

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**NICOLET AREA TECHNICAL COLLEGE
SUPPORT PERSONNEL UNIT/NTU**

and

NICOLET AREA TECHNICAL COLLEGE

Case 19
No. 64910
MA-13051

(Karl Horwath Grievance)

Appearances:

Gene Degner, Director, Northern Tier UniServ, appearing on behalf of the Association.

Robert Mulcahy, Attorney, joined on the reply brief by **Kristi Nelson Foy**, Attorney, Michael, Best & Friedrich, appearing on behalf of the College.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and College or Employer, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on November 14 and 15, 2005, in Rhineland, Wisconsin. The parties filed briefs on January 18, 2006 and reply briefs on February 13, 2006, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE(S)

The parties did not stipulate to the issue(s) to be decided herein. The Association frames the issue as:

Did Nicolet Technical College violate the rights of Karl Horwath that are afforded him in the collective bargaining agreement when they dismissed him from his position as café manager on April 1, 2005? If so, what is the appropriate remedy?

The College frames the issues as:

1. Did the grievant voluntarily resign?
2. Was the grievant's termination supported by just cause?

I have not adopted either side's wording of the issue(s). Instead, my wording of the issue is as follows:

Did the College have just cause to discharge the grievant? If not, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2003-06 collective bargaining agreement contains the following pertinent provisions:

Article II – Management Rights

The Board, on its own behalf, and on behalf of Nicolet Area Technical College, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the constitution of the State of Wisconsin and of the United States, except as modified by the specific terms and provisions of this agreement.

These rights include, but are not limited to:

...

5. Suspending, demoting, discharging, or taking other appropriate disciplinary action for just cause.

...

Article XVI - Discipline Procedure

- A. After serving a six (6) month probationary period, no bargaining unit employee may be discharged except for just cause.

- B. No bargaining unit employees shall be suspended, disciplined, or reduced in rank or compensation without just cause. All information forming the basis for disciplinary action shall be made available to the employee and the Union.
- C. All employees shall at all times be entitled to have present a representative of the Union Executive Committee when being disciplined for any infraction of the rules or delinquency in job performance, except in an emergency situation.

FACTS

Nicolet Area Technical College (hereinafter the College) is located in Rhinelander, Wisconsin and is a member of the Wisconsin Technical College System. The Association is the exclusive collective bargaining representative for the College's support personnel. Karl Horwath was a bargaining unit employee.

The Cafeteria at the College is called the Lakeside Café. The Café is not intended to be a money maker for the College; instead, it is intended to be a service for students, staff and community members. Thus, the Café is not operated for profit. The Café also offers catering services and caters food during the fall and spring semesters for the Nicolet Daycare Center. The College's culinary arts program is connected with the Lakeside Café. Three employees work at the Café: the Cafeteria manager and two food service specialists. All three are in the same bargaining unit.

Horwath was hired as the Cafeteria manager for the Lakeside Café in January, 2001. The Cafeteria manager is responsible for running the Café on a day-to-day basis, catering, ordering and preparing food, cleaning and sanitation, ensuring that food service codes and regulations are complied with, and overseeing the two food service specialists. Horwath has worked in food service for almost 40 years. He is a very experienced food service manager and is familiar with the codes relating to food service. Prior to working at the College, he worked for institutions where the Cafeteria was operated for profit. This was the first time he worked for an institution where the Cafeteria was not operated for profit.

Insofar as the record shows, no one got sick from eating old, spoiled or undercooked food while Horwath was the Cafeteria manager. Additionally, during his tenure as Cafeteria manager, the College was not cited by the State Department of Health for serious food safety and sanitation violations.

. . .

On April 1, 2005, Horwath was given the choice of resigning or being fired because of job performance issues. That action by the Employer is the subject of this case.

Horwath's supervisor at the College was Jill Price, the Director of Business Services. Price is in charge of the business office, and has numerous job duties. Supervising the Cafeteria manager is a very small part of her job. In 2002, Price took the ServSafe course offered at the College and became certified in Food Safety and Sanitation.

Prior to November, 2002, Price had verbally counseled Horwath numerous times about work performance problems related to sanitation and food safety that Price wanted Horwath to correct. She told him repeatedly to label food in the refrigerator/freezer and throw old food away, and not reserve it, because she did not want anyone to get sick from eating old food and/or leftovers.

