issue as follows:

> Whether the County violated the collective bargaining agreement between the parties when it disciplined the Grievant for an alleged threat to his supervisor on or about September 1, 1998? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 – RECOGNITION AND BARGAINING UNIT

> The Employer recognizes the Union as the exclusive bargaining agent of the employees of the Employer engaged in the operation of the Manitowoc Health Care Center, excluding the Administrator, Human Resource Director, Director

of Nursing, Pharmacy Director, Director of Social Services, Clinical Care Coordinators, Environmental Services Director, Dietician, Social Workers, QMRPs, Recreation Therapist, DD Program Supervisor, Director of Activities, Supervisors, Director of Business Services, Registered Nurses, confidential office employees, temporary employees, Director of Dietary Services, and Nursing Secretary, Staff Specialist, temporary employees, Music Therapist, and Education and Quality Standards Coordinator.

. . .

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

ARTICLE 4 – DISCIPLINARY PROCEDURES

A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be followed. The Employer shall provide the employee and the Vice-President of Local 1288 with a letter setting forth the reason(s) for the disciplinary action.

. . .

B. Discharge: When an employee is discharged or terminated by the Employer, a written discharge or termination report shall be prepared stating the effective date and the reason(s) for the discharge or termination. One (1) copy of the report shall be retained by the Employer, one (1) copy shall be given to the employee, and one (1) copy shall be filed with the Vice-President of Local 1288.

. . .

ARTICLE 7 – GRIEVANCE PROCEDURE

A. Definition of a Grievance: Should any differences arise between the Employer and the Union as to the meaning and application of this Agreement, or as to any question relating to wages, hours, and working conditions, they shall be settled under the provisions of this Article.

. . .

C. Steps in Procedure:

. . .

Step 4 – Arbitration:

. . .

c. Arbitration Hearing: The Arbitrator shall with the consent of both parties, use his or her best efforts to mediate the grievance before the Arbitration Hearing. The parties shall attempt to agree in advance on stipulated facts and issues to be used as well as procedures to be followed at the hearing. The Arbitrator selected or appointed shall meet with the parties at the earliest mutually agreeable date to review the evidence and hear testimony. The Arbitrator shall make a decision on the grievance which shall be final and binding on both parties. The decision shall be submitted in writing as soon as possible after the completion of the hearing.

. . .

f. Decision of the Arbitrator: The Arbitrator shall not modify, add to or delete from the terms of the Agreement.

STATEMENT OF THE CASE

This grievance involves Manitowoc County Health Care Center Employees Local 1288, AFSCME, representing the employes set forth in Article 1, Recognition. (Jt. 1) The Union alleges that the County did not have just cause when it disciplined the Grievant for an alleged threat to his supervisor on or about September 1, 1998. (Jt. 2) Grievant has worked for the

County at its Health Care Center since July of 1988. In 1998, there was a decision to implement layoffs in the Maintenance Department at the Health Care Center. Grievant's position in the Maintenance Department was eliminated. Grievant exercised his bumping rights to move into a float position in Housekeeping. Grievant's supervisor, Michael Thomas, decided to assign Grievant to a specific unit rather than leave him in a float position. As a result of the transfer to the Housekeeping position, Grievant's pay was reduced by approximately one dollar per hour. Mr. Thomas is the Manitowoc County Health Care Center Administrator and had served in that capacity for approximately one year at the time of the arbitration hearing. In 1998, in recognition of workplace violence, Manitowoc County created a "Zero Tolerance Workplace Violence Policy and Procedure." (Jt. 3) Each employe, including Grievant, was provided with a copy of said policy on or about August 26, 1998. (Jt. 3) The policy provided that the County would maintain a zero-tolerance policy toward violence in the workplace including the possession, use or threat of use of any weapon in the workplace. "Workplace violence" as described by the policy means any oral, written or physical conduct that occurs in the workplace intended to harm or cause a reasonable person to fear imminent harm. (Jt. 3)

