

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WOOD COUNTY TELEPHONE COMPANY**

and

**OFFICE AND PROFESSIONAL EMPLOYEES  
INTERNATIONAL UNION, LOCAL 95**

Case 5

No. 62512

A-6078

(Marianne Webster, One-Day Suspension)

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Appearances:

**Mr. Jack Walker**, Attorney, appearing on behalf of the Company.

**Mr. Bruce Ehlke**, Attorney, appearing on behalf of the Union.

**ARBITRATION AWARD**

Wood County Telephone Company (hereafter referred to as the Company) and Office and Professional Employees International Union, Local 95 (hereafter referred to as the Union), were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance concerning the suspension of Marianne Webster. Hearing on the matter was held on October 22, 2003, in Madison, Wisconsin, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the grievance. The hearing was transcribed. The parties filed briefs by February 2, 2004. Having considered the evidence, the arguments of the parties, the applicable provisions of the contract, and the record as a whole, the Arbitrator makes the following Award.

**ISSUE**

The parties stipulated to the following substantive issue:

Did the Employer have cause to suspend Marianne Webster on January 24, 2001? If not, what is the remedy?

In addition to the substantive issue just noted, the Company also raised the following procedural arbitrability issue:

Was the grievance timely filed?

**PERTINENT CONTRACT PROVISIONS**

The parties' 1999-2003 collective bargaining agreement contained the following pertinent provisions:

**ARTICLE IV**

**MANAGEMENT RIGHTS & PREROGATIVES**

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**Section 402 – Specific Additional Management Rights:**

Without limiting the generality of the foregoing Section 401, the Company and management rights and prerogatives shall include without condition or limitation:

**402.1** – The management and operation of the business and the direction and arrangement of the working forces including the right to hire and employ employees and to transfer, suspend, lay off, discharge or discipline employees with cause.

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**Section 4.03 – Employer Rules:**

**403.1** – The Company shall have the right to establish reasonable rules for all employees as the Company deems appropriate; to promote the safety and welfare of all employees; to maintain necessary discipline; and to protect the interest of the Company.

**403.2** – Violators of rules will be subject to disciplinary measures *including, but not limited to* verbal warnings, *written warnings, suspensions* and immediate dismissal, depending upon the seriousness of the offense. . . (Emphasis in original)

**403.3** – The Company’s rules shall be published and distributed to all unit employees and supervisors from time to time.

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## ARTICLE V

### GRIEVANCE PROCEDURE

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#### Section 503 – Deadline for Filing:

No grievance shall be recognized or processed based on facts or events which have occurred seven (7) working days, prior to the *verbal* presentation of the Grievance unless the Grievant or Union could not have known about the violation. Grievances based on discipline including suspension and discharge must be filed within three (3) working days (Saturdays, Sundays, and holidays, not counted) of the event complaint of or be barred. (Emphasis in original).

#### Section 504 – Appeals:

Any grievance not appealed from in writing by the aggrieved employee(s) within the time limits set out for any step shall be considered dropped and thereafter barred. The time limits for any of the levels can be shortened or lengthened only by signed mutual agreement between the Company and the Union. . .

#### Section 505 – Procedure:

A grievance shall be processed in the following manner:

##### Step One:

An employee with a grievance shall first discuss it *within seven (7) working days of the event or first knowledge of the event with* his/her

immediate supervisor either individually or with his/her steward to try to resolve the matter. If the grievance is not satisfactorily resolved, the grievant may reduce the grievance to writing and present it according to Step 2. *The timelines between Step 1 and Step 2 may be extended if the grievance is scheduled for discussion at a Labor/Management meeting.* (Emphasis in original)

**Step Two:**

The grievance shall be reduced to writing and presented to the employee's immediate supervisor within *three (3) days following the Step 1 meeting or the Labor/Management meeting.* The written grievance shall give a clear and concise statement of the alleged grievance, the issue involved, the specific section(s) of the Agreement alleged to have been violated and the relief sought. A meeting shall be held within five (5) working days after the receipt of the grievance between the Company's Step Two Representative(s) and the grievant, accompanied by the grievant's department steward. The Company shall give its answer in writing within five (5) working days following the meeting. If the grievance is not satisfactorily settled within the Company's Step Two Representative(s) within five (5) working days of the written answer: (Emphasis in original)

**Step Three:**

The grievant may appeal the grievance and a meeting will be held between the *Business Agent* or his or her Representative, and not more than three (3) members of the Grievance Committee, the department steward, the grievant, and the Company's Step Three Representative(s). The meeting will be scheduled at a mutually convenient time but no later than ten (10) working days following the date of the appeal. The Company shall give its answer within five (5) working days after the meeting. (Emphasis in original).

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**BACKGROUND**

The Company provides telephone service, cable television and internet service to the residents of Wood County, Wisconsin. The Union is the exclusive collective bargaining representative for the Company's office clerical employees. The grievant in this case, Marianne Webster, is a member of that bargaining unit.

The grievant has worked for the Company since 1998. She is a cashier/receptionist. She greets customers, answers the phone, and handles customer bill payments.