On November 15, 2002, Price inspected the Café and its premises and found numerous problems which will be identified below. She was not pleased with what she found. Afterwards, she met with Horwath and reviewed all these problems with him and identified what Horwath should do to remedy same. On November 21, 2002, Price sent a letter to Horwath with the caption "Problems with the Lakeside Café" wherein she documented, in great detail, what she found on her inspection and what she had talked to Horwath about afterwards. Portions of that letter follow:

This letter is a follow-up to our conversation on Tuesday, November 19, 2002. I informed you that I was not pleased with how things were operating at the Café. On Friday, November 15th, I found a lot of food that had to be thrown out for various reasons which include the following:

- Being placed in improper storage containers that do not meet safety and sanitation requirements
- Food in freezer not being correctly labeled as to contents and date when it was frozen
- Food that was not found in any containers at all. It had fallen out of the thin storage bags and left along the sides and bottom of the freezer
- Food that was cooked and then frozen and left frozen beyond a freezing life cycle
- Food that was frozen that was bought and never used/cooked prior to expiration of a normal freezer life
- Food and beverages that had past expiration dates and were still available for sale

These are unacceptable conditions that do not meet the necessary codes and regulations.

The storage area behind the bookstore was also in an unacceptable condition. Items were packed in there leaving little room for walking or working. The Styrofoam containers which we had discussed on many occasions were still present. You were informed to dispose of them by the fall semester as no Styrofoam was to be used after the start of the semester. I was told that you were trying to negotiate for either SYSCO to take them back or sale to Bernie's Bakery. Neither of these transactions took place in the time frame that was originally stated.

. . .

The Café also looks like it is constantly in a state of disrepair. It needs to be kept clean and as uncluttered as possible. . . .

Another area of concern is the length of time food is kept before being thrown away. On numerous occasions items have had to be thrown out because they were kept too long. There are time frames that food could be kept after cooking and still be safe. Once you pass those dates, you jeopardize the health and safety of your customers. As a Cafeteria manager you should know these time frames and adhere to them.

I am also concerned about the working environment at the Café. It can be hostile, back stabbing, and non-productive at times. We have talked about this and specific incidents before and nothing has changed. . . .

You need to be open-minded to ideas and concerns that the staff has. This is not occurring. . . .

I am setting up a meeting with you and your staff so that we can work through these issues. We will establish orderly times for saving and disposing of food, safe conditions for storing food, rectifying morale, etc. Your cooperation is a must. Anything besides that will not be tolerated. I will also not tolerate your excuses for why things did or did not happen and you blaming the staff for what they did not do. It is your job as the manager to insure that you and your staff are adhering to the codes and regulations.

You and I have discussed many of these issues on numerous occasions and you have been unwilling to take the corrective actions I have directed. Ignoring my directives must cease immediately. When I direct you to take actions in the Café, I expect that you address my concerns in a timely fashion.

The purpose of this memo is to put you on notice that your performance is unacceptable. If I do not see immediate and sustained improvement in all the areas mentioned above, you will be subject to disciplinary action.

This letter put Horwath on notice that Price was unhappy with his job performance and he needed to improve it; if he did not, discipline would follow.

In the summer of 2003, Price was alerted to continued problems in the Café by both students and staff who complained to her about the quality of the food being served. As a result, Price met with the three members of the Cafeteria staff (including Horwath) on June 26, 2003. In that meeting Price told all of them that leftovers should not be served, that leftovers should be thrown out daily, and that if Horwath did not throw away leftovers, the other employees had permission to toss out the food. Price ended the meeting by telling Horwath directly that if he ignored these directives, he would be subject to disciplinary action up to and including termination.

On June 27, 2003, Price sent a letter to Horwath with the caption "Leftovers from the Lakeside Café" wherein she documented, in great detail, what was discussed at the June 26, 2003 meeting. Portions of that letter follow:

This is to put on record our conversation on June 26, 2003 regarding complaints that I have received about the food being served in the Lakeside Café. Gayle and Joni were also present for this conversation.

I am beginning to receive complaints again about the quality of the food in the Café. We have talked numerous times about the use of leftovers in the café. People are perceiving (and justly so) that the food being served is a leftover. One such complaint was in regards to the reuse of food from the weekly barbecues that you do. Once the food has sat after the barbecue, it is dried out and to reuse it just makes the quality and taste diminish. People have also told me that they will only eat off the inside grill because the food is fresh and has not sat around for any length of time.

