BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN CENTER DISTRICT

and

LOCAL 150, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Case 10
No. 59527
A-5903

(Knutsen Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill Hartley**, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, WI 53212, on behalf of Local 150.

Michael, Best & Friedrich, by **Attorney Jesus Villa**, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, WI 53202-4108, on behalf of the District.

ARBITRATION AWARD

According to the terms of the 1999-2003 collective bargaining agreement between Wisconsin Center District (District) and Local 150, Service Employees International Union, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the termination of Jeff Knutsen. Hearing was originally scheduled for May 14, 2001, but was postponed at the District's request. Hearing was rescheduled and held on June 18, 2001. No stenographic transcript of the proceedings was made. The parties agreed to file their initial briefs with each other post-marked July 13, 2001, with a copy to the Arbitrator. The parties agreed to waive reply briefs. Briefs were received on July 16, 2001, and the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties stipulated that the following issues should be determined in this case:

Was there just cause for the Grievant's discharge? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE XVI
Probation, Disciplinary Action and Representation

Section 1. All employees shall serve a probationary period of 135 hours during which they may be disciplined or discharged without recourse to the procedure set forth below or the grievance procedure.

An employee shall not be discharged without just cause. If an employee is to be disciplined, the employee may request the presence of the steward. The course of disciplinary actions shall be as follows:

Step 1. Verbal Warning.

Step 2. Written warning, in triplicate, one copy to the employee, one copy to the steward and one copy in the employee's file.

Step 3. Course of Action – Three day suspension.

Step 4. Course of Action – Termination.

Any dispute as to whether an employee committed a particular offense or participated therein, shall be subject to the grievance arbitration procedure provided it is presented in accordance with the outlined grievance procedure. Exceptions to the progressive discipline system may be made where flagrant violations occur.

ARTICLE XVII
Management Rights

Section 1. The Union recognizes that the Employer possesses the sole right to operate the WCD and WCD services. The management of the facility and the

direction of the work force, except as limited by this Agreement, is vested exclusively with the Employer. This will not be used to discriminate against any member of the Union. The Employer's management rights include, but are not limited to, the following:

1. To direct all operations of the Employer, including the determination of means, methods and personnel needed to provide efficient service;
2. To establish reasonable work rules;
3. To hire, evaluate, promote, train and schedule employees in positions within the Department;
4. To direct the employees, including assigning work and overtime;
5. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
6. To relieve employees from their duties for just cause; and
7. The Union recognizes that except as hereinafter provided, the Employer has the right to subcontract work provided that jobs and duties historically performed by members of the bargaining unit shall not be subcontracted and further provided that no present employee shall be laid off or suffer an unreasonable reduction of hours as a result of subcontracting. Notwithstanding the above, this does not prevent the Employer from using a subcontractor to avoid the payment of overtime (on a temporary basis) or to provide (on a temporary basis) a large enough complement of presently qualified workers to accomplish the work that needs to be done.

RELEVANT WORK RULES

IV. EMPLOYEE CONDUCT

Rules of Conduct

To ensure orderly operations and provide the best possible work environment, WCD expects its employees to follow rules of conduct that will protect the interests and safety of its clients, employees, and the organization. Employees are expected to know and observe these rules to avoid discipline.

While no organization can be expected to specify all potential forms of unacceptable behavior, the following are examples of behavior which could result in disciplinary action, up to and including immediate termination.

1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.

2. Abusing, striking, or deliberately causing mental anguish or injury to clients, visitors, employees, or others.

3. Stealing, neglect, destruction or unauthorized use of WCD owned or leased property, equipment or supplies.

4. Unauthorized lending borrowing or duplication of keys; careless or improper use of keys; or failure to report promptly loss of keys.

5. Disorderly or illegal conduct including, but not limited to, the use of loud, profane or abusive language; horseplay; gambling; or other behavior unbecoming a WCD employee.

6. Violation of health, safety and sanitation procedures, directions and requirements.

7. Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.

8. Inappropriate dress, grooming, or personal hygiene including, but not limited to, the improper use of prescribed uniform, badge, or other article of clothing of identification.

9. Unauthorized posting, changing or removal of posted material or unauthorized distribution of written material.

10. Entering or permitting others to enter restricted areas without authorization or failing to comply with posted instructions in various areas.

