

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SEIU, LOCAL 150,
AFL-CIO, CLC**

and

MERITER HOSPITAL, INC.

Case 101
No. 62337
A-6068

(Bill Zimmerman Discharge Grievance)

Appearances:

Matthew Robbins, Attorney, appearing on behalf of the Union.

Michael Westcott, Attorney, appearing on behalf of the Employer.

ARBITRATION AWARD

SEIU, Local 150 (hereinafter referred to as the Union) and Meriter Hospital, Inc. (hereinafter referred to as the Hospital or Employer) are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the Bill Zimmerman discharge grievance. Hearing on the matter was held on July 7, 2003, in Madison, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs by August 19, 2003, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the contract, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties stipulated to the following issue:

Was there just cause for the discharge of the grievant? If not, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2002-2006 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 3 - EMPLOYER RIGHTS

Section 1 – Scope

. . .

It is agreed that, except that as otherwise expressly limited by this Agreement, the management of the Hospital and the direction of the work force including, by way of example and not by way of limitation, the right to . . .promulgate and enforce reasonable rules and regulations it considers necessary or advisable for the safe, orderly and efficient operation of the Hospital, . . .and to discharge employees for just cause. . .

. . .

Section 2 – Procedure in Case of Disagreement In Interpretation

In the practical administration of this contract, it will be necessary for supervisors and administrators to interpret its applicability to certain situations that may arise. For the sake of the vital and safe conduct of the Hospital's business, it is imperative and agreed that every employee shall follow the instructions of his/her supervisor. In cases where she/he disagrees with her/his supervisor on the interpretation of the applicable part of the contract or feels that a directive given is unfair to her/him, she/he shall have the right to question the interpretation or direction through the grievance procedure outlined in Article 24, section 7. It is agreed that the failure of an employee to follow the reasonable instructions of her/his supervisor constitutes possible just cause for disciplinary action up to and including discharge.

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ARTICLE 25. DISCHARGE AND DISCIPLINE

Section 1 – Authority

The Hospital may discharge, suspend or otherwise discipline for just cause any employee who has completed his/her probationary period, subject to the grievance procedure. Prior to any discharge disciplinary meeting, employees will be advised of their right to have a Union Work Site Leader present.

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Section 4 – Sequence of Disciplinary Action

Any employee may be disciplined for just cause or for performance which is less than satisfactory. Ordinarily, such discipline would include the sequence of verbal warning, written warning, suspension and termination. Certain actions by the severity of their nature will require immediate progression to more severe discipline including suspension or termination. In all cases, written notification shall be provided to the employee which will indicate the current step of the disciplinary process and the reasons for the disciplinary action. In the cases of written warning, suspension, and termination, the Union shall be notified in writing by the Hospital at the same time the information is provided to the employee, and a copy of these disciplinary actions will be placed in the employee's personnel file, and a copy will be provided to the Union Coordinator. The Union will also be notified in writing when written warnings or suspensions are removed; however, failure to do so will not be grievable.

BACKGROUND

Meriter is a hospital located in Madison, Wisconsin. The Union is the exclusive bargaining representative for certain hospital employees. One position in the bargaining unit is the position of Housekeeper I in the Environmental Services Department. Grievant Bill Zimmerman was a Housekeeper I and thus was in the bargaining unit.

A document entitled "Meriter Services Behavior Expectations" specifies what Meriter's behavior expectations are regarding its service employees. That document provides, among other things, that employees are to show respect and to be courteous to others. These expectations have been communicated and reinforced to employees through "five-minute meetings," which occur regularly in the department.

Another document pertinent herein is the “Environmental Services Employee Handbook”. The handbook contains a Value Statement which provides that the team works together to “create a positive work environment that fosters trust, cooperation and mutual respect.” The handbook goes on to provide certain rules of conduct concerning conduct that is not tolerated of Meriter employees. These rules prohibit insubordination, along with the use of offensive or abusive language. This handbook has been distributed to all employees in the department. The handbook applies to both bargaining unit employees and supervisors.

Finally, the collective bargaining agreement provides that supervisors are to be treated with dignity and respect. The grievant herein, Bill Zimmerman, was familiar with the contents of the collective bargaining agreement because he was a union coordinator (i.e. a union steward) and a member of the Union’s negotiating team.

The record contains Zimmerman’s evaluations for the years 2001 and 2002. In both years, his overall numerical rating was “3” out of a possible “4”. The “rating scale” on the evaluation form indicates that a rating of “3” means “significantly exceeds standards of good, solid performance.” These evaluations were done by his immediate supervisor, PM Operations Manager Jim Masterson.

Zimmerman and Masterson have had conflicts and difficulties in the past. The record does not detail the reasons for these conflicts. The two men have had meetings to improve their working relationship. Zimmerman did not have conflicts or difficulties with PM Supervisor Deanne Baley. Instead, he had a good working relationship with her. Baley used to be Zimmerman’s direct supervisor.

The record indicates that prior to the incident referenced in the **FACTS**, Zimmerman had received the following discipline for workplace misconduct. He received a verbal warning on June 9, 1995 for excessive use of unscheduled earned time; a verbal warning on May 13, 1996 for taking excessive breaks; a verbal warning on October 30, 1998 for an unauthorized break; a written warning on November 18, 1998 for unscheduled earned time; and a verbal warning on August 30, 2000 for an unauthorized break. He received a written warning on August 30, 1996 for taking an extra break, insubordination and abusive language toward his supervisor. He was advised in that warning that insubordination is a serious infraction of Meriter’s policies and further violations could result in immediate termination. This warning was not grieved. He also received a written warning on August 14, 2000 for disrespect toward his department manager, including pointing his finger, the tone of his voice, using profanity toward a co-worker, and violence for slamming his fist on the table. In that warning, he was again told that “future or continued occurrences of this conduct or similar conduct will result in termination”, and he was offered assistance through the Employee Assistance Program for his personal problems. This warning was not grieved.