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The grievant's disciplinary history which is relevant to this case is as follows.

On September 28, 2000, she was counseled by her supervisor, Terry Lee, about taking a long afternoon break.

On October 3, 2000, Webster was counseled again by Supervisor Lee about her (Webster's) work performance. Afterwards, Lee wrote a letter dated that same day which memorialized the meeting and what was addressed therein. In that letter, Lee wrote in pertinent part:

This is to inform you that your work performance has not been what is expected of you and needs to be improved or further disciplinary action will be taken. Your performance will be reviewed in two weeks, October 17, 2000.

The letter went on to admonish Webster for: 1) leaving the cash drawer and switchboard unattended when she left work on September 19, 2) making too many personal phone calls, and 3) taking a long afternoon break.

On October 9, 2000, Webster received a letter which was denominated as "a record of a verbal warning" for two work performance issues. The two work performance issues which were identified therein were 1) making too many personal phone calls, and 2) taking a long afternoon break. These two items were the same two items that were referenced in the October 3, 2000 letter. Thus, the October 9 letter is very similar to the October 3 letter in that both admonish Webster for 1) making too many personal phone calls, and 2) taking a long afternoon break. The October 9 letter does not reference the September 19 incident while that matter is referenced in the October 3 letter.

On October 17, 2000, Webster was again counseled by Supervisor Lee about her (Webster's) work performance. Afterwards, Lee wrote a letter dated that same day which memorialized what Lee called a "work performance review conference." In that letter, Lee wrote in pertinent part:

Although I have seen improvement in your work performance there still seems to be needed improvement.

The letter then went on to admonish Webster for 1) taking an extended morning break, and 2) having trouble balancing her cash drawer. With regard to the second matter, the letter specifically stated:

You still seem to have trouble understanding how to balance your cash drawer. As an example, when checking out your drawer on Friday morning you had trouble balancing and did not know how to figure out if it was with checks or cash. Thus, it took 2½ hours with my help to balance.

Finally, Lee stated in the letter that Webster would be “re-evaluated” on October 31, 2000, and if her “work performance has not improved, this will be cause for disciplinary action.”

On October 31, 2000, Lee and Webster met as planned concerning Webster’s work performance. Afterwards, Lee wrote a letter dated that same day which memorialized their meeting. It provided in pertinent part:

As of this date Marianne’s performance has improved. There are no personal calls being made, breaks are being taken within the 15 minutes and her drawer has been checked out in a timely manner.

On November 6, 2000, Webster received a letter which was denominated as a “written verbal warning” for poor job performance. The two matters that were referenced therein were 1) improper handling of a payment situation, and 2) forgetting to lock her batch. This letter indicated that “any further incidents will result in further disciplinary action, which if necessary, will be a written warning.”

On November 14, 2000, Webster was counseled again by Supervisor Lee regarding the procedure to be used for cash drawer balancing. Afterwards, Lee wrote a letter, dated November 16, 2000, which memorialized this meeting. In that letter, Lee wrote that Webster was going to be “re-trained” by Rollie Ashbeck “on balancing the cash drawer as well as how to find errors if the batch does not balance.” That letter also said that Lee and Webster would meet again on November 28, 2000 concerning Webster’s work performance.

The Rollie Ashbeck referenced in the letter is a bargaining unit employee who works in the accounting department; his job is to put entries into a ledger. He is not a supervisor or manager. At Lee’s direction, Ashbeck re-trained Webster on the procedure to be used to balance a cash drawer. This re-training took three days and occurred in mid-November, 2000. This re-training was given only to Webster; it was not given to other employees. During this re-training, Ashbeck created a written procedure for Webster to use to balance her cash drawer. The part of the procedure pertinent here is that the cashier is supposed to write the numbers on the batch report. If a number is subsequently discovered to be wrong, then the wrong number is rewritten/corrected.

On November 29, 2000, Lee and Webster met as planned concerning Webster's work performance. Afterwards, Lee wrote a letter dated that same day which memorialized their meeting. It provided in pertinent part:

I have reviewed your work performance and feel at this time that your performance is as expected of you. The additional training on the cash procedure was helpful and you have improved on balancing your drawer. I see no problem with breaks or personal calls.

At this time I feel we do not need any more re-evaluations unless something should come up.

On January 16, 2001, Webster received a letter which was denominated as "documentation of a verbal written warning" for several instances of being late to work. One of the instances referenced in this letter was alleged to have occurred the previous day – January 15, 2001. The original version of this letter said it was a "written warning" -not a "verbal written warning." The record indicates that the word "verbal" was added to this letter at the request of Union steward Amy Coulthurst to reflect the fact that Lee talked to Webster orally about the written warning.

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The following grievance history relates to the discipline just referenced.