I am telling you again, for the final time, do not keep leftovers. The only exception to this is food that will be used in the next day's soup, chili, and barbecues. If the food is not going to be used for these reasons, it must be tossed in the garbage at the end of the day. It is not going to be given to individuals to take home unless persons here for a catering event want to take some of their catered food with them. All food from catering must be thrown out after the catering is done. It may not be resold on another day. All food from the salad bar needs to be thrown out daily. Again the only exception is the cheese and meats that can be used the next day in cooking. If it is not to be used the next day, it needs to be thrown out. All daily entrees and sandwiches not purchased must be disposed of at the end of the day. They may not be kept out for a smorgasbord day at the end of a week. Soups and barbecues must be used for one day. People have questioned the quality and taste of those being offered. Do not reuse any of this leftover food for the daycare children. They will receive fresh food daily.

You can avoid some of the waste by gauging the quantities of food prepared daily. . . .

It is your responsibility to throw out the food on a daily basis. If you do not follow these instructions, Gayle and Joni have my permission to toss out food that you did not. There will be no repercussion to Gayle or Joni regarding these actions. When I left yesterday, you, Joni and Gayle all said that you understood these instructions.

Up to this point, you have elected to ignore my directives concerning leftover food. Further failure on your part to comply with my directives will result in disciplinary action up to and including termination of your employment.

This letter put Horwath on notice that Price was still unhappy with his job performance and he needed to improve it; if he did not, discipline would follow – up to and including termination.

In May, 2004, Price received more complaints from students and staff about the Café. Price documented these complaints, as well as other concerns she had with Horwath's work performance, in a memo dated May 6, 2004. This memo was sent to Bob Pound, the College's Director of Human Resources. After he received Price's memo, Pound set up a meeting with Horwath, Tom Eckert (the College's Vice-President of College Services) and Shelley Eades (the Association President) to address the topics referenced in Price's May 6, 2004 memo.

That meeting was held June 17, 2004. Since a union representative attended this meeting, it was a disciplinary meeting. At that meeting, Pound went through Price's May 6, 2004 memo with Horwath and addressed the issues referenced therein. The specific items which were discussed were as follows: 1) Horwath's handling of a Skills Olympics event on the College's campus; 2) Horwath's rude behavior towards a group of visiting teachers and students; 3) Horwath's forgetting to provide catering for two scheduled events; 4) Horwath's continuing to serve old food and not throwing it (i.e. the old food) away; 5) serving food on small plates; and 6) Horwath's ordering and selling food to employees at discount prices despite Price's directive forbidding him to do that. When all these topics were addressed, Pound felt there was a common theme to Horwath's responses. The theme was that he (Horwath) was not to blame – others were – and that he had not been given specific direction. Pound did not find Horwath's responses acceptable and told him so. Pound then asked Horwath if he still wanted to work at the College, and Horwath responded that he did. Pound then directed Horwath to improve his work performance and told him that if he (Horwath) was going to continue to work at the College he had to change his attitude, comply with Price's work directives and not push the envelope. Horwath replied that he would do those things and change his (workplace) behavior. The meeting ended with Horwath asking Pound for another chance. Pound essentially granted Horwath's request (for another chance), because Pound did not impose any formal discipline on Horwath at the end of this meeting. Pound indicated that the reason he did not impose any discipline on Horwath at the end of that meeting was because of Horwath's promise that he would change (his workplace behavior).

In early March, 2005, food service specialist Joni Sperberg complained to Price about Horwath's food service practices in the Café and asked for a meeting to discuss her concerns. In doing this, Sperberg knew she was going over Horwath's head in the Employer's organizational structure. Price subsequently met with food service specialists Humpal and Sperberg, and temporary food service worker Ira Sommerville, and listened to their complaints about Horwath. This meeting was intentionally held on a day when Horwath was absent so that the food service workers could speak freely. The claims which they raised with Price in that meeting can be characterized as involving old claims and new claims. Some of the old claims were that Horwath: 1) routinely reused old food and would not throw it (the old food) out; 2) became angry with them when they either attempted to, or actually did, throw old food out; 3) did not put labels on food in the refrigerator and/or freezer so it was unknown how old the food was; 4) would not listen to their recommendations about food orders; 5) was rude to customers; and 6) did not follow accepted food storage and sanitation practices. The new claims were that Horwath: 1) dropped a pan of meat onto his shoes and the floor and subsequently served the meat that had not fallen out of the pan; 2) ordered that food returned by a customer be put back on the serving line; 3) did not always take the temperature of meat before serving it; 4) on one occasion left raw chicken out on the counter for several hours; 5) took non-food items out of the trash and reused them; 6) left dirty towels on the counter; and 7) cut raw vegetables on the counter after preparing meat and not sanitizing the counter in between.