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The record also indicates that the following employees received the following discipline from the Employer for workplace misconduct.

Supervisor Peter Schultz received a verbal warning from Masterson in November, 2001 for using profanity towards an employee and kicking the back of an employee's chair. This incident occurred in the Environmental Services office. The warning notice does not indicate what profanity was used or what type of discipline Schultz had previously received.

Bargaining unit employee Dave Reeve received a "memo for the record" from supervisor Pete Goepfert on May 1, 2000 to document an incident which occurred April 25, 2000. In that incident, Reeve was paged and asked by someone in the secretarial staff to move something in a hallway. This request agitated him, and he said (referring to the secretarial staff that paged him) that he would like to "slug them between the eyes" and "I could just kill somebody." The memo admonished Reeve for saying these things. The warning does not indicate what type of discipline Reeve had previously received.

Reeve (the employee just referenced) also received a written warning from Goepfert on July 10, 2000 for telling Goepfert that "the schedule is your fucking job" and pointing his finger at Goepfert while he said that. This incident occurred in the maintenance shop.

Supervisor Dean Thomas, who was then the PM Operations Manager, received a final written warning from Alice Butler on November 18, 1997 for (unspecified) conversations with an employee which were of a sexual nature. As part of that discipline, Thomas was forced to either resign or accept a demotion. He accepted the latter (i.e. a demotion), and went from his supervisory position to a Mechanic II position (a bargaining unit position).

Bargaining unit employee Ruthie Donaldson received a final written warning in November, 2001 from supervisor Mona Hull for an incident involving a co-worker. In that incident, Donaldson was apparently hit in the chest by a magazine thrown at her by a co-worker. This resulted in a loud argument between the two. There was also an allegation that Donaldson pushed the other employee during the argument in a conference room. The warning notice does not indicate what type of discipline Donaldson had previously received.

FACTS

Bill Zimmerman was hired as a Housekeeper I 13 years ago and worked in that capacity at Meriter until his discharge effective January 31, 2003. His discharge is the subject of this case and involves his conduct on that date.

A Housekeeper I is responsible for, among other things, trash collection in the hospital. There is a huge amount of regular and contaminated trash generated in the hospital. The record indicates that the daily pick-up of this trash has been an ongoing problem for some time. Housekeepers on both the first and second shifts have complained about the failure of the housekeepers on the other shift to complete the trash pick-up. When a housekeeper encounters a problem with the trash, the Employer's standard operating procedure is that the employee is to contact their supervisor regarding same. Zimmerman knew this procedure and had followed it numerous times prior to the incident involved herein. Sometime in 2002, Zimmerman met with the Operations Manager of Environmental Services, Alice Butler, about the trash problem. Zimmerman testified that co-employees complained to him regularly about the trash problem.

On Friday, January 31, 2003 Zimmerman reported to work at 4:00 P.M. for what is known as the P.M. shift, punched in and started working. Early in his shift, he walked through the various areas of the hospital to see how much trash pick-up needed to be done. First, he went to the atrium. It was filled with trash. Next, he went to another room known as 4 Tower. It was filled with trash. This made him angry. He took the cardboard boxes from that room to the loading dock where the compactor is located, but the compactor was full. This made him angrier. He then saw co-worker Marlene Johnson and told her that there was a lot of trash to pick up. She responded thus: Wait till you see Room 175. Room 175 has a trash chute in it and trash from a section of the hospital is sent by the chute to that room. Zimmerman then went to Room 175 and looked inside. It was filled with trash. He then went to Area 1B. It was filled with trash too. Zimmerman was overwhelmed with the amount of trash he was to pick up. The trash situation frustrated him and, in his own words, made him "hot under the collar." Zimmerman then went looking for the two P.M. supervisors, Jim Masterson and Deanne Baley, to complain to them about the trash situation.

When Zimmerman found them both in the hallway of 1 North (a public area) about 5:15 p.m., he walked up to them and the following occurred. In a loud voice, Zimmerman yelled at Masterson and Baley that he was pissed off because the fucking A.M. shift was not picking up the trash and he was sick and tired of picking up after them. Masterson said the following in response in a normal voice: settle down; there are visitors nearby (referring to four hospital visitors who were about 20 feet away); don't yell at me; it's not my fault. Zimmerman then told Masterson in a loud voice to "fuck off". When Zimmerman said this, his face was red with anger and he was visibly upset. Zimmerman then took his hand-held radio (a two-way communication device) which was attached to his belt, raised it over his head like a pitcher who was about to throw a baseball, and pointed the radio antenna at Masterson and Baley. Baley flinched when this happened because she thought, based on the throwing motion Zimmerman was using, that he was going to throw the radio at them. He did not throw the radio but pointed it at Masterson and Baley and yelled: if you don't do anything about it, it's gonna bite you in the ass. (Note: Zimmerman was referring to the trash). Zimmerman