11. Unauthorized solicitation for any purpose while on duty or on WCD property.

12. Reporting to work or while at work manifesting any evidence of having consumed alcoholic beverages or illegal drugs or having possession of such items while on duty or on WCD property.

13. Unauthorized possession of weapons.

14. Failure to give proper notice when unable to report for or continue duty as scheduled, tardiness, excessive absenteeism, or abuse of sick leave privileges.

15. Requesting, retaining, or failing to report an offer of a bride [sic] or gratuity.

16. Failure to submit upon request to the inspection of packages or containers taken form [sic] or into the work area.

17. Failure to follow the policies set forth in this Handbook.

Discipline

The purpose of this policy is to state WCD's position on administering discipline equitably and consistently. Undoubtedly, the best disciplinary measure is the one that does not have to be enforced. Also, without doubt, the best discipline comes from good leadership and firm, fair supervision at all employment levels.

Typically, disciplinary action will call for any of four measures depending upon the severity of the infraction and the number of times the particular employee has committed the offense in question or any other offenses: verbal warning, written warning, suspension, dismissal.

The major purpose of any disciplinary action is to correct the situation and prevent recurrence. Therefore, the method of disciplinary action chosen will be the one most likely to accomplish the overall purpose in the particular situation. As the situation demands, WCD reserves the right to use any, all or none of the aforementioned disciplinary measures. Depending upon the severity of the violation(s) and/or the consequences of the prohibited conduct, discipline may be accelerated up to and including immediate termination for any violation of these rules.

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Tardiness

"Tardiness" is defined as the failure to report for work or be at one's designated work station at the starting time of the shift; failure to report within 30 minutes of call-in; reporting back to work late from meal periods or work breaks; or leaving prior to the end of a scheduled shift, including overtime.

Example of tardiness, which may be considered a violation of WCD's standards of employee conduct may include, but are not limited to:

- Occurrence of tardiness which establish a pattern, such as regular tardiness on certain days of the week.
- Other patterns of tardiness.
- Excessive tardiness.

"Banking" of break or lunchtime, for purposes of early departure, is not allowed without prior approval from your supervisor.

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Dress Code

Our first impression is one of the most valuable tools we have in helping to make guests and clients fell welcome and appreciated. It is very important for us to focus on providing the best service possible at all times. This includes constant awareness of how we look when on duty within the complex.

All employees are expected to look their best. If you have been issued a uniform, it is your responsibility to wear it appropriately and at all times when working in the complex. This includes keeping all items clean and neat in appearance. If you have back-up pants and/or shirts, an extra set should be kept on site in case you need to change during the day. If you are in need of replacement articles, please contact your supervisor for assistance.

For those employees that have not been issued a uniform, you will be expected to dress in appropriate business attire. This includes dress slacks or skirt, dress shirt with tie or blouse, dress shoes, and suit coat or sport coat. There is no "dress down" day permitted.

For outside contracted services/employees working for WCD, it is expected that they also wear proper attire when on duty within the complex. All personnel require proper hygiene.

If there is any exception required to the above, it must be cleared through the President's office.

Only clothing that allows a staff member to deal with a variety of job duties in a safe manner will be worn. The clothing shall be neat, clean, and comfortable. Clothing should not be modified in any way.

Clothing with the following writings, pictures, or advertisements are prohibited:

- Advertisements of alcoholic beverages, drugs, cigarettes, and any type of gang affiliations.

- Jokes or derogatory comments about sex, religion, race, creed, color, conviction record, national origin or ancestry, handicaps, sexual orientations, marital status, political affiliation or military service or any other class protected by law.

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Loafing, Loitering and Reading

In order to function and provide quality service to our customers, WCD depends on its employees to pay attention to detail and be focused on their assigned responsibilities whenever they are on work time; it is equally important not to distract other employees from their duties. Consequently loafing, loitering and reading non-work materials during work time is prohibited.

Examples of prohibited conduct may include but are not limited to:

- Loafing or engaging in unauthorized visiting during work time.
- Loitering in or on the premises before, after or during scheduled work shifts.
- Reading unauthorized materials during work time. Reading material provided by WCD for job-related purposes is not covered under this rule.

Such conduct may result in discipline, up to and including, immediate termination.