On September 2, 1998, Thomas was advised that Grievant allegedly made a statement about Thomas at lunch on the previous day that "it was time for an assassination around here; maybe I should get my gun" and pointed to Thomas when making the statement. Thomas did not hear the statement, but it was reported to him by another employe whose name the County has kept confidential because of the County's concern about retaliation against employes bringing forward reports of co-worker misconduct. Thomas conducted an investigation under the County's zero-tolerance policy and reported the matter to Sharon Cornils, Personnel Director for Manitowoc County. Thomas' investigation included interviews with employes who were reported to have been with the Grievant at the time the comment was made. (E. 5) After sharing this information with Cornils, Thomas interviewed Grievant. Grievant, accompanied by Union representative Decker, was asked about the comment that he allegedly made regarding Thomas. On advice of Union Steward Decker, the Grievant would not comment.

On September 10, 1998 the Grievant met with the County Threat Management Team, a team established to handle workplace violence and investigations under the County's zero-tolerance policy. The team included Thomas, Cornils, Rollins, County Corporation Counsel, and Petersen, an Investigator with the Manitowoc County Sheriff Department. The Threat Management Team considered the results of Thomas' investigation, Grievant's prior work history and prior discipline (E. 10) and made the decision to terminate the Grievant. Grievant again appeared with his steward and again declined to respond to the alleged threat made by him. Grievant was told that termination of his employment would occur. Union Steward Decker then spoke to Grievant privately. When Grievant and Decker returned to the Threat Management Team, Grievant stated that while he would not admit to making the statement alleged to him, if he did make the statement, he could not help it that people took it the wrong way.

The decision to terminate was made final on September 15, 1998. (Jt. 8) Grievant was, however, given an opportunity to return to work if he were to obtain a confidential psychological assessment and that assessment revealed that he was not a danger to himself or others. (Jt. 8) The Grievant accepted the County's terms of undergoing a psychological exam as a condition for his reinstatement and indicated his acceptance of said conditions in a letter to Thomas dated September 16, 1998. (Jt. 9)

The Grievant was on paid suspension from September 2 through September 15, 1998 during the County's investigation and was on unpaid suspension for nineteen days during which he met with a psychologist in Green Bay. The psychologist determined that Grievant was not a threat to himself or others; Grievant was reinstated to his employment immediately upon the psychologist's report. Further facts as alleged by the parties will be discussed through the statements of the parties' positions and the Discussion section of this Award.

The parties processed the grievance through the contractual grievance procedure and were unable to settle the grievance; the grievance was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on August 26, 1999 in the City of Manitowoc, Wisconsin in the offices of the Manitowoc County Health Care Center. The hearing concluded at 2:34 p.m.

POSITIONS OF THE PARTIES

Union Position

In its post-hearing brief the Union commences its argument to sustain the grievance in this matter by pointing out that the individuals who heard Grievant make the alleged statement did not feel threatened; the Grievant laughed after making the statement; none of the witnesses to the statement feared imminent harm. The Union points out that the Grievant does not remember making the alleged statement and that he intended to harm no one and has never been disciplined for harming anyone during his employment with the County. The Union points out that there is no direct evidence in the record that the statement was directed at Thomas, and there is no direct evidence that Thomas was in the lunchroom at the time Grievant allegedly pointed at Thomas when he made the statement. The Union argues that the County only introduced hearsay testimony through Thomas that someone who reported the statement to him alleged that Grievant pointed to Thomas. The Union argues that because of this hearsay, and the failure of the County to present a witness to verify this alleged pointing, the weight of the hearsay statement should be taken into account when I consider the discipline given to the Grievant.

The Union further argues that Administrator Thomas had a natural bias when investigating the statement made by Grievant under the zero-tolerance policy because he believed that the statement was intended for him. The Union submits that Thomas' role on the

Threat Management Team biased the decision of the entire team and that the County overreacted to the allegation. The Union argues that at a minimum Thomas' involvement intensified the disciplinary action of the County. The Union also argues that the previous disciplinary record of Grievant introduced at the hearing is not relevant because of the dissimilar facts involved in the prior discipline and the number of years since that discipline was administered.