The Union filed three grievances on October 17, 2000 which it denominated as 023, 024 and 025. Grievance 023 dealt with the level of discipline for the long afternoon break incident which occurred September 28, 2000. The grievance contended that the matter was not discussed at the October 3, 2000 counseling session, but was nonetheless referenced in the document dated October 3, 2000 which memorialized that counseling session, as well as the document dated October 9, 2000. Grievance 024 dealt with the level of discipline for making personal phone calls. The grievance acknowledged that that matter was discussed at the October 3, 2000 counseling session, but it contended that the document which memorialized that counseling session amounted to a written warning. Grievance 025 dealt with the level of discipline for allegedly leaving work early on September 19, 2000. The grievance acknowledged that that matter was discussed at the October 3, 2000 counseling session, but it contended that the document which memorialized that counseling session amounted to a written warning. After these documents were filed, the parties met and discussed them in late October, 2000. On October 31, 2000, Union Business Agent Wayne Pankratz sent three different memos to Company Controller Jerold Johnson regarding the grievances, one for each grievance. The memo dealing with Grievance 023 said in pertinent part: "Based upon. . .our formalization of the verbal warning for . . .taking an extended break on Thursday,

September 28, 2000, the Union and Ms. Webster are withdrawing this grievance.” The memo dealing with Grievance 024 said in pertinent part: “Based upon. . .our formalization of the verbal warning for. . .making extensive personal phone calls, the Union and Ms. Webster are withdrawing this grievance.” The memo dealing with Grievance 025 said in pertinent part: “Based upon . . .Management’s decision to remove the written warning from the personnel file of Ms. Marianne Webster. . .regarding an incident which occurred on September 19, 2000, the Union and Ms. Webster are withdrawing this grievance.”

Webster’s warning dated November 6, 2000 was not grieved.

Webster’s warning dated January 16, 2001 was not grieved.

### FACTS

On the morning of January 23, 2001, Webster had trouble balancing her cash drawer. Webster thought she was off, but she did not know if she was off in checks or cash. Also, she did not know how much she was off because she had two differing amounts she might be off: \$78.06 or \$78.12. When Lee learned of this, she directed Webster to go to relieve the other cashier, so that employee could take a break. Webster did as directed. After Webster left her work station, Lee worked on her (Webster’s) cash drawer to find the source of the problem. When Lee checked Webster’s cards versus her codes, Lee discovered that Webster had made two mistakes in coding, namely that she had coded two entries wrong. Lee also discovered that Webster had not written the numbers on the batch sheets. After Webster returned from relieving the other cashier, Lee told Webster that she had found two miscoded payments, but that she was still trying to determine if the amount was off. They ultimately determined that the amount was not off. While Webster’s cash drawer ultimately balanced that day, Lee concluded that Webster’s work performance in balancing her cash drawer that day was inadequate because she (Webster) had not followed the cash drawer procedure created for her by Ashbeck and written the numbers on the batch sheets. Lee felt that if Webster had followed that procedure, and written the numbers on the batch sheets, Lee would not have had to try and find Webster’s mistake. Lee decided that the appropriate discipline under the circumstances was a one-day suspension. Later that same day, Lee wrote the following letter to Webster:

January 23, 2001

Marianne Webster:

This is documentation of poor job performance on Tuesday, January 23, 2001.

On Tuesday, January 23, 1001, you started checking out your drawer before 10 AM. At about 20 minutes to 11 I came back and asked you how were doing



and you said you didn't come out. I asked if you were off in checks or cash and you stated that both were off. You gave me an amount of \$78.06 and \$78.12. You felt that you coded an entry wrong and then looked for an amount of \$78.06 but could not find it. I then said to relieve Lin so she could go on break and then I went through your entries and found two that were coded (1) for cash that should have been coded (2) for check. The two entries equaled \$78.12. I showed you the entries and you changed them. At that time I said to you, "that is a wash, and won't alter your total, how much are you off?" You thought about \$10. I should have been able to look at your batch report and it should have been written on the last page. That comes from page 4 of Martin's Cash Instructions under Balancing the Drawer item 6-11. When I looked at your report no where did I see that you had done steps 6-10. If your two totals do not equal you are to repeat steps 1-10. That was not done either, because you told me you had only run one tape on checks and when I went through checks you had one entry as \$48.01 instead of \$48.07 (the six cents difference).

When it was all said and done, you weren't even off! You not only wasted much of your own time but mine as well as Rollie's because by this time it was well after 11:30 and he was waiting for your bag. I feel you have been given sufficient training, retraining and enough time that you should be able to check your drawer out in a timely manner and yet I have witnessed you here sometimes until 5:30 (when you started checking out at 4 or quarter to 4). I feel this is unacceptable. Therefore, because you have previously received both verbal and written warnings for poor job performance, I am giving you Wednesday, January 24, 2001 off without pay. Report back on Thursday morning at 9 AM

Terry Lee

Webster served the one-day suspension referenced above on January 24, 2001.

On Friday, January 26, 2001, Pankratz and Johnson, and others, met to discuss Webster's one-day suspension. In that meeting, Pankratz offered to settle the matter by converting the suspension to a written warning. Johnson responded that he would think about it (i.e. Pankratz's settlement offer) and that he would call Pankratz on Monday, January 29, 2001. During the course of the January 26 meeting, Pankratz also told Johnson that if the matter did not settle, the Union would be filing a grievance over same, and that he would like a time extension to do so. Johnson granted a time extension, but the length of the time extension is unclear: Johnson thought the time extension was until Monday, January 29, 2001, while Pankratz thought the time extension was not limited to that date, although he never specified a particular date.