then said in a loud voice that he was sick of this fucking bullshit, you're just ignoring the trash problem. Zimmerman then turned around and walked down the hallway. Masterson and Baley followed him. The three of them (i.e. Zimmerman, Masterson and Baley) then walked past the four visitors who were still in the hallway by the vending machines. Zimmerman was wearing a uniform and an employee badge, so the visitors could tell he was a hospital employee. The four visitors backed up against the wall with their backs and hands against the wall and stared as Zimmerman, Masterson and Baley walked past them. As he walked past them, Masterson said "excuse us" to the four visitors. Zimmerman, who was still in the lead, then walked to Room 175 which was nearby and either knocked or kicked the door to that room open causing the door to slam against the wall, whereupon he said in a loud voice: look at this mess. After he did this, Masterson told Zimmerman again to settle down. Baley then stepped in to Room 175 to have a look for herself at the room's condition. In doing so, she walked past Zimmerman who was still standing by the door. Baley acknowledged to Zimmerman that the room was a mess. About the same time (although it is unclear whether this happened before or after she went into Room 175), Baley asked Masterson if she should call security. Masterson did not respond. Zimmerman then left Room 175 and walked to the housekeeping office which is nearby. Once inside that room, Zimmerman threw his radio and work keys on a table and said he was going home sick. Zimmerman then punched out and left the room. Neither Masterson nor Baley tried to prevent Zimmerman from punching out and leaving. Instead, both of them felt that given what had just happened, it was safest and most appropriate for him to leave the building. Neither Masterson nor Baley followed Zimmerman after he punched out to see where he went.

The entire incident described above took about five minutes.

After Zimmerman left the housekeeping office, he went to the hospital's designated smoking area where he smoked three or four cigarettes. He then called his dad and asked him (i.e. his dad) to come pick him up. He then went to the hospital's lobby where he stayed for 45 minutes, without incident, while he waited for his dad.

About 6:00 p.m., Masterson called his supervisor, Alice Butler, at her home and told her in detail what Zimmerman had done. After hearing the details and asking if employees were safe, she told Masterson that she would address the issue on the following Monday. In the meantime, she told Masterson that he and Baley were to document in writing what had happened. They did that later that night.

Over the weekend, Baley told Masterson she was concerned about her safety around Zimmerman. Baley described Zimmerman as a time bomb and out of control. She said she had never seen him that mad, nor had she ever seen any other person act that way at the hospital.

On Monday, February 3, 2003 Butler decided, after discussing the situation with Human Resources, to suspend Zimmerman pending an investigation. She called Zimmerman that afternoon at home and told him that he was not to return to work until his next scheduled workday (Tuesday, February 4, 2003) because he was suspended pending an investigation of his conduct on January 31, 2003.

Prior to calling Zimmerman at home, Butler talked with Don Morschauser, the other Union Coordinator. She told Morschauser of her concerns about Zimmerman's conduct and behavior on January 31, 2003. She told Morschauser that she wanted to meet with Zimmerman to get his side of the story, but in the meantime, Zimmerman was suspended pending an investigation.

On Wednesday, February 5, 2003 Butler met with Morschauser, Masterson, Baley and Zimmerman regarding Zimmerman's conduct on January 31. During that meeting, questions were asked of Zimmerman as to what occurred and why, and he was given the opportunity to say whatever he wanted. During that meeting, Zimmerman admitted that he had yelled loudly at his supervisors and directed profanity, including "fuck off", at them. He also admitted that he did this in front of hospital visitors. He also admitted that he had kicked open the door to Room 175. During the meeting, Zimmerman described himself as being out of control and out of his mind on the day in question. During the meeting, Zimmerman did not show remorse or apologize for his conduct, did not offer any mitigating circumstances to justify his conduct, did not talk about his parents or any other stressors in his life, nor did he indicate that he was provoked by Masterson or Baley. It is disputed whether Zimmerman acknowledged in this meeting that his conduct on January 31 was inappropriate. The Employer witnesses at the hearing testified that he did not (acknowledge what he did was wrong), while the Union witnesses testified that he did (acknowledge what he did was wrong).

Following this meeting, Butler concluded that the facts of the January 31, 2003 incident were essentially undisputed and warranted termination, as opposed to some lesser penalty. On February 7, 2003 she discharged Zimmerman. Her written discharge notice provided in pertinent part:

Nature of Discipline:

<input type="checkbox"/> Written Warning	<input type="checkbox"/> Final Warning (with suspension)
<input type="checkbox"/> Final Warning (without suspension)	<input type="checkbox"/> Length of suspension:
<input checked="" type="checkbox"/> Termination (effective 01/31/03)	From _____ to _____
	Next scheduled work day:

SUMMARY OF FACTS SUPPORTING THIS DISCIPLINARY ACTION:

On Friday, January 31st, 2003, your behavior at Meriter was insubordinate and inappropriate according to policy HR-6 Counseling, Corrective Action and Discipline, and policy HR-33 Harassment.

On Friday, January 31st, 2003 a little after 5:00 p.m. you approached the PM Operations Manager and the PM Supervisor in the 1-North corridor. You were very upset about the overflowing trash situation and snapped. Your voice was loud as you swore at the PM Supervisors. Jim Masterson asked you to settle down, your response was ("Fuck off"). You made threatening gestures (using radio and motioning it towards supervisors), and you were disruptive (kicking room 175 door open). You were asked to settle down twice during this incident.

On Tuesday February 4th, 2003 you were suspended from work pending investigation. On Wed. February 5th, 2003, at 1:30 p.m. I conducted an investigation regarding the above situation with you, Don Morschauer (Union Coordinator), Jim Masterson (PM Operations Manager), and Deanne Baley (PM Supervisor). Your responses and summary of what happened occurred with the witnesses and parties that were involved. You were again suspended pending further investigation and follow up.