The Union then argues that the Grievant received disparate treatment because the Director of Nursing made a similar threatening statement to the Certified Nursing Assistants and did not receive any discipline. The Union points out that the Director of Nursing had received criticism from a state survey regarding Certified Nursing Assistants not wearing a new pair of protective hand wear each time with a different patient and this was a motive similar to the claimed motive that Grievant had in threatening Thomas. The motive assigned to Grievant was loss of his maintenance job and being reassigned from a float housekeeping position to an assigned area. The Union points out that the County, through Cornils, did not refer the threat by the Director of Nursing to the Threat Management Team.

The Union also submits that, while the Grievant was on paid suspension during the course of the investigation, he was paid at the housekeeping rate even though he had not assumed the housekeeping position upon his transfer and should have been paid at his previous building maintenance rate.

In its reply brief, the Union continues its argument that the County overreacted to the statement of the Grievant and argues the lack of verification that it was directed at Administrator Thomas. The Union argues that the cases cited by the Employer in its initial post-hearing brief are inapposite to the facts in this matter since in those cases the threat was proven to be directed at a supervisor or other employes substantiating the discipline in the cited cases, while there is no direct evidence in this record to substantiate that the alleged threat of the Grievant was directed at anyone. The Union restates its bias argument on the part of Administrator Thomas. The Union argues that Thomas, relying on the unsubstantiated claim that a threat was made against him, forwarded the results of the investigation to the Threat Management Team. Further, the Union argues, the team had no other information afforded to them and that therefore their conclusion that Grievant made the statement and needed to be terminated was biased by Thomas' information. The Union submits that the zero-tolerance workplace violence policy defines workplace violence as conduct that occurs in the workplace intended to harm or to cause a reasonable person to fear imminent harm and that none of the employes who heard the threat felt that they were in fear of imminent harm. The Union submits that the investigation by Thomas was incomplete and did not substantiate the particulars of the alleged statement as to time, place, who was involved and exactly what was said. Finally the Union continues its disparate treatment argument. The Union submits that the Certified Nursing Assistants did in fact feel threatened by the statement made by the Director of Nursing. This disparate treatment raises the issue that Thomas stated the Zero

Tolerance policy applied to all employes and therefore why did not the Director of Nursing receive discipline as well. The Union concludes its argument by stating that Grievant had no other choice but to agree to the psychological evaluation and assuming the co-pay under the health plan; if he had not agreed to the terms set forth in Joint Exhibit 8 he would have been terminated.

The Union submits that the record fully and fairly substantiates that the Employer violated the collective bargaining agreement. The Union asks as a remedy that: (1) the County remove any and all reference to the matter from the Grievant's employment files; (2) reimburse the Grievant for all time suspended at the Building Maintenance wage rate; (3) reimburse the Grievant for all out-of-pocket expenditure for the psychological evaluation he was required to receive under threat of termination; (4) remove any and all correspondence regarding and evaluations or statements made by the psychologist appointed by the County to evaluate Grievant; and (5) make the Grievant whole.

County Position

The County in the introduction to its argument cites the Bureau of Labor Statistics' most recent data that a co-worker or former co-worker kills another co-worker every week. The County points out that workplace violence in today's society is a serious problem and shows no signs of improving. This leads to the County's position that Manitowoc County recognizing this situation created a zero-tolerance workplace violence policy and procedure. (Jt. 3) The County submits that the Grievant committed a serious violation of this policy when he stated that maybe he should bring his gun to work and assassinate or eliminate his supervisor. The County points out that Grievant offered no explanation for his threat, nor any apology. After a thorough investigation by the County, the Grievant was discharged but allowed to return to work after an evaluation showed he was no longer a threat to himself or others.