On Monday, January 29, Pankratz and Johnson resumed their discussion by phone, but were not able to resolve the matter. Pankratz then told Johnson that the Union would be filing a grievance over the suspension, and asked if it (i.e. the grievance) could be filed at Step 3 (of the grievance procedure). Johnson said that was acceptable to him. Nothing else was said in this conversation about extending the time limit for filing a grievance.

On February 1, 2001, the Union filed a grievance which provided in pertinent part:

**STATE NATURE OF GRIEVANCE (describe in full):**

On Tuesday, September 19, 2000, the Grievant, Ms. Marianne Webster, left work at the end of her scheduled shift. Her Supervisor, Ms. Terry Lee, believed a different procedure should have been used rather than the Grievant leaving at that time. This incident commenced approximately a four month period of employee harassment by the Supervisor, wherein, this employee was subjected to various disciplines, some of which were modified or removed and where the Supervisor was overly zealous in her enforcement and scrutinization of the Grievant's work in comparison to other employees. This harassment and close scrutinization of this employee continued through a one-day unpaid suspension on January 24, 2001.

The Supervisor administered this discipline following a discipline which was given in written form and was listed as a "verbal written warning" for the Grievant not being at her workstation at 8:00 a.m. The Grievant's work shift started at 8:00 a.m. and she was performing her duties for the Employer at 8:00 a.m. by getting her cash drawer from the vault. However her Supervisor felt she should have gotten her cash drawer and started working before 8:00 a.m. so she was at her workstation at 8:00 a.m. to work with customers. Other employees in the area indicated the doors opened early on the date in question causing a customer to enter early. It was not until the suspension was given that an Employer Representative explained their intent with the "verbal written warning" was for it to be a written warning. Therefore, they believed the next step in the discipline procedure was suspension. This employee was suspended based upon an unwritten work rule that was not given to all employees regarding the amount of time it should take an employee to balance their cash drawer. However, another employee had just taken as much or more time to balance her cash drawer on the same morning in question. This, for the other employee, was after having attempted to balance her cash drawer the previous evening.

The Supervisor has set double standards for employees, has not notified nor set a standard for the length of time for balancing a cash drawer, has attempted to utilize a verbal warning as a written warning to accelerate discipline, has attempted to discipline this employee for not being at her workstation at the start of her shift knowing this would mean the employee would have to “donate time” each day to the Company and has too harshly disciplined this employee for this situation. This harsh discipline follows the Grievant having received written confirmation from her Supervisor that she was performing adequately in the balancing of her cash drawer following additional training.

Remedy:

- 1) The write-up of January 16, 2001, be completely removed from the Grievant’s file since the Grievant was at work at the time of her scheduled shift and was performing her normal work duties during that time.
- 2) The write-up of January 23, 2001 be changed to a “verbal warning” and that the employee be made whole for the day of January 24, 2001 when she suffered a one-day unpaid suspension.
- 3) The Employer and specifically the Supervisor cease and desist from their harassment of this employee and their closely “looking for reasons” to discipline and moreover, use discipline as a method of remediation rather than a way to sever the employment relationship with this employee.

On February 7, 2001, Johnson responded in a letter that it was the Company’s position that the grievance had not been filed in a timely manner, and in any event, no contract violation had occurred. The grievance was ultimately appealed to arbitration.

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At the hearing, Webster admitted she did not write down all the numbers on the batch sheets on January 23, 2001. She testified that the reason she did not do so (i.e. write down all the numbers on the batch sheets) was because she did not want to mess up the report and was still trying to figure out where she was off.

Webster also testified at the hearing that if Lee had not interrupted her on January 23, 2001, and instead given her ample time to complete the procedure, she (Webster) would have found the error and corrected it herself in three to five minutes.

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Another cashier in the office, Scheid, once took as long as Webster did to balance her cash drawer on January 23, 2001, and was not criticized for doing so. Insofar as the record shows, Lee was not aware of Scheid taking a lot of time to balance her cash drawer. Scheid did not have a history of problems balancing her cash drawer.

### POSITIONS OF THE PARTIES

#### Union

The Union initially argues that the grievance was filed in a timely manner. It notes in this regard that when Pankratz and Johnson talked about the suspension on Friday, January 26, Pankratz asked Johnson for a time extension to file a grievance and Johnson granted an extension. According to the Union, the extension was not until Monday, January 29, as Johnson averred. The Union argues there are three flaws with Johnson's assertion that the extension was only until Monday, January 29. First, the Union contends there is no evidence in the record that Johnson's asserted intention, that "the extension was to be until. . .Monday", ever was communicated to the Union, at least not before Johnson wrote to Pankratz on February 7, 2001. Second, the Union asserts that Johnson's statement of his intention, that "the extension was to be until Monday", simply is not credible. The Union submits that there is no evidence in the record to contradict Pankratz' testimony that the agreed upon extension of time was not so limited. As the Union sees it, Johnson's statement that he told Pankratz to "go ahead and do whatever you had to do" was consistent with Pankratz' recollection of their discussion and also suggestive of an agreement that the extension in question was not intended to expire as of Monday, January 29. The Union suggests that it simply does not make sense that Johnson intended that any grievance would have to be filed as of Monday, January 29. Third, the Union maintains that, in any event, the Union did not need a time extension because the "discussion" of the matter that commenced on Friday, January 26 continued on Monday, January 29, and therefore the three working days referenced in Section 505 starts then. The Union therefore avers that the grievance was filed in accordance with the timeline contained in the grievance procedure and thus is properly before the arbitrator for a decision on the merits.