The following are the results of this investigation:

- You openly admitted using profanity in the work place and toward supervisors.
- You openly admitted to displaying violence in the work place and directing it toward supervisors, and you displayed disruptive behavior to hospital property when you kicked/pushed open a door forcefully.
- You admitted to displaying disruptive behavior by yelling loudly at supervisors, and also using profanity "(Fuck off)" within the hospital, including in front of visitors.

This behavior on January 31st and these past occurrences show that there is a pattern to this behavior/conduct.

Your honesty and cooperation during our discussion and investigation was very much appreciated. However, these behaviors that you displayed do not represent the behaviors of Meriter's Service Expectations and policies. Therefore, the behavior that you displayed was unacceptable and will not be tolerated at Meriter as stated in HR-6 Counseling, Corrective Action and Discipline policy and also in HR-33 Harassment policy. As a result of this, your employment at Meriter has been terminated effective January 31st, 2003.

...

The discharge was grieved and was ultimately appealed to arbitration.

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At the hearing, Union witnesses testified that employees and supervisors commonly use profanity in the workplace. Supervisor Masterson admitted to using profanity in discussions with employees. Additionally, there was testimony that swearing occurred at the bargaining table during negotiations and when grievances were being discussed. Insofar as the record shows, this swearing did not occur in public places or in front of hospital visitors.

At the hearing, Zimmerman testified that at the time he was discharged, he was under a lot of stress because of his parents' health problems. He takes care of his elderly parents. At the time he was discharged, Zimmerman had not used the Employer's Employee Assistance Program to help him deal with the stress in his life.

At the hearing, Zimmerman testified that he thought Baley was not threatened by his conduct on January 31, 2003.

At the hearing, Zimmerman testified that he does not remember if he told Masterson to "fuck off" on January 31, 2003.

At the hearing, Zimmerman testified that he thought Masterson was partially responsible for what happened on January 31, 2003 because Masterson failed to do anything about the trash problem.

Insofar as the record shows, the visitors who were witnesses to Zimmerman's conduct in the hallway on January 31, 2003 did not file a complaint with the hospital regarding same.

POSITIONS OF THE PARTIES

Union

The Union's position is that the Employer did not have just cause to discharge the grievant for his conduct on January 31, 2003. According to the Union, what happened that day was a minor incident where the grievant lost his temper for several minutes. As the Union sees it, the Employer overreacted afterwards. The Union contends termination was not warranted under the circumstances. It makes the following arguments to support these contentions.

Before addressing the events of January 31, 2003, the Union emphasizes the following points in order to put what happened that day in an overall context. First, the Union calls attention to the fact that the grievant was a long-term employee who got "laudatory" evaluations in 2001 and 2002. Second, the Union characterizes the grievant as "mild-mannered, soft-spoken and dedicated." Third, the Union calls the arbitrator's attention to the grievant's testimony that at the time he was discharged, he was under a lot of stress because of his parents' health problems. Fourth, the Union notes that there is a history of conflict between the grievant and supervisor Masterson. According to the Union, Masterson held a hostile attitude toward the grievant because of the grievant's role as a union coordinator. The Union notes in this regard that there had been a meeting to improve the working relationship between the two men, but it was unsuccessful. As the Union sees it, Masterson's hostility toward the grievant was a contributing factor to the January 31 incident and should serve as a mitigating factor. Fifth, the Union maintains that the pick-up of trash at the hospital has been a long-term problem which management has failed to address. According to the Union, the second shift employees regularly complained to the grievant that the first shift employees were not picking up sufficient trash (thus leaving the bulk of it to the second shift employees to pick up). The Union avers that assurances were given to the grievant that the trash problem would be addressed, but management failed to comply with those assurances and the problem persisted. As the Union sees it, the fact that "management turned a deaf ear" on the trash problem made "a confrontation of some kind. . .inevitable."

Turning now to the January 31, 2003 incident, the Union makes the following comments concerning same. First, building on the last point made in the preceding paragraph, the Union asserts that when the grievant walked into work that day and checked out the trash situation, "he was once again faced with the serious problem of materials, trash and garbage not having been moved during the first shift." Second, the Union characterizes the grievant's conduct that day (when he lost his temper) as "heat of the moment" and "out of character". The Union therefore believes what happened that day was an "isolated incident." Third, the Union emphasizes that the grievant did not physically touch the supervisors, or have a physical confrontation with them. Building on that premise, the Union asserts that the grievant's

conduct “did not involve any threat of violence or any physical violence directed towards a supervisor.” Further, with regard to the radio matter, it asserts that “all he did was turn and point with his pager and then walk the other way.” Fifth, with regard to supervisor Baley’s claim that she was fearful of the grievant, the Union calls attention to the fact that management never called security during the incident itself, nor did they have security escort the grievant from the hospital afterwards. Additionally, the Union also believes that if Baley was fearful of the grievant, she would not have walked into Room 175 (because, in doing so, she walked past the grievant). Sixth, with regard to the hospital visitors who were in the hallway and saw the whole thing, the Union notes that afterwards, they did not complain or report the incident to management. The Union also believes that the testimony of the two supervisors about how the visitors stood or held their hands is not credible, because the supervisors claimed they were focusing at the time on the grievant.

Next, the Union argues that the grievant’s discharge was not warranted because 1) the Employer failed to follow progressive discipline and 2) the grievant was subjected to disparate treatment. These contentions are addressed in the order just listed.