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FACTS

The facts surrounding the incident for which the Grievant was discharged are not disputed. On October 16, 2000, the Grievant (a set-up crew employee) and at least four other set-up employees of Wisconsin Center District (WCD) were observed by a WCD security guard watching TV during working hours. The security guard identified the Grievant, Shawn Hall, Robert Rydlewitz, Greg Witkowski and Lucious Robinson all WCD employees, engaged in watching TV on this date. In addition, two unidentified black employees were also reportedly involved in the incident. On that evening, these employees had worked through their first break and apparently decided to watch TV at a later time. The Grievant admitted watching TV on October 16th during his working hours. It is undisputed that the Grievant did not engage in any other misconduct involving this incident. 1/

1/ During the District's investigation of the incident, WCD employee Lucious Robinson used profanity and threatened the security guard who observed him watching TV on October 16.

It is also undisputed that Knutsen's past work record included the following discipline:

1) Verbal warning for being tardy on 3/17/97 and 3/22/97.
2) Written warning for reporting to work one hour late on 3/23/97.
3) Three-day suspension for reporting 20 minutes late to work on 5/5/97 and reporting 30 minutes late to work on 5/6/97.
4) Sent home early on 9/17/99 and given a three-day suspension thereafter for insubordination for not having his hair in a pony tail on 8/20/99, 8/21/99 and 8/30/99.

The dispute between the parties in this case is the level of discipline meted out against the Grievant for his part in the incident on October 16, 2000. In this regard, the evidence showed that the WCD completed a full investigation of the October 16th incident and terminated the Grievant on November 21, 2000, based upon his prior disciplinary history and the incident of October 16, 2000.

District Representative Sleaper stated herein that in determining the appropriate punishment for the Grievant's conduct on October 16th, he did not consider the staleness of the prior warnings/discipline against the Grievant because WCD does not expunge employee personnel records or discount old disciplinary actions when it decides how to discipline an employee for a new incident. In this regard, Sleaper stated under cross-examination questions that the District would consider warnings and discipline that were 12 and even 15 years old against employees in determining punishment for recent misconduct of that employee.

Sleaper asserted that in one prior grievance, a local union officer had stated that disciplinary actions over one year old could not be considered by the District. Sleaper stated this was incorrect and that the contract did not support such a reading. Sleaper noted that the Union did not take that particular case to arbitration. However, Sleaper could not recall who the grievant was, how old his/her prior disciplinary actions were or why the Union dropped the grievance.

In addition, Sleaper stated that in negotiations for the 1999-2003 collective bargaining agreement, Local 150 Union representative Darryl Evans (now deceased) asked Sleaper and his team whether the employer would consider putting something into the contract to remove prior warnings from employee files at some point. The Union never made a formal proposal, either written or verbal, on this point. At the time, the District refused to consider this suggestion. Sleaper could not recall at which of three separate Local 150 bargaining sessions the issue was raised by Evans. 2/

2/ The District has three contracts in three Local 150 units (which are bargained separately), the terms of which, vary significantly from one another.

Sleaper stated that because Hall, Rydlewitz and Witkowski had no prior disciplinary warnings in their files, they received written warnings for the October 16 incident. Also, because Robinson had one written warning (issued on August 31, 2000) in his file the District gave Robinson a three-day suspension for the October 16 incident. Finally, Sleaper stated that all employees are given a copy of the District's July, 1999 employee handbook. Indeed, Knutsen signed a form indicating that he had received a copy of the handbook. Sleaper admitted, however, that the District has not in any way negotiated with the Union regarding the contents of the handbook.

POSITIONS OF THE PARTIES

The District

The District asserted that the issues in dispute in this proceeding are narrow and few. In this regard, the District noted that the Grievant admitted the wrongdoing he was accused of; that there was no question that the investigation had been fairly conducted; and the District believed the Union had no dispute that it had a progressive disciplinary policy that provides for discharge after a three-day suspension. Thus, in the District's view, the only issue in this case was whether the District had properly considered the Grievant's September, 1999 three-day suspension in terminating Knutsen for wrongdoing he engaged in along with other WCD employees on October 16, 2000.

The District anticipated that the Union would argue that prior disciplinary actions taken against Knutsen should not have been considered by the District in determining that he should be discharged for the October, 2000 incident. The District urged that there was no support for this argument. In this regard, the District noted that most arbitrators interpret and apply the collective bargaining agreement and do not add to or modify the agreement. Arbitrators, as a general rule, leave to collective bargaining the addition, deletion or modification of contractual provisions. The District argued that the undersigned should follow this path in the instant case.