Next, the Union argues that the Company failed to apply progressive discipline in this case. The Union implies that before the Employer can suspend an employee (as happened here), the employee must have previously received a written warning concerning their work performance as distinguished from a verbal written warning. The Union avers that Webster had not, in fact, received a written warning. With regard to the January 16, 2001 warning which Webster received for lateness, the Union describes it as a "verbal written warning". According to the Union, this document was not a written warning because it included the word "verbal" in it. The Union submits that it understood this letter to be the documentation of a verbal warning. That's it. The Union maintains that the first time it learned that the Company

intended the January 16 warning to be a written warning was on January 26 when the parties met to discuss Webster's suspension. The Union submits that had it known that the January 16 warning was, in fact, a written warning, it would have grieved it.

Although it did not grieve the January 16 warning, the Union nonetheless addresses the merits of one tardiness incident referenced in that warning. Specifically, the Union focuses on the events of January 15, 2001. The Union avers that contrary to Lee's assertion in that warning, Webster was not, in fact, late on that date. The basis for the Union's assertion concerning same is that the clock at the vault showed she was a few minutes early, and that Webster had been making a special effort to be on time.

Putting the foregoing points together (i.e. that the January 16 warning was not a written warning but rather the documentation of a verbal warning and that Webster was not late for work on January 15, 2001), the Union's position is that under progressive discipline, Webster's discipline herein should have been a written warning – not a suspension.

With regard to the merits, the Union contends that Webster's work performance on the day in question was not "poor" and did not constitute a "cause" sufficient to justify a one-day suspension. For the purpose of putting this matter in context, the Union submits that Webster is not the inept and hopelessly ineffective employee which the Company paints her as in their briefs. The Union avers that to the contrary, since she was re-trained on cash drawer procedure, she has consistently done a good job of balancing her cash drawer. Turning now to the events of the day in question, the Union asserts that that morning, Webster was in the process of balancing her cash drawer when Lee interrupted her and sent her off to relieve another employee. The Union notes that Webster testified that when that happened, she was following the correct cash drawer procedure. The Union contends that given that testimony, it would be speculative for the Arbitrator to conclude otherwise. That said, the Union does acknowledge that "Lee and Webster disagreed whether Webster had done something wrong by not recording a particular number. . . on the batch report", but then the Union goes on to opine that "there is no evidence in the record to help us determine whose opinion in this regard was correct; nor any that would indicate what might have been the significance of recording or not recording that particular number, on the batch report. . . ."

The Union also makes the following arguments about the suspension letter which Lee wrote. First, the Union reads that letter to criticize Webster for the time that she had taken balancing her cash drawer on that date. The Union responds to that by averring that "it is not disputed that the other cashier took as long as Webster to balance her drawer, or longer, with Lee's knowledge, without being criticized for doing so." Second, the Union addresses Lee's comment in that letter that Webster "wasted" her (i.e. Lee's) time. In response to same, the Union avers that what Lee overlooked is that she was the one who chose to interrupt Webster and involve herself in the balancing of Webster's cash drawer, without having been asked to do

so. The Union characterizes Lee as an “officious intermeddler” who had no basis for complaining about the time that she had spent related to the matter in question. The Union asserts that if Lee had not intervened, Webster would have found the problem herself and corrected it, probably within three to five minutes. Third, the Union responds to Lee’s criticism that Webster did not write down the numbers on her batch report and should have. The Union characterizes this as a strange criticism. According to the Union, the reason Webster had not yet entered the totals in the batch report was because she knew that one or the other of the totals was not correct. The Union questions “why any rational person would want to record a number that was known to be incorrect, in a report, only to have to cross it out and record another, correct, number in the report a few minutes later.” Fourth, the Union reads Lee’s January 23 letter to criticize Webster for having remained at work, on her own time and without pay, after her scheduled shift had ended in order to study her batch reports. Once again, the Union characterizes this as a strange criticism. As the Union sees it, Lee should not have given Webster a suspension for her work performance, but rather a commendation for the extra effort that she was making to please her supervisor.

In sum, it is the Union’s position that the Company did not have a “cause” to discipline Webster and that, to the extent it is unclear that they did, the Company has failed to meet its burden of proof here. The Union therefore requests that the grievance be sustained and the grievant made whole for her one-day suspension.