First, the Union argues that by discharging the grievant, the Employer did not follow progressive discipline as it should have. It acknowledges in this regard that prior to the incident involved here, the grievant had received written warnings in 1996 and 2000. However, according to the Union, neither of those incidents involved a threat to a supervisor, any profanity directed to a supervisor or any misconduct in a public area. The Union avers that given the grievant’s past disciplinary history, the next step under progressive discipline should have been for the grievant to receive a final warning (rather than be discharged). The Union views discharge as too harsh and excessive under the circumstances. It notes that when employers fail to follow progressive discipline, arbitrators have not hesitated to overturn the discipline imposed.

The Union’s disparate treatment argument consists of two parts. The first part deals with the use of profanity in the workplace. According to the Union, the use of profanity is common at the hospital. It cites the following to support that assertion. First, it cites supervisor Masterson’s admission that he has used profanity in discussions with employees. Second, it cites Union Coordinator Morschauser’s testimony that he routinely uses profanity in the workplace and in his interactions with supervisors. Third, it cites bargaining unit employee Langer’s testimony that a former supervisor routinely used profanity in the workplace. According to the Union, these examples show “the disconnect between the discipline given” to the grievant (for using profanity) “and what has gone on in the hospital”. The Union argues that an employer should not be able to tolerate profanity (as the Employer does here) and then use it against the employee.

The second part of the Union's disparate treatment argument deals with the discipline imposed on other employees for workplace misconduct. The Union contends that the grievant was treated unfairly because "the Employer in similar or even more egregious circumstances has not discharged other employees, including supervisors, or even resorted to severe discipline." To support its disparate treatment argument, the Union relies on five instances involving employees Peter Schultz, Dave Reeve, Dean Thomas and Ruthie Donaldson. The Union notes that in the Schultz matter, supervisor Masterson gave Schultz a verbal warning for using profanity towards an employee and kicking the back of the employee's chair. The Union characterizes this incident as "far more serious than that here", because it "involved not only indecent language but a physical assault upon an employee." The Union notes that in the first Dave Reeve matter, supervisor Goepfert gave Reeve a "memo for the record" for saying that he wanted to "slug them between the eyes" and "I could just kill somebody", and in the second matter, a written warning for telling Goepfert that "the schedule is your fucking job" and pointing his finger at the supervisor when he said it. The Union asks rhetorically: "how can the Employer justify the discharge" of the grievant when it only gave Reeve a written warning for "engaging in threatening conduct and using profanity toward a supervisor." The Union notes that in the Thomas matter, supervisor Butler gave Thomas a written warning for engaging in a sexual conversation with an employee. The Union contrasts this factual situation with what happened in the grievant's situation and asserts that the grievant "engaged in no sexual harassment or used sexually-related language." Finally, the Union notes that in the Donaldson situation, she received a written warning for engaging in a physical confrontation with another employee. The Union asserts that while Donaldson got a warning letter for a physical assault, the grievant was terminated even though he made no physical threat or touching. The Union avers that the conduct of these employees was far more serious than what the grievant did on January 31, 2003. The Union maintains that since these employees received no more than a written warning for their misconduct (which the Union characterizes as "threats, threatening conduct and physical attacks"), the grievant should receive the same punishment (i.e. a warning).

Finally, the Union asserts that the circumstances present here are somewhat similar to factual situations where other arbitrators concluded there was not just cause for discharge and reinstated the employee. The Union urges the arbitrator to follow their lead and reinstate the grievant.

In sum, it is the Union's view that the Employer did not prove that it had just cause to discharge the grievant. The Union therefore requests that the grievance be sustained, the grievant be reinstated, and a make-whole remedy issued. Additionally, in the event that Unemployment Compensation seeks any repayment of benefits, the Union asks that the Employer be held responsible for the repayment.

Employer

The Employer's position is that it had just cause to discharge the grievant for inappropriate workplace conduct on January 31, 2003. According to the Employer, his conduct that day was insubordinate, offensive, threatening and abusive, and is the kind that everyone, including the grievant, knows cannot be tolerated in the workplace. In its view, it provided sufficient evidence to satisfy its burden of proving that termination was warranted under the circumstances. It makes the following arguments to support these contentions.

First, the Employer contends that the grievant engaged in workplace misconduct on January 31, 2003 when he shouted "fuck off" to two supervisors in a public area of the hospital and in the presence of hospital visitors; raised his radio over his head and pointed it at the supervisors, causing one of them (Baley) to be fearful of her personal safety; and kicked the door to Room 175 open. The Employer notes that when all this happened, the grievant was wearing his hospital uniform and employee identification tag. According to the Employer, the grievant was not provoked or goaded by either supervisor into reacting this way; instead, he simply "lost it" and engaged in an angry, uncontrolled tirade. As the Employer sees it, the grievant's conduct on that date warrants summary discharge.

Next, the Employer argues that the grievant's discharge was warranted under all the relevant facts and circumstances. In this portion of its brief, the Employer addresses the following: 1) the notions of progressive discipline; 2) due process protection; and 3) disparate treatment.

With regard to the first matter (progressive discipline), the Employer avers that notwithstanding the fact that his conduct on January 31, 2003 standing alone, justified his discharge, the grievant was given fair notice to correct his behavior through previous progressive discipline. The Employer specifically cites the following two incidents from the grievant's disciplinary history. It notes that in 1996, the grievant received a written warning for using abusive language toward his supervisor, as well as engaging in insubordination. It also notes that in 2000, the grievant received another written warning for demonstrating disrespect toward a supervisor, using profanity toward a co-worker, and slamming his fist on a table. According to the Employer, both of these warnings were efforts by the Employer to correct/change the grievant's workplace behavior.