The District contended that the Union is attempting to achieve in arbitration what it could not successfully achieve in bargaining. In this regard, the District noted that the contract has no provision to remove disciplinary action from employees' files after a certain period of time has passed. The Union wanted such a provision in the collective bargaining agreement and suggested this, but the District refused and no such provision went into the most recent contract between the parties.

In addition, the District noted that the Union attempted to raise this issue again through the filing of a 1999 grievance over a three-day suspension, by asking that the disciplinary records regarding that grievant, which were more than one year old, be removed from his/her personnel file. The District refused to do this and stated that the contract does not provide for

such removal of prior disciplinary actions. The Union later dropped the grievance. In all these circumstances, the District urged that the grievance should be denied and dismissed in its entirety, as the District followed its normal procedures in assessing the penalty against the Grievant and discharging him.

The Union

The Union argued that the District discharged the Grievant without just cause because the termination penalty was too harsh for the Grievant's misconduct. In addition, the Union urged that the District's reliance on past discipline of the Grievant, some of which was more than 3.5 years old, for unrelated misconduct should not, in fairness, form the basis for the Grievant's discharge concerning the October 16, 2000 incident.

The Grievant's prior disciplinary record shows that the District's "strict" progressive disciplinary system is not so strict. In this regard, the Union noted that the Grievant had received one verbal warning for being tardy twice, one written warning for another tardiness incident, one three-day suspension for tardiness and another three-day suspension for failing to put his hair in a pony tail, all prior to the October 16, 2000 incident. The District could have discharged the Grievant over the pony tail misconduct but it failed to do so. Just as the pony tail offense committed by the Grievant did not warrant immediate termination nor does the instant offense warrant immediate termination. The Union noted in this regard that the other participants in the October 16, 2000 incident were not discharged.

As the District has the burden to prove just cause for the Grievant's discharge by a preponderance of the evidence, the Union urged that the record failed to show that the District had just cause for the Grievant's discharge by its unfair use of stale and unrelated warnings to support "progressive discipline." In this regard, the Union conceded that the contract does not limit the time a warning or disciplinary action is effective in an employee's file so that it could technically be used in consideration of progressive discipline forever. But, this does not mean that any disciplinary actions, no matter how old or for what offense, should be used against an employee. The Union noted that the verbal, written and the first three-day suspension were received by the Grievant more than three years ago and were all for the offense of tardiness, unrelated to the incident of October 16, 2000. The Union further noted that Human Resources Director Sleaper indicated that even if a disciplinary action were ten or more years old and the employee had no disciplinary action for that ten year period, the District would still use the old disciplinary action in determining the penalty for a new incident of misconduct by the employee. The Union urged that this approach is simply unfair and violates the principle of just cause, on its face.

The Union contended that the purpose of discipline is generally to notify employees of unacceptable behavior and to give them a chance to correct their conduct so that they can become successful employees. Indeed, the Employer's handbook affirms this principle. After

the Grievant had received the verbal, written and the first three-day suspension, the Union noted he had no more incidents of tardiness, proving that he learned his lesson in this regard. The Union urged that the District's reliance on these disciplinary actions as a basis for terminating the Grievant, three years after the last tardiness incident, was certainly unfair.

Thus, it appears the District is using progressive discipline not to correct employee behavior, but to terminate employees for any four offenses. Such an excessively harsh approach, the Union noted, is likely to be counter-productive with unit employees. That is, employee awareness of the excessively harsh penalties meted out by management may simply cause employees to feel that management is unfair and destroy good morale and good discipline among employees, without improving employee conduct.

The Union denied that it attempted to negotiate a provision limiting the time that warnings could be considered by the Employer for purposes of progressive discipline. In this regard, the Union noted that no written proposal was made by the Union on this particular point and none was submitted by the District herein. The record evidence showed that Union Representative Evans merely asked for the District's position on the issue and the District said it was not interested in pulling old disciplinary actions and no further discussion occurred on the subject. In addition, the Union noted that Human Resources Director Sleaper could not remember in which of the three collective bargaining units this discussion occurred. Sleaper also admitted that these comments could have been made in one of the other two units' collective bargaining negotiations.