### Company

The Company initially argues that it is unnecessary for the Arbitrator to address the merits of the grievance because it was not initiated within the prescribed three-day time limit which is set forth in Section 503 of the contractual grievance procedure. Hence, the Company avers that the grievance was not timely filed. The Company acknowledges that when the parties met on Friday, January 26 to discuss Webster’s suspension, Johnson granted Pankratz a time extension to file a grievance. According to the Company, the time extension which Johnson granted was until Monday, January 29. That’s it. The Company avers that to the extent he contends otherwise, “Pankratz is just not telling the truth.” The Company also addresses the Union’s claim that they did not need a time extension (to file a timely grievance) because the “discussion” of Webster’s suspension, which started on Friday, January 26, continued on Monday, January 29, and therefore the three working days starts then. The Company avers that the problem with that claim is that the contractual section cited by the Union (namely, Sec. 505) is the time limit for going to Step Two. The Company maintains that is not the relevant section herein. As the Company sees it, the relevant time limit is found in Sec. 503 (wherein it identifies the timetable for filing grievances over discipline). Putting the foregoing points together, the Company contends that the grievance was untimely filed, and should be dismissed on that basis alone.

If the Arbitrator finds otherwise, and addresses the substantive issue in dispute, it is the Company's position that it had cause to suspend the grievant for one day for failing to follow procedures in balancing her cash drawer on January 23, 2001, and therefore that suspension did not violate the collective bargaining agreement. It elaborates as follows.

The Company begins its argument by reviewing Webster's work history. It notes in this regard that in the 3½ month period before the suspension involved here, Webster had received three disciplinary warnings, been counseled twice about cash drawer balancing, and been retrained on cash drawer balancing. With regard to the disciplinary warnings, it notes that Webster received warnings in letter form on October 9, November 6 and January 16, and that the November 6 warning dealt with two cash drawer matters. With regard to the counseling sessions, it notes that Webster was counseled about cash drawer procedures on October 17 and November 14. Finally, with regard to the retraining, it notes that after the November 14 counseling session, Webster was retained on balancing the cash drawer by another employee. The Company characterizes the foregoing, particularly the training and counseling, as an "extremely deliberate and considerate attempt to straighten out an unsatisfactory employee" and address her performance issues relating to cash drawer balancing.

Next, the Company reviews the grievance history of all the foregoing. It notes that while the Union did file three grievances which referenced, in part, the October 9 warning, none of those grievances involved cash drawer balancing. Additionally, the Company further notes that all three of those grievances were either settled or withdrawn. Finally, the Company notes that the November 6 and January 16 warnings were not grieved, so those warnings were unchallenged.

Having commented on that background, the Company turns its attention to the day in question (i.e. January 23, 2001). The Company avers that on that day, Webster failed twice to follow the cash drawer procedures which had been specifically created for her. First, she did not know, after a considerable period of time, if she was off in checks or cash, and had two differing amounts she might have been off. Second, she should have written information upon the batch sheets and did not do so. According to the Company, that's the procedure, and she did not follow that procedure. The Company avers that her failure to write down that information on the batch sheets resulted "in an inability to know how much she was off at a time when she would have known that, if she had followed the procedure."

The Company responds as follows to Webster's assertion that if she had not been interrupted by Lee, but instead given enough time, she would have found her error in three to five minutes. The Company calls this a bold prediction, given that it took Lee some time to solve the first problem (i.e. the two miscoded payments). Aside from that though, the Company emphasizes that the "first problem was the first problem." It argues that Webster

never adequately addressed the second problem, which was her failure to follow the procedure she had been taught to write the information on the batch sheets.

Next, the Company addresses the other arguments raised by the Union. The Company characterizes them all as unpersuasive.

First, the Company addresses the Union's argument that progressive discipline was not imposed here. It disputes that contention. In its view, Webster has received progressive discipline for her previous cash drawer failures, and is not entitled to more. With regard to the January 16, 2001 warning, the Company disputes the Union's assertion that that document was merely a verbal warning. The Company avers it was a written warning because the word "verbal" modifies the word "written." It also notes that the word "verbal" was added to that document at the request of a Union steward. The Company argues in the alternative that even if that document was not a written warning, that does not mean that a written warning had to be imposed here. The Company contends that given the number of times Webster had previously been counseled and trained on cash drawer balancing because of her previous cash drawer failures, the suspension level of discipline was justified here.

Second, the Company addresses the Union's argument about the merits of the January 16, 2001 discipline for lateness. It notes at the outset that that discipline was not grieved. With regard to the Union's contention that it would have grieved this discipline if had known it was a written warning, the Company calls this "after the fact rationale". Aside from that though, it notes that while that warning referenced four instances of being late, the Union challenged just one of the four instances, namely the lateness on January 15, 2001. The Company disputes the Union's assertion that she was not late on that date. According to the Company, she was, in fact, late on that date.

Third, the Company addresses the Union's contention that another cashier (Scheid) once took as long as Webster did to balance her cash drawer and was not disciplined for it. The Company avers that if that were true, Lee was not aware of it. In support of that premise, it notes that Lee testified she was not aware of Scheid taking a lot of time (to balance her cash drawer), and there is no other testimony on the point.