With regard to the second matter referenced above (due process protection), the Employer argues that there is no evidence that the grievant was not afforded due process. Specifically, it calls attention to the following facts: 1) that when Butler first learned of the incident and decided to suspend the grievant pending an investigation, she informed Union Coordinator Morschauer of it and discussed the situation with him; 2) that Butler obtained written statements from the witnesses to the incident; 3) that a meeting was held wherein the

grievant had the opportunity to tell his side of the story and, after doing so, his version essentially matched the version supplied by the witnesses (i.e. the two supervisors); and 4) that Butler subsequently reviewed the grievant's personnel file and disciplinary history. As the Employer sees it, this proves that Butler did not make a fast decision, but instead took her role as the decision-maker very seriously.

With regard to the third matter referenced (disparate treatment) the Employer argues that the Union's disparate treatment argument should fail because no similar conduct has ever been condoned by the Employer. According to the Employer, the five disciplinary actions which the Union relies on (to prove disparate treatment) are not similar to the instant factual situation and therefore are of little probative value. In the Peter Schultz situation, the Employer notes that he was a supervisor, as opposed to a bargaining unit employee, and there is no evidence that he was ever subject to a just cause requirement. It further notes that the record does not indicate what discipline Schultz had previously received or what profanity was used during the incident. Finally, the Employer notes that this incident occurred in an office (as opposed to a public area of the hospital) and did not occur in the presence of hospital visitors. In the two Dave Reeve situations, the Employer notes that the record does not indicate what his previous discipline was. The Employer also calls attention to the fact that in the first matter, his frustration was not directed toward his supervisor, while in the second matter, his conduct was not in a public place or in front of visitors. In the Dean Thomas situation, the Employer notes (as it did in the Schultz situation), that Thomas was a supervisor, as opposed to a bargaining unit employee. The Employer avers that the conduct involved therein was of a sexual nature. Building on that premise, the Employer submits that Thomas' conduct is not similar at all to the grievant's conduct. In the Ruthie Donaldson situation, the Employer notes that her conduct was not directed toward a supervisor, and did not occur in a public area or in front of hospital visitors. Given this dissimilarity in conduct or in context, the Employer believes the Union did not prove that disparate treatment occurred.

As part of its discussion on disparate treatment, the Employer also addresses the matter of swearing in the workplace. The Employer contends that Don Morschauser's testimony that he swears in his interactions with supervisors and at the bargaining table bears little relevance to this case for the following reasons. First, Morschauser never suggested that he engaged in insubordinate or abusive language directed toward a supervisor (as the grievant did). Second, Morschauser never suggested that he engaged in any conduct that was physically threatening toward a supervisor. The Employer also contends that Joe Langdon's testimony was equally unpersuasive.

Finally, the Employer contends that there are no mitigating circumstances which should excuse the grievant's conduct herein. First, with regard to the grievant's longevity, the Employer asserts that his disciplinary history demonstrates that he has not been a model employee. The Employer cites Elkouri for the proposition that an employee's past record is a

major factor in the determination of the proper penalty for an offense. Second, with regard to the grievant's suggestion that the health of his parents had placed him under some stress, the Employer calls the arbitrator's attention to the fact that the grievant had not used the avenues which are available to employees for exactly those types of issues – family and medical leave or the Employer's Employee Assistance Program.

Given all the above, the Employer submits it did not abuse its discretion in making the decision to terminate the grievant's employment, and its exercise of judgment should not be usurped. The Employer therefore asks that the grievance be denied and the discharge upheld. The Employer further asks that "the Union be ordered to pay the costs of the arbitration proceeding pursuant to the terms of the collective bargaining agreement."

DISCUSSION

Article 25 of the parties' collective bargaining agreement contains what is commonly known as a "just cause" provision. It provides that the Hospital will not discipline or discharge an employee without just cause. What happened here is that the Hospital discharged the grievant. Given this disciplinary action, the obvious question to be answered here is whether the Hospital had just cause for doing so.

As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through numerous arbitral decisions. That analytical framework consists of two basic elements: the first is whether the employer proved the employee's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances. The relevant facts and circumstances which are usually considered are the notions of progressive discipline, due process protection, and disparate treatment. These components will be addressed in the order just listed.

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

The grievant's discharge notice indicated that the reason he was being discharged was because of his conduct at the hospital on January 31, 2003. That notice charged that on that day, he was "very upset about the overflowing trash situation and snapped", whereupon he loudly swore in a public area; shouted "fuck off" at Masterson after Masterson told him to settle down; pointed his radio at the supervisors; and kicked open the door to Room 175.

There really is no dispute that the grievant did those things because he admitted to doing them at the February 5 meeting. Additionally, in that meeting, the grievant described himself as being out of control and out of his mind (on January 31, 2003).

That said, at the hearing, the grievant backpeddled on one of the charges, namely the charge that he shouted “fuck off” at Masterson after Masterson told him to settle down. The grievant testified at the hearing that he does not remember saying that. However, the question is not whether he remembers saying it; it is whether he said it. Since he admitted saying it at the February 5 meeting in front of numerous witnesses, he is stuck with his own admission.

I therefore find that the grievant did what he is charged with doing on January 31, 2003.

The Union offers several defenses for the grievant’s conduct on January 31, 2003 which, in their view, should excuse or justify his actions. These defenses are addressed next.

One defense is that the Employer’s inaction on the trash problem precipitated the incident in question. According to the Union, management turned a “deaf ear” to the trash problem, and this made a “confrontation. . .inevitable”. My discussion on this point begins with the general observation that employees are often frustrated with management’s inactions on workplace problems. That certainly was the situation here. The grievant was extremely frustrated with management’s failure to resolve the trash pick-up problem because it was something he had to deal with on a daily basis. However, the fact that the trash pick-up problem persisted does not let him off the hook, so to speak, for what he did. Here’s why. The record indicates that the Employer’s standard operating procedure is that when a housekeeper encounters a problem with the trash, they are to contact the supervisor about it. The supervisor then decides what to do about the problem. The grievant knew this was the procedure because he had followed it numerous times before. That is what he should have done on January 31, 2003, but obviously he failed to do so.