Regarding the 1999 grievance raised by the District, the Union noted that the local Union officer's comments were not clearly recalled by HR Director Sleaper. Indeed, Sleaper could not recall the grievant involved in the case or how old the prior disciplinary actions of that grievant were or why the grievance was ultimately dropped by the Union. Therefore, the Union urged that there was no credible evidence to support the District's contention that the Union waived its right herein by dropping the prior grievance.

The Union asserted that it is the responsibility of this Arbitrator to determine if the punishment fits the crime and to set aside the Grievant's discharge if the penalty is unduly severe or unreasonable in the circumstances of this case. Here, the District admitted the misconduct which the Grievant engaged in on October 16, 2000, was not normally the type of activity that an employee would be discharged for outright. The Grievant cured his tardiness problem three years ago. The fact that the Grievant, approximately one year ago, failed to put his hair in a pony tail should not fairly warrant the Grievant's discharge for the type of misconduct he engaged in on October 16, 2000. Indeed, the Union noted that the Grievant admitted his misconduct on October 16th — did not resist or run away or attempt to hide himself or commit any other wrongful acts in order to avoid the penalty for that misconduct.

In essence, the Union urged that the District, contrary to its own handbook, was punishing the Grievant for the sake of punishment. Therefore, the Union sought a lesser penalty for the Grievant, a make whole remedy and reinstatement to his position.

DISCUSSION

The District submitted evidence that the Union had made a proposal in bargaining for the effective labor agreement, which was ultimately rejected by the District, that the District disregard prior disciplinary actions which occurred more than one year prior to the most recent misconduct of an employee. The District asserted id had rejected this proposal. The District also proffered evidence that the Union had failed to pursue a 1999 grievance in which the Union had argued that no value be given to prior disciplinary actions (more than one year old) of that grievant. The District rejected this argument and the Union dropped the grievance. The District argued that by these actions, the Union essentially waived its right to argue that the Grievant's prior disciplinary warnings should be disregarded by the Arbitrator herein. For the reasons stated below, I disagree.

First, the record made by the District is insufficient to prove a Union waiver. In this regard, it should be noted that the record showed that the Union made no formal written or verbal proposal to amend the labor agreement to expunge past disciplinary actions. Indeed, Mr. Sleaper admitted that former Local 150 Agent Evans merely asked the District if it would consider putting something in the contract to remove prior warnings from employee files. The District failed to offer any bargaining notes or a written Union proposal on this point to support its assertions. In addition, Mr. Sleaper was unable to specifically state that Evans' comments were made regarding the contract relevant in this case, and not one of the other two Local 150 contracts which separately cover other District bargaining unit employees. In these circumstances, the clear evidence that is required to show a waiver was not present.

Similarly, in regard to the 1999 grievance, I note that when the conversation occurred regarding past disciplinary actions, it was between Sleaper and Local Union officers, and no Local 150 Agent was present. Furthermore, the District presented no documentary evidence to support its argument on this point. Indeed, Sleaper's inability to fully identify the case as to the grievant's name, how old his/her prior disciplinary actions had been, or why the Union dropped the grievance, makes this evidence unreliable and insufficient to bind the Union on a waiver argument. Therefore, I reject the District's arguments on these points.

I turn now to the central dispute in this case — whether the District had just cause to discharge Mr. Knutsen. An initial inquiry whenever just cause is involved is whether the misconduct was so serious that it called for immediate discharge. In this case, I note that Mr. Sleaper stated that had Knutsen had no prior discipline on his record, he would have received a written warning for his misconduct as did Rydlewitz, Witkowski and Hall. Therefore, the misconduct of October 16, 2000, in the District's view, did not call for immediate discharge.

A close analysis of the labor agreement shows that Article XVI, Section 1, states:

> An employee shall not be discharged without just cause. . . . Exceptions to the progressive discipline system may be made where flagrant violations occur.

Article XVI, also states that "the course of disciplinary actions shall be" in four steps: verbal warning, written warning, three-day suspension and termination. This is strong language. However, I note that Article III, Grievance and Arbitration, does not contain any language indicating that arbitrator cannot modify a penalty assessed by the District if mitigating circumstances exist in the case to show that that the penalty assessed is unreasonable.