In sum, the Company believes there is no basis for the Arbitrator to substitute his judgment for that of management in determining whether Webster failed to follow the cash drawer procedures on January 23, 2001. It cites several arbitrators who declined to substitute their judgment for management's in assessing employee performance. It therefore asks that the suspension be upheld and the grievance denied.



## DISCUSSION

### Timeliness

While the Company contends that the grievance was untimely filed, I have decided to assume for the purpose of discussion herein that it was timely filed. Here's why. Since this is a discipline case, the focus should be on the grievant's conduct. The parties' arguments concerning timeliness don't deal with the grievant's conduct at all. Instead, they involve the conduct of Pankratz and Johnson and the length of the time extension which Johnson granted Pankratz for filing a grievance. The length of the time extension is disputed: Johnson thought it was until Monday, January 29, while Pankratz thought the extension was not limited to that date. Were I to decide this case on the basis of this disputed oral argument, this would obviously switch the focus of attention from the grievant's conduct to theirs. I decline to do that. In this particular case, I see no compelling reason for me to resolve this case on that basis. Accordingly, this case will not be decided on the basis of timeliness.

### Merits

Attention is now turned to the substantive merits of the grievance.

Section 402.1 of the parties' collective bargaining agreement provides that the Company retains the right to discharge and discipline employees "with cause". What happened here is that the Company disciplined the grievant. Given that disciplinary action, the obvious question to be answered here is whether the Company had cause for doing so.

As is normally the case, the term "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 include the notions of progressive discipline and disparate treatment.

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

I have decided to begin this part of the discussion by first addressing the subject of which alleged "wrongdoing" is going to be reviewed. Rhetorically speaking, what is the scope of this decision going to be? I have decided to limit it to just the alleged "wrongdoing" which occurred January 23, 2001. Here's why. The grievant was suspended for "poor job

performance” on January 23, 2001. While the specific charges will be identified and reviewed later, it suffices to say here that the allegation was that the grievant failed to follow the Company’s cash drawer procedure on that date. The grievance which was ultimately filed in this matter not only referenced the January 23, 2001 incident, but other matters as well. Specifically, it referenced an incident which occurred on September 19, 2000 and the warning notice which the grievant received on January 16, 2001. I am not going to address the September 19, 2000 incident in this decision at all. That incident was the subject of Grievance 025 which was settled and withdrawn. While I will address the January 16, 2001 warning in the part of the discussion dealing with progressive discipline, that discussion will not deal with the merits of that warning. Here’s why. If the Union wanted to challenge that warning, it should have grieved it. It did not. The Union’s attempt to bootstrap that warning to the January 23 warning is unsuccessful. Consequently, I am not going to address the question of whether the grievant was or was not late to work on January 15, 2001.

Having so found, the focus now turns to the grievant’s job performance on January 23, 2001. The Company alleges that the grievant’s job performance that day was inadequate because she failed to follow the Company’s cash drawer procedure that day. The suspension notice which Lee wrote essentially indicated that on that date, Webster did two things wrong with the cash drawer. First, it alleged that she did not know, after a considerable period of time, if she was off in checks or cash, and had two differing amounts she might have been off. Second, it alleged that she did not write the numbers on the batch sheets and should have done so.

At the hearing, the grievant expressly disputed the assertion in the preceding paragraph that she failed to follow procedure in balancing her cash drawer on January 23, 2001. The Union avers that given Webster’s testimony that she followed the cash drawer procedure that day, it would be speculative for the Arbitrator to find otherwise. I disagree. Here’s why. At the hearing, Webster did not dispute the two things which Lee alleged she did in the remainder of the preceding paragraph. First, she admitted she was off in her cash drawer that day, and she also admitted not knowing if she was off in checks or cash, and having two differing amounts she might have been off. Second, she admitted she did not write down all the numbers on the batch sheets. The grievant’s admission about the latter two matters undercut her assertion that she followed the cash drawer procedure on that date. In point of fact, she could not have followed the Company’s cash drawer procedure that day if she did those things. One part of the Company’s cash drawer procedure is that the cashier is supposed to write the numbers on the batch reports. Webster did not do that. She should have done so and written all the numbers on the batch reports. Her failure to write down that information on the batch sheets resulted in her inability to know how much she was off at a time when she would have known that, if she had followed the procedure.

The Union offers several defenses for the grievant's work performance that day which, in its view, should either excuse or justify her actions. These defenses are addressed below.

One defense is that Webster did not ask for Lee's help that day; rather, Lee injected herself into Webster's cash drawer balancing without being asked to do so. While that is true, it ignores the fact that Lee supervises Webster and her work. Supervisors are empowered to inject themselves into the work of their subordinates if they so desire. The fact that Lee chose to inject herself into Webster's work, and later criticize Webster for wasting her (Lee's) time shows chutzpah. Nothing else.