Another defense is that there is a history of conflict between the grievant and Masterson, and that this conflict was a “contributing factor” to what happened January 31, 2003. For the purpose of responding to this contention, it is assumed that tension existed between the two men because of their past workplace conflicts. However, even if that was the case, it does not automatically follow that this conflict was a “contributing factor” to the incident in question. It would be one thing if the record evidence showed that on that day, Masterson did or said something to the grievant that provoked him (i.e. “jerked his chain” or “pressed his button”). If the evidence showed that, then some blame for the incident could be placed at Masterson’s feet. However, there is no evidence that anything like that occurred. Insofar as the record shows, the grievant did not have any contact with Masterson that day until the grievant went looking for him and Baley for the express purpose of complaining to

them about the amount of trash he had to pick up. When the grievant found them in the hallway, he began his tirade. Specifically, he yelled at them in the hallway about the trash, whereupon Masterson told the grievant in a normal tone of voice to settle down. As the grievant's tirade continued, it was he alone who used profanities; neither Masterson nor Baley did. When the hallway incident is considered together with the other events of the day, there is nothing about Masterson's conduct that day that indicates he did anything that provoked the grievant's tirade. That being so, Masterson does not bear any responsibility for it. Instead, it is the grievant who bears that responsibility, and he alone.

The Union's attempt to pin part of the blame on Masterson also misses the mark because Masterson was not the only supervisor involved in the incident. So was Baley. While the Union emphasizes that the grievant had a good working relationship with Baley, she was on the receiving end of the grievant's wrath that day too. In fact, it was Baley who felt physically threatened by the grievant's outburst and behavior, particularly when the grievant pointed the radio at her and Masterson and she thought the grievant was going to throw it at them. The irony in the grievant's conduct is that while he liked Baley and disliked Masterson, he treated them both the same on January 31, 2003.

The Union's next defense expounds further on the last point referenced in the preceding paragraph (i.e. Baley's reaction to the grievant's conduct). The Union noted that the grievant testified at the hearing that he thought Baley was not threatened by his conduct (specifically, when he pointed his radio at her). However, he does not get to decide if his conduct threatened her. She does. She testified that she flinched when this happened because she thought, based on the throwing motion the grievant was using, that he was going to throw the radio at them (i.e. Baley and Masterson). Given the angry tirade that the radio matter was part of, it is certainly understandable why Baley was fearful of her personal safety and felt physically threatened by the grievant's behavior. The fact that security was not called to deal with the grievant does not alter this conclusion.

Still another defense is that the grievant was under a lot of stress at the time because of his parents' health problems. The undersigned has no reason to dispute that assertion. However, while I am personally empathetic to the fact that the grievant was caring for his elderly parents, that does not mean that this fact excuses his conduct on January 31, 2003. It does not. Employees are expected to act appropriately in the workplace even if they have a lot on their plate, so to speak.

Having found that none of these defenses excuse the grievant's conduct on January 31, 2003, the next question is whether that conduct warranted discipline. I find that it did. Here's why. The Employee Handbook specifies that certain employee conduct cannot be tolerated by the Employer. Some of what the Handbook calls "common sense prohibited behaviors" are "insubordination" and "use of offensive or abusive language". In my view, the phrase

“offensive or abusive language” is self-explanatory and needs no elaboration. However, I think that the term “insubordination” needs elaboration because that term has multiple meanings and applications in labor relations. “Insubordination” is defined in *Robert’s Dictionary of Industrial Relations* as “A worker’s refusal or failure to obey a management directive” and/or “the use of objectionable language or abusive behavior towards supervisors.” Under this definition, either type of conduct can qualify as insubordination. In this case, the charges against the grievant involve the latter type of conduct, not the former. Employers have a legitimate and justifiable interest in preventing employees from using objectionable language towards supervisors or verbally abusing/threatening them. Such conduct is obviously detrimental to the working environment since it undercuts the authority of supervisors. No employer can be expected to tolerate it. The grievant’s tirade on January 31, 2003 was not the “minor incident” the Union tries to make it out to be. It was much more serious than that. The grievant’s conduct that day violated the previously-noted proscriptions found in the Employee Handbook. Specifically, he used offensive and abusive language to supervisors Masterson and Baley in a public area in front of visitors. Additionally, his behavior to those supervisors constituted insubordination. The fact that the grievant did not physically touch either supervisor does not lessen the seriousness of his offense.

The second part of a just cause analysis requires that the Employer establish that the penalty imposed was appropriate under the relevant facts and circumstances. In reviewing the appropriateness of discipline under a just cause standard, arbitrators generally consider the notions of progressive discipline, due process protection and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. discharge). Based on the following rationale, I conclude discharge was appropriate here.

First, while Article 25, Section 4 specifies that the normal progressive disciplinary sequence is for employees to receive warnings and a suspension prior to discharge, that does not mean every disciplinary situation must follow this sequence. Some misconduct is considered so serious that an employer does not have to follow progressive discipline. This disciplinary principle is incorporated into this labor agreement in the third sentence of Article 25, Section 4 wherein it provides that “certain actions by the severity of their nature will require immediate progression to more severe discipline including. . . termination.” The Employer concluded that the grievant’s misconduct falls into that category. For reasons that will be elaborated on later, I find no contractual reason to overturn that decision.