The County argues that the Health Care Center could not simply hope that Grievant's threat was a joke. A threat to kill anyone is not a joke, the County points out, but is a matter of grave concern and Grievant offered no mitigating factors to justify his actions. The County submits that I should uphold the suspension particularly as Grievant has been reinstated and only "endured" a suspension long enough to gather medical information about his propensity to cause harm to himself or others.

The County continues its argument by pointing out that it is uncontested that Grievant made the threat attributed to him, reminding me that Grievant did not deny making the threat and witness testimony at the hearing confirmed that the threat was made. The County seeks to counter the Union's argument that the Grievant is merely a "happy-go-lucky guy who jokes around" by stating that there is no excuse for such statements and that they are not a "joke" especially within the employment context of an employe who is unhappy with his supervisor about a dollar an hour pay cut and an unwanted job transfer.

Citing several arbitration cases dealing with workplace violence, the County submits that case law supports discipline up to and including termination for threats made to management representatives and that in most of those cases arbitrators have upheld discharge of the employe even though in some cases the employe never has actually engaged in violence and did not intend the threat literally. The County points out that in the cases cited in its initial post-hearing brief, the arbitrators have consistently upheld discharge for a threat similar to the threat made in this case; all the County is asking for in this case is affirmance of a suspension which was only inflicted on the Grievant while he was being evaluated to ensure that it was safe for him to return to work. The County argues that it had no choice but to investigate and initiate the Threat Management Team because the employe refused to comment to his supervisor regarding the alleged statement or threat that was verified by three witnesses. The County submits that it could have terminated Grievant immediately but instead offered him another opportunity by ensuring that he was not a threat to himself or others by being evaluated. Given that there was just cause to support termination, the Grievant's suspension, the County submits, is also supported by just cause.

The County strongly argues that the Union's attempt at hearing to raise a statement made by a nursing supervisor as a defense has no bearing on the case before the Arbitrator and that the Union failed to meet its burden that this incident was relevant to the County and Health Care Center's decision in this particular case. The County points out that the Director of Nursing situation was factually different from the situation with Grievant. While Grievant had a motive because he had recently lost a job he liked doing, the Director of Nursing had no such motive because the fact that some certified nursing assistants were not changing gloves between residents was not cited by the State in its survey of the Health Care Center. Further the Director of Nursing immediately apologized to and assured the employes that she did not mean the statement in a threatening manner. The County characterizes this attempt to prove disparate treatment as nothing more than the Union's desperation in trying to find anything to defend the Grievant's conduct.

The County further objects to the attempt by the Union to bring to this arbitration issues regarding the County's right to have the Grievant evaluated and the County requiring the Grievant to assume the insurance co-payment involved in the evaluation. The County argues that these are not the real issues before the Arbitrator as reflected in the grievance filed by the Union. The County argues that the Grievant was not forced or directed to undergo a medical evaluation but rather made the decision after he was given "one final opportunity to return to work" by agreeing to undergo the evaluation in order to be reinstated. The Grievant, the County submits, throughout the County's investigation had a number of opportunities but chose not to discuss his statement when he was interviewed by Administrator Thomas and the Threat Management Team, instead choosing neither to explain nor apologize for his statement. The County argues that even if the Arbitrator were to address the issue of whether Grievant was wrongfully directed to have a psychological evaluation the County may upon reasonable and nonarbitrary basis require any employe to undergo a violence propensity evaluation similar to the employer's right to require drug/alcohol testing. The County supports this position by the citation of labor arbitration cases.

In its reply brief the County points out that the Union's testimony trying to establish Grievant as a "likeable guy" flies in the face of a threat to kill someone in front of co-workers on work premises and points out that there is no dispute that the threat occurred. The County asks the Arbitrator to consider that even if there were no threat to a specific individual, County policies make clear that all threats must be taken seriously, especially threats that are specific in detail as the threat made by the Grievant and a threat supported by a possible motive (Grievant's recent job reassignment).