The Union's next defense is related to the one just addressed. The Union contends that if Webster had not been interrupted by Lee, but instead been given more time, she could have found the error on her own. In fact, the grievant speculated that she could have found her miscoding error in three to five minutes had she not been ordered to leave her work station. What is noteworthy about that short timeframe (i.e. three to five minutes) is that it took Lee far longer than that to find the two miscoded payments. Be that as it may, even if Lee did jump the gun, so to speak, by sending the grievant away from her work station when she did, the Union's "interruption" defense only applies to the first problem identified by the Company (i.e. finding the two miscoded payments). It does not apply to the second problem identified by the Company (i.e. that the grievant failed to write down all the numbers on the batch sheets). It would be one thing if the grievant was in the process of writing down numbers on the batch sheets when Lee "interrupted" her. However, that is not what happened.

Another defense is that the part of the Company's cash drawer procedure which requires the cashier to write down all the numbers on the batch sheet is irrational because it sometimes entails writing down a wrong number which will later have to be rewritten when it is discovered to be wrong. Even if that is so, this argument misses the mark for the following reason. It's not my task herein to decide if the existing cash drawer procedure is rational or irrational. What's important here is that it's the procedure and is supposed to be followed. All the numbers are supposed to be written down, even if it later turns out that a number is wrong.

In sum then, none of these defenses excuse or justify the grievant's poor work performance on January 23, 2001. Accordingly, the Company proved the grievant's misconduct of inadequate work performance that day.

The second part of a cause analysis requires that the Employer establish that the penalty imposed for this wrongdoing was appropriate under the relevant facts and circumstances. In reviewing the appropriateness of discipline under a cause standard, arbitrators generally consider the notions of progressive discipline and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. suspension).

Progressive discipline is addressed first. The Union argues that by suspending the grievant, the Company did not apply progressive discipline in this instance. Based on the following rationale, I conclude otherwise.

My discussion on this point begins, as promised, with an examination of the January 16, 2001 warning. That is the warning, of course, that used the phrase “verbal written warning”. In their briefs, the parties addressed in great length whether that warning constituted a verbal warning or a written warning. Not surprisingly, the Union characterized it as the former, while the Company characterized it as the latter. The distinction between whether the January 16, 2001 warning was a verbal warning or a written warning would be critical if Sec. 403.2 required the Company to always impose a written warning before a suspension. However, that is not what the language says. The following review of that language shows this. Section 403.2 references the traditional progressive disciplinary sequence of verbal warning, written warning, suspension and discharge. While some labor contracts say that the employer has to follow that sequence in each and every disciplinary situation, this language does not say that because it includes the following hedge words: “including, but not limited to” and “depending on the seriousness of the offense.” These hedge words make it clear that the Employer is not contractually obligated to always impose discipline in the aforementioned order.

The distinction between whether the January 16, 2001 warning was a verbal warning or a written warning would also be important to this case if the grievant had no previous history of having problems with her cash drawer. However, the fact of the matter is that she had a history of having problems with her cash drawer. The following shows this. First, one of the three disciplinary warnings she had recently received, namely the November 6, 2000, warning, specifically dealt with two cash drawer matters. Second, both of the counseling sessions she had (which were held October 17 and November 14, 2000), involved cash drawer procedures. Finally, after the November 14 counseling session, Webster was re-trained on balancing the cash drawer. All of the foregoing were attempts by the Employer to address and change the problems Webster was having balancing her cash drawer.

Given the above, I find that in this particular case, it simply does not matter whether the January 16, 2001 warning is considered a verbal warning or a written warning. Either way, the record establishes that Webster had previously had problems with her cash drawer, and that the Employer had responded to these problems, over a three and a half month period, by 1) warning her about her deficiencies in balancing her cash drawer, 2) counseling her on cash drawer procedure and 3) giving her additional training on cash drawer procedure. Under these circumstances, Sec. 403.2 did not require that the Company impose only a written warning on the grievant for her inadequate work performance on January 23, 2001.

The focus now turns to disparate treatment. The Union's disparate treatment argument essentially consists of two closely-related parts. The first part is that Lee watched Webster like a hawk, so to speak, when she balanced her cash drawer, but did not do so with the other cashier (Scheid). That may be. However, as previously noted, Webster had a history of having problems balancing her cash drawer, while Scheid, insofar as the record shows, did not. The second part is that Scheid once took just as long as Webster did to balance her cash drawer on January 23, 2001, and was not criticized for doing so. The problem with this contention is that the Union did not establish that Lee was aware of it. Lee testified in this regard that she was not aware of Scheid taking a lot of time to balance her cash drawer, and there is no other testimony on that point. In order to prove disparate treatment, the Union must do more than simply show that the grievant was treated differently than other employees; it must also establish that the factual circumstances involved were similar. The Union did not prove that here. I therefore find that the grievant was not subjected to disparate treatment in terms of the punishment imposed on her for her poor work performance on January 23, 2001.

Accordingly, then, it is held that the severity of the discipline imposed here (i.e. a one day suspension) was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was reasonably related to the grievant's proven poor work performance. Under these circumstances, the Company had cause to suspend the grievant for one day on January 24, 2001.

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

**AWARD**

That the Employer had cause to suspend Marianne Webster on January 24, 2001. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 30th day of June, 2004.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc  
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