Assuming for the sake of discussion that the grievant’s misconduct did not warrant summary discharge, but instead progressive discipline should apply, the grievant’s disciplinary history indicates that he had previously been put on notice to control his anger in the workplace. I’m referring to the fact that the grievant received a written warning in 1996 for being insubordinate and using abusive language toward a supervisor, as well as a written warning in 2000 for being disrespectful toward a supervisor, pointing his finger (at the

supervisor), the tone of his voice, using profanity toward a co-worker and slamming his fist on a table. While the Union views the facts in these two cases as being very different from the facts involved here, I believe they share something in common: in each case, the grievant lost his temper. The written warning from 2000 is particularly applicable here because it said that “future or continued occurrences of this conduct or similar conduct will result in termination.” That warning, and specifically the line just quoted, was still in full force and effect on January 31, 2003. While some labor agreements provide that discipline evaporates or disappears after a certain time period has elapsed, that is not the case under this collective bargaining agreement.

Next, there is no evidence herein that the grievant was denied due process. This statement is based on the following facts. After Butler learned of the incident, she decided to suspend the grievant pending an investigation into what happened. She informed the Union of her decision to suspend the grievant and the reason for it. She then obtained written statements from the two eyewitnesses to the incident (Masterson and Baley). A meeting was then held to determine the facts. All of the people involved in the matter were present at that meeting. During the meeting, the grievant told his side of the story. In doing so, he essentially admitted to doing what Masterson and Baley said he did in their written statements. Following the meeting, Butler reviewed the grievant’s personnel records and disciplinary history. Afterward, she decided to discharge the grievant. In my view, there is nothing in the foregoing facts that raise any so-called red flags. To the contrary, Butler’s handling of the matter was a textbook example of giving an employee due process before imposing discipline.

Finally, I find that the grievant was not subjected to disparate treatment in terms of the punishment imposed. Insofar as the record shows, no similar conduct has ever occurred at the Hospital, much less been condoned by the Employer. In so finding, I am well aware that the record contains five disciplinary actions against four employees wherein those employees received written warnings or less for their misconduct, while the grievant, of course, was discharged for his misconduct. However, in order to prove disparate treatment, the Union must do more than show that the grievant was treated differently than other employees; it must also establish that the factual circumstances were similar to those of employees who received the more moderate penalties. The Union did not prove that. The five disciplinary actions cited by the Union are not identical to what the grievant did. Said another way, those employees did not do exactly what the grievant did. The following shows this. In the Peter Schultz situation, it is noteworthy that he was a supervisor (as opposed to a bargaining unit employee) and that his misconduct occurred in an office (as opposed to a public area of the hospital) and did not occur in the presence of hospital visitors. In the two Dave Reeve situations, it is noteworthy that in the first matter, his misconduct was not directed toward his supervisor, while in the second matter his misconduct was not in a public place or in front of visitors. In the Dean Thomas situation, it is noteworthy that he (like Schultz) was a supervisor (as opposed to a bargaining unit employee), and that the misconduct involved therein was of a sexual nature.

Sexual misconduct is not similar at all to the grievant's misconduct. In the Ruthie Donaldson situation, it is noteworthy that her misconduct was not directed toward a supervisor, and did not occur in a public area or in front of hospital visitors. Given these dissimilarities, it is held that these five disciplinary actions are not similar to what the grievant did herein. Additionally, the Union has not proven its assertion that these five disciplinary actions were more serious than what the grievant did on January 31, 2003.

The second part of the Union's disparate treatment argument deals with the use of profanity in the workplace, and specifically its contention that profanity is commonly used in the workplace by employees and supervisors. While the Union showed, via testimony, that employees and supervisors commonly use profanity in the workplace, that testimony proves little in and of itself. Here's why. The Union did not show that profanity was commonly used the same way the grievant used it on the day in question. For example, if the Union had established that employees commonly and routinely tell their supervisors, to their face, to "fuck off", and the Employer imposed no discipline for it, that certainly would have buttressed the Union's disparate treatment argument. However, that is not what the record evidence shows. Similarly, if the Union had established that employees commonly and routinely use profanity in public areas in front of hospital visitors, and the Employer imposed no discipline for it, that would have buttressed the Union's disparate treatment argument as well. However, once again, that is not what the record evidence shows. Since that proof is lacking here, the Union has not proven its disparate treatment contention dealing with profanity.

Aside from that, it is implicit in the Union's disparate treatment argument on profanity that the Union is saying that the grievant was discharged for using profanity. That is not completely accurate. What is accurate is that the grievant's misconduct on the day in question involved a number of offenses, one of which was using profanity in a public area in front of hospital visitors. He was also insubordinate, abusive and threatening to two supervisors. When all of these separate offenses are considered collectively as one overall act, it was grounds for summary discharge.

Accordingly, then, it is held that the severity of the discipline imposed here (i.e. discharge) was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was reasonably related to the seriousness of the grievant's proven misconduct. The grievant's length of employment (i.e. 13 years) and the fact that he got good evaluations in 2001 and 2002 are not sufficient reasons to alter this conclusion. The Employer therefore had just cause to discharge the grievant.

One final comment. While the Employer asks me to order the Union "to pay the costs of the arbitration proceeding pursuant to the terms of the collective bargaining agreement", I have decided to not rule on that request because, in my view, it is beyond the scope of the stipulated issue herein.

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

AWARD

That there was just cause for the discharge of the grievant. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 14th day of November, 2003.

Raleigh Jones /s/

Raleigh Jones, Arbitrator