Following this meeting, Price met with Eckert and Pound and told them of the cafeteria workers' complaints about Horwath's food safety and sanitation practices. After hearing those complaints, Pound asked Price to do an on-site investigation of the Café and its premises and document any problems she observed.

Price subsequently conducted an on-site investigation of the Café and its premises. Price had Cindy Domaika, the College's book store manager, accompany her on this tour and take pictures of what they found. They found three improper food storage practices and/or food code violations. Specifically, they found umbrellas that had been used outside stored inside with the food items; food items stored next to Ice Melt; and food items stored directly on the floor rather than on a raised surface. Domaika took pictures of the foregoing. Price subsequently gave these pictures to Pound.

On March 17, 2005, Pound met with Humpal and Sperberg to hear their complaints about Horwath's food service practices and decide if their complaints were credible. Price also attended that meeting. At that meeting, Humpal and Sperberg told Pound what they had told Price (earlier in the month) about Horwath's food service practices. Pound found their claims to be credible. Pound knew that some of the claims which they raised were similar to the matters addressed in Price's two letters to Horwath. It was Pound's view that Humpal and Sperberg were frustrated with Horwath, but they were not out to get him.

Pound then scheduled a meeting for April 1, 2005 to address Humpal and Sperberg's claims with Horwath.

On March 18, 2005, Pound spoke with Association President Shelley Eades to arrange for a union representative to attend the April 1 meeting. The Association selects the union representative who attends disciplinary meetings. Eades planned to be on vacation on April 1, so she designated Chris Meyers as the union representative for the April 1 meeting. Pound told Eades about Humpal and Sperberg's claims regarding Horwath's food service practices. Pound also told Eades that the charges against Horwath were very serious and could lead to his termination.

The record does not indicate if Eades subsequently told Horwath what Pound told her about the April 1 meeting and its purpose.

On April 1, 2005, Price called Horwath on the phone and summoned him to the meeting. When Price called, she did not tell Horwath the purpose of the meeting and he did not ask.

Before the meeting started, the management representatives met by themselves. Pound told them that the meeting's purpose was to hear what Horwath had to say about the various claims. Pound also told them that if discipline was warranted, he would make the decision about any discipline imposed.

The meeting with Horwath was held, as scheduled, on April 1, 2005. The meeting lasted over two hours. Five people attended the meeting: Horwath, Pound, Price, Eckert and Chris Meyers. Horwath and union representative Meyers did not confer amongst themselves before the meeting started. The only people who spoke during the entire meeting were Pound and Horwath. Pound began the meeting by telling Horwath that numerous instances of unsafe food and sanitation practices had been attributed to him by Humpal and Sperberg, and that he (Horwath) would have the opportunity to respond to all these claims. Pound then told Horwath about the numerous reported instances of unsafe food and sanitation practices that had been attributed to him by Humpal and Sperberg, to wit: dropping a pan of meat onto his shoes and the floor and subsequently serving the meat that had not fallen out of the pan; ordering that food returned by a customer be put back on the serving line; improper chicken thawing practices; serving leftover food that was more than seven days old despite Price's directive to throw out old food; failing to label food in the refrigerator and/or freezer and taking off labels put on by other Cafeteria workers; routinely reusing old food and not throwing it (the old food) out; failing to routinely take meat temperatures before serving; and failing to properly sanitize counters. Pound then told Horwath about the instances of improper food storage which Price had discovered, to wit: storage of food with umbrellas that had been used outside, storage of food items close to Ice Melt, and storage of food items directly on the ground rather than on a raised surface. Some of these claims were very familiar to Horwath because he had addressed them before, while other claims were not familiar to him because he heard about them for the first time at the meeting. Horwath then responded to all the claims – both old and new - in detail. His responses can be categorized as either admissions, denials, or do not remember. They will be addressed in that order. He admitted the following: that he had dropped a pan of meat onto his shoes and the floor and subsequently served the meat that had not fallen out of