The County responds to the bias argument against Thomas, who investigated the allegation, by pointing out that Thomas was only one of several individuals in the investigatory process and that the Union did not object to the individuals on the Threat Management Team. The County submits that there is no evidence in the record that Personnel Director Cornils, the County Corporate Counsel, and the Sheriff Department Investigator could be manipulated by Thomas.

The County submits that its introduction at the hearing of Grievant's prior discipline record is appropriate as it offers insight into the Grievant's character and credibility during the investigation although it is not directly analogous to his threat to kill his supervisor. The County repeats its argument against the Union's disparate treatment position involving the Director of Nursing, again submitting the County position that the two instances are entirely different.

The County again in its reply brief weighs in with its strongly worded argument that in this case termination would have been justified and would have been followed by many arbitrators in the cases cited by the County in its initial post-hearing brief. But in this case the County gave the employe an opportunity to be evaluated, considered his long term employment and only suspended the employe for a not unreasonable period of time, while the psychological evaluation that got his job back was taking place.

The County concludes its argument by stating that Grievant is a seasoned employe who knew that if he had a gripe about his new work position, he could have filed a grievance. The County submits that the law does not and should not tolerate violence or threats of violence and that sustaining this grievance would tolerate threats of violence in the work place, but denying the grievance would send a clear message that violence or threats of violence will not be tolerated. The County submits that jokes about going home to get a gun so that you can kill your supervisor have no value as humor or otherwise. The County asks the Arbitrator to deny the grievance in its entirety.

DISCUSSION

In this case, the Union has grieved the discipline of Grievant. The Grievant was disciplined for making an alleged threat to his supervisor in violation of the County's Zero Workplace Violence Tolerance Policy. The Grievant was suspended with pay during the

investigation of the grievance; he was suspended without pay while he was consulting with a psychologist under an agreement with the County. The suspension without pay lasted nineteen days and ended when the County received the treating psychologist's report that Grievant could return to work as he was not a threat to any employe with whom he worked or to himself.

I do not need to discuss acts of violence in the workplace. That such acts occur is common knowledge. In recognition of this situation, generally, in the workplace today, and, in particular because of a case in Green Bay, Wisconsin, where and employe was killed in retaliation for informing police about thefts by fellow employes, the County enacted a Zero Tolerance Workplace Violence Policy and Procedure. (Jt.3) Even without this justification the Union never grieved the establishment of the Policy or objected to it. (Tr. 53) Said Policy was adopted in August of 1998 and was distributed to every employe with his or her paycheck. (Tr. 53) There is no evidence in the record to indicate that Grievant did not receive the Policy and the Union made no such defense.

On September 1, 1998, the Grievant was with approximately four other employes in the lunch room when he is alleged to have said: "It's about time we had an assassination around here. Maybe it's time I bring in my gun." (Tr. 10) The Grievant also was alleged to have pointed at Administrator Thomas when he made this statement. (Tr. 17) While there may be some question as to whether the Grievant pointed at Thomas when he made the statement, I do not believe there can be any issue about whether Grievant said the words or words to that effect. Other than the unnamed employe who reported the statement to supervisor Kulas who reported it to Thomas, Thomas on September 2, 1998 interviewed three employes who were sitting with the Grievant who verified to Thomas that Grievant made the statement. Further, one of those employes, Feldhaus, testified. Feldhaus, a long term employe, who is a friend of the Grievant, testified creditably and without contradiction that Grievant made the statement. Feldhaus testified that he thought Grievant said "elimination" rather than "assassination." (Tr. 38, 40-41) (Co. 5) Given the fact the Grievant used the word "gun" I do not find the statement to be any less a threat regardless of which word Grievant used.