It is because Knutsen had one verbal warning, one written warning and a three-day suspension for five instances of tardiness, all of which occurred in 1997 as well as a second three-day suspension received in 1999 for failing to keep his hair in a pony tail on three occasions, that Knutsen was fired for the incident of October 16, 2000. The District has asserted that it has consistently applied progressive discipline, no matter what the offense, so that an employee can expect to receive one verbal warning, one written warning and three-day suspension before being discharged for any forth incident of misconduct. However, Mr. Knutsen's record shows that progressive discipline has not been consistently followed by the District.

The evidence in this case showed that in 1997, Knutsen was absent/tardy five times and received one verbal warning, one written warning and a three-day suspension therefor. This evidence leads me to conclude that when Knutsen has been disciplined in the past, he has changed his behavior and learned his lesson. This is precisely what the District's work rules were intended to do by disciplining employees — "to correct the situation and prevent reoccurrence." It is significant that no evidence was placed in this record to show that when Knutsen was absent/tardy in 1997, he actually received money (pay) for time he did not work. Therefore, I conclude that absent specific evidence to show that Knutsen was paid for time he did not work in 1997, the misconduct involved in the instant case — watching TV while in paid status — is a separate and different type of infraction. In addition, I am also convinced that Knutsen's violation of the District's dress code 3/ should also be considered a separate and distinct infraction. Thus, neither of Knutsen's prior areas of difficulty in working at the District are comparable to the type of misconduct he engaged in on October 16, 2000.

3/ I note that nowhere in the District's work rules does it mention that long hair must be kept in a pony tail. Rather, in the dress code section, the only reference possibly applicable to Knutsen's prior infraction was the following: "all personnel require proper hygiene."

The District has asserted that it would find even unrelated disciplinary actions more than ten years old to be relevant and applicable in determining discipline. What the District does or does not consider relevant and applicable in its deliberations regarding discipline of employees is a separate and distinct question from the inquiry a third-party neutral must make in determining whether just cause existed for the District's actions. Therefore, the lengthy arguments of the District that it does not and has not expunged or disregarded prior

disciplinary actions of employees does not mean that in applying just cause principles, the Arbitrator may not find that the District has fallen short of fair and reasonable conduct in assessing the discharge penalty against Knutsen.

The Union has argued that the absenteeism/tardiness disciplinary actions are not only unrelated but are also stale and should not be considered in determining a just cause penalty for Knutsen's misconduct on October 16, 2000. In the circumstances of this case, I agree. As the Arbitrator in this case, I am bound to analyze the District's actions to determine whether they have met the just cause standard in assessing the penalty of discharge, the most serious penalty an employer can mete out. It is significant to this Arbitrator that Mr. Knutsen's absenteeism/tardiness problems all occurred and were cured in 1997. Mr. Knutsen has had no reocurrence of this misconduct. In addition, I note that in regard to Mr. Knutsen's alleged violation of the District's dress code, the District's issuance of a three-day suspension to Knutsen in 1999, ended his violations in that area of the District's work rules as well. Thus, discipline has had the intended affect on Knutsen — to correct the situation and prevent reoccurrence.

Although the conduct Knutsen engaged in on October 16th is serious, I am in agreement with the District that that conduct was not, in and of itself, the type of conduct which called for immediate discharge. In addition, this was, according to this record, the first time that Knutsen engaged in conduct whereby he attempted to take wages for time he did not work. As this record demonstrates that Knutsen has in the past learned his lesson and mended his ways, I believe that he can do so again with the type of misconduct he engaged in on October 16, 2000. Indeed, Knutsen would be well advised to make sure that he does not run afoul of the District's rules in the future. Furthermore, I note that in the processing of the instant case, the Grievant admitted watching TV on October 16th during his work hours; and that he did not engage in any other misconduct involving that incident. Finally, the District failed to prove it has consistently applied progressive discipline in the past. Therefore, based upon the relevant evidence and argument in this case, I find that significant mitigating circumstances exist to militate against terminating Knutsen for his misconduct on October 16th and I issue the following

AWARD

There was not just cause for the Grievant's discharge. The Grievant shall serve a three-day suspension without pay for the misconduct he admittedly engaged in on October 16, 2000. Thereafter, he shall be reinstated with full back pay, benefits and all contractual rights.

Dated in Oshkosh, Wisconsin, this 4th day of September, 2001.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

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