The Union offered no real defense to the County's claim that the Grievant made the statement. I do not need to consider the hearsay evidence regarding employes who made a statement to Thomas during his investigation about what Grievant said to find, as I do, that Grievant made the statement. Feldhaus, who testified, was a creditable witness and the Grievant himself testified that he did not believe Feldhaus would lie. (Tr.85) Further, Grievant was offered several opportunities to deny that he made the statement but never did so, saying only that he did not remember making the statement. (Tr. 78) This fact was confirmed in a memorandum from Union Steward Decker to Thomas, of September 4, 1998, wherein she states only that Grievant did not remember making the statement contributed to him. (Co.6)

The Union argues that the County's case is seriously weakened because there is no direct evidence that Grievant pointed at Thomas when he made the statement. I agree with the Union that no such direct evidence exists but there is ample circumstantial evidence to support

a strong probability that Grievant did indicate that his statement was directed at Thomas. By Grievant's own admission and testimony, he was upset at being laid off and assigned to a set area in housekeeping rather than to a float position. Feldhaus testified that on the day Grievant made the statement, he was complaining and clearly upset at his working conditions resulting from the maintenance department layoff. (Tr. 85 and 39) Circumstances in the record would suggest that Thomas was in the lunchroom at the time of the statement. (Tr. 17) And the testimony of Feldhaus that Grievant states that "he's going to do the plane crash dance" when Thomas goes on vacation, lends credence that it was more likely Thomas than anyone else that Grievant was referring to on September 1st. (Tr. 44)

I have been referring to Grievant's words as a statement. I find under any reasonable and objective consideration that these words constitute a threat covered specifically in the County's Zero Tolerance Workplace Violence Policy. Section 24.02 states: "The possession, use, or threat of use of any weapon in the workplace is prohibited." Section 24.03 of the Policy states in defining workplace violence that: "means any oral . . . conduct that occurs in the workplace intended to harm or to cause a reasonable person to fear imminent harm." (Jt.3) The Union argues, and I accept, that the employes sitting in the lunchroom with Grievant did not fear harm. However, it is clear that the statement was not directed at them. These employes also felt that Grievant was just joking, often joked around and they had known him a long time and believed that he would never harm anyone. However, none of the Union witnesses stated that making such threats was typical of Grievant. Since such a statement was atypical from the Grievant was this a threat he intended to carry out? The very nature of this rhetorical question is the reason for the policy. No one can know and even if the threat were not directed at Thomas, I join other arbitrators who have found that a threat did not need to be directed at anyone to justify discipline. 1/ Further, Grievant's reference to bringing a gun to the workplace in and of itself is a violation of the policy warranting discipline under a just cause standard.

1/ Proof of a threat directed specifically at someone is not always necessary to substantiate discipline by an employe.

> ***Grievant testified that his working environment was stressful and hostile. He also felt his job was underrated. When he went to the Human Resources Office to fill out a workers compensation claim, Grievant said ". . . if I go back into the work station, someone will be hurt." Grievant testified that he never intended to harm anyone. The Arbitrator used a reasonable person factor to decide whether the statement was a threat. In upholding the Grievant's discharge the Arbitrator stated ". . . removal was in reasonable balance with the proven misconduct."***

111 LA 161, 165 MARINE CORPS AIR GROUND COMMAND CENTER, USMC, NAVAL HOSPITAL (GENTILE, 1998).

> ***In another case, a custodian was walking toward his supervisor's office. The custodian, with other employes around him, said he was tired and a supervisor who heard him said he better not sleep on the job. The custodian said "If I bring a 44-magnum, can I go to sleep then?" The supervisor***

reported the incident to his boss. The custodian (Grievant) immediately told his union steward he made the threat and went to his supervisor's office and apologized. Grievant also wrote an apology to the employer and explained he did not own a gun. The supervisor and other employes did not feel threatened and didn't take Grievant seriously. The Arbitrator held that whether the supervisor felt threatened is relevant to the disciplinary penalty but does not affect the threatening nature of the words themselves. The arbitrator modified the discharge to a seventeen month suspension holding that employes have to know such behavior is not tolerated.

WAYNE STATE UNIVERSITY, 111 LA 986, 987 (BRODSKY, 1998)

The Union submits that the County through Thomas was biased in its investigation. It may have been procedurally more appropriate for someone other than Thomas to direct the investigation as he believed he was the object of the threat. However, I find that the evidence of the investigation in the record does not show bias. Even if Thomas had been biased, the other three members of the Threat Management Team were not under Thomas' control or jurisdiction. It just does not seem plausible to me that the County Personnel Director, the County Corporation Counsel or an investigator from the County Sheriff's office would have been unduly influenced by Thomas. Further the investigation was hindered by Grievant's refusal, on advice of his Steward, to say nothing until he was confronted with probable termination.

As to the discipline itself, a nineteen day suspension without pay, I do not find that unreasonable. The Union argues that the County knew Grievant was a happy-go–lucky guy and wouldn't hurt anyone and overreacted in disciplining the Grievant. I cannot find that just because someone jokes about eliminating or assassinating someone I should find the discipline by the County to be unreasonable. To do so would emasculate the Policy; rather the Grievant and employes in general need to know that, if it ever was, it no longer is acceptable to make such threats even if joking; the point being who is to decide if the threat is a joke or the real thing; no employer or employe should be placed in the position of making that decision, particularly on the spot. I find that my decision on the length of suspension in this case is supported by ample arbitration case law. 2/

2/ PHILLIP MORRIS USA, 109 LA 299 (WAHL, 1997)

In this case, the arbitrator changed a discharge to a thirty day suspension. The Grievant had threatened a supervisor in front of the Company health nurse. The Grievant had been laid off from a $18.50 an hour production worker position to a $9.00 an hour janitor.

DETROIT NEWSPAPERS 109 LA 813, 816 (BROWN, 1997)

In this case, Grievant threatened his brother's supervisor with a "kick ass" threat and was discharged. The Company had a Zero Tolerance Policy for threats of violence. In upholding the discharge the

Arbitrator held:

> ***The employer's policy is to have zero tolerance of threats of violence. The rules which prohibit such misconduct have a rational basis. Such rules have been adopted in many work places in an effort to avoid the kind of employment violence we all read about everyday."***

I next turn to the Union's argument that the County's discipline of the Grievant was biased to a greater severity because of the consideration of two prior disciplinary actions, one in 1989 and the other in 1996. Given the fact that Grievant was not discharged but was suspended without pay and that I have found such discipline reasonable under the facts in this case, I do not need to consider or give weight to the prior discipline record of the grievant. I do agree with the County that the prior disciplines tend to show a pattern of conduct by the Grievant of not owning up to his transgressions. While the Union has the accepted right to emphasize Grievant's length of service with the County, the County has the equal right to ask me to consider all of Grievant's record. 3/ Were this a discharge case, the length of time between the previous offenses and the discipline in this case might be more problematic, but, as I have said above, the Grievant was not discharged. The County itself recognized Grievant's long service with the County when it gave him an opportunity to continue his employment by submitting to psychological counseling and evaluation. (Tr. 61) It is evident that while the County considered Grievant's prior disciplinary record in making its decision to discharge, it equally considered Grievant's length of service in giving him a chance to redeem himself. It also must be noted that the original decision of the County to discharge only came after the Grievant on two occasions refused to tell his side of the story to his supervisor, Thomas, and to the Threat Management Team.

3/ See, generally <u>How Arbitration Works</u> Elkouri and Elkouri Fifth Edition Voltz & Goggin co-editors (1997) Chapter 15, Discharge and Discipline, pages 925-926 "Grievant's Past Record."

The Union also submits that I should overturn this disciplinary action based on an alleged threat made by the Director of Nursing that occurred several months after the incident before me and after the discipline to the Grievant. This disparate treatment argument by the Union is problematic for two reasons. One, the subsequent threat occurred months after the discipline to the Grievant and two, the incident involved a non-bargaining unit manager. Accepting an argument that the Zero Tolerance Workplace Violence Policy should be applied equally that still would leave open the issue of whether the County could not levy equal but different discipline between a bargaining unit employe and a high level supervisor. More importantly, I could not find any arbitration case law with a reasonable amount of research wherein arbitrators considered or were even asked to consider, under a disparate treatment argument, discipline that occurred well after the discipline in the case before the arbitrator. I

was not cited to any case law to support the Union's disparate treatment defense under the facts in this case. There is ample case law on the relevancy of disparate treatment of employes occurring prior to the discipline of an employe, as well as after acquired evidence used against an employe to substantiate an employer's discipline; this is not the situation in this case.

If the facts were the same in the case against the Grievant as in the matter involving the Director of Nursing, it might be a closer call, but clearly they are not. And this is not to say that I accept that I should even consider or would consider in a subsequent case evidence of disparate treatment that occurred after the discipline of an employe -- Grievant. Having said that, I find that this argument of the Union can be disposed of by pointing out that the Director of Nursing made her threat in the presence of another supervisor in the privacy of her office who, for some reason, passed it on to bargaining unit employes. 4/ The Director of Nursing when confronted with the threat immediately apologized to the employes and informed them she meant none of them any harm and that it was merely a figure of speech that wasn't even meant to be made public. (Tr. 59, 60 & 149) Further, after she apologized to the Certified Nursing Assistants, the Union witnesses testified that they did not feel threatened. One Union witness made clear in her testimony that she thought Grievant's situation was different than the situation with the Nursing Director. (Tr. 32, 35, 66, 131-132, 141 and 145) Grievant as has been discussed, offered no explanation for his statement, did not offer any apology and never ensured anyone that he meant no harm by it. Therefore, I find that even considering this argument by the Union, it does not warrant overturning or modifying the discipline to Grievant.

4/ The Director of Nursing said: "If they don't wear the gloves, I'll kill them." This was in response to a state survey that found some CNA's were not changing gloves between patients.

Lastly, I will consider the Union's attempt to expand, from the County's perspective, the grievance subject(s) before me. While arbitrators have been willing to look at issues that are tangentially related to the grievance before them, they must be issues about which the other party has reasonable notice and has an adequate opportunity to defend. There is no evidence in the record that this grievance was modified or amended prior to the hearing. Further, there is no testimony in the record from any witness that the parties expanded the scope of the grievance or even discussed these related issues during the course of the contractual grievance procedure. Therefore, I am unwilling to consider whether the County violated the agreement by directing the Grievant to attend counseling and be evaluated by a psychologist as part of a reinstatement agreement. Likewise, I will not consider whether during the time Grievant was on administrative leave he should have been paid his prior maintenance hourly wage rate rather than the housekeeping rate; Grievant was suspended with pay on the day he was to assume housekeeping duties. I find that both of these issues present separate and distinct issues under

the labor agreement and that I do not need to answer them to make my decision and award.

I will consider, and I note the County had no objection, whether Grievant should be reimbursed for what he paid toward the cost of the psychological exam. Normally when an employe is ordered to take a medical or similar exam by the employer, the employer assumes that cost. Here, the Grievant agreed to assume co-payment of the cost of his exam as part of a "last chance" agreement. (Jt. 8 and 9) While, as the Union argues the Grievant had little choice, the Grievant put himself in that position to a large extent by not cooperating in the County's investigation. Grievant still had the option to refuse to accept the County's offer for employment and grieve his termination. Grievant probably did not see the latter as a very good option. Given the circumstances I do not find the County's actions on this issue to be unreasonable.

A suspension without pay is a significant punishment. But given the long suspensions and discharges upheld by arbitrators cited in the footnotes to this decision, I believe the County has not acted arbitrarily toward this employe. The Grievant has a reputation, confirmed by his fellow employes who testified, for having a loose mouth and speaking before he thinks. Jokes about eliminating someone are simply not acceptable in any context. If the discipline to Grievant causes him to think before he speaks, then it will have accomplished correcting his behavior while at the same time upholding the County's policy against such threats.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The County did not violate the collective bargaining agreement when it suspended the Grievant for a threat on September 1, 1998 toward his supervisor. The grievance is denied.

Dated at Madison, Wisconsin this 22nd day of December, 1999.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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