the pan; that he had not always labeled old food in the refrigerator and/or freezer; that he reserved food that was three days old, contrary to Price's directive to not serve leftovers; that on occasion, he had served meat that was undercooked; that he stored dirty umbrellas with food items, despite knowing that it was a food safety code violation and despite Price's directive to not store the umbrellas in the food storage area; that he stored food items directly on the floor, despite knowing that food items must be stored off of the ground; and that he stored food near Ice Melt, which is potentially hazardous. He denied the following: that he thawed chicken improperly; that he did not routinely take the temperature of meat before serving it; and that he took labels off old food in the refrigerator and/or freezer that had been put on by the other Cafeteria workers. He said that he could not remember whether he ever ordered that food returned by a customer be put back on the serving line; whether he left dirty towels on the counter; and whether he cut raw vegetables on the counter after preparing meat without sanitizing the counter in between. When Horwath made the admissions referenced above, he showed no remorse or willingness to change his conduct to ensure that it was not repeated. Horwath said that Humpal and Sperberg were out to get him.

After listening to Horwath's responses in this meeting, Pound reached the following conclusions: that Horwath's many admissions were incriminating and showed a pattern of poor food storage and sanitation practices; that Horwath was refusing to accept responsibility for the continuing unsanitary conditions in the Café for which he was responsible; that Horwath was not going to improve his work performance; that Horwath would continue to either ignore or fail to follow Price's work directives just as he had been doing; and that since Horwath showed no remorse at this meeting or a willingness to change his conduct to ensure that it was not repeated, there was no chance that Horwath could be rehabilitated by a suspension of some sort. Pound then told Horwath that his poor food storage and sanitation practices harmed the Café's reputation, posed a health risk to students and exposed the College to financial liability. Pound then told Horwath that he (Pound) had decided to end Horwath's employment with the College. Pound then offered Horwath the following choice: resign or be fired. After telling him this, Pound told Horwath that if he chose to resign, the College would inform potential employers that he had resigned from his position, whereas if he was terminated, the College would inform potential employers that he had been discharged. Horwath responded by saying he was prepared to resign. Pound then said that Horwath could think about his decision over the weekend, but Horwath said no - he had made his decision, and he had decided to resign. Pound asked Horwath to give him a letter of resignation.

Following that meeting, Horwath never submitted a letter of resignation to the College.

On April 7, 2005, Pound sent a letter to Horwath wherein Pound confirmed that Horwath had resigned from the College on April 1, 2005. Neither Horwath nor the Association responded to this letter. Additionally, neither Horwath nor the Association told Pound that Horwath wanted to rescind his resignation.

The College posted the Cafeteria manager position internally on April 6, 2005. Gayle Humpal signed the posting. She was the only applicant. Humpal was officially appointed to

the Cafeteria manager position on April 18, 2005. After Humpal became Cafeteria manager, the College hired someone to fill Humpal's former food service specialist position.

On April 12, 2005, the Association filed a timely grievance on Horwath's behalf. The grievance alleged a violation of Article XVI, Discipline Procedure. The grievance was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

Additional facts will be set forth in the DISCUSSION section below.

POSITIONS OF THE PARTIES

Association

The Association contends that the College violated Horwath's rights under the collective bargaining agreement when it dismissed him on April 1, 2005. It makes the following arguments to support that contention.

The Association's initial focus is on Horwath's resignation. It acknowledges at the outset that Horwath said he resigned at the April 1 meeting. The Association believes that statement should be considered in the following context. First, at the April 1 meeting, Pound gave Horwath his choice of "which poison pill he wanted to swallow. . . resign or be fired." The Association avers that "without a moment to reflect, discuss options with his union representatives and feelings of disbelief, the grievant indicated he would probably resign but needed the weekend to think about it." Second, the Association asserts that "following the weekend, reflection and consultation, the grievant did not turn in a letter of resignation as requested by management." The Association submits that since Pound asked Horwath for a resignation letter, the implication is that an employee is not considered to have resigned until the employee's resignation letter is received by the Employer. The Association reasons that since Horwath did not turn in a letter of resignation "no rescinding of the resignation was necessary." The Association also claims that Horwath's failure to submit a letter of resignation is significant because it shows that Horwath did not have an intent to resign. The Association asserts that the Employer must have known that, because Pound offered Horwath the weekend to think about it (i.e. whether to resign). Additionally, the Association avers that when management did not receive a letter of resignation from Horwath on Monday morning, "they should have, with rational thinking, understood that the grievant had reconsidered his options" (and decided not to resign). Third, the Association contends that when Horwath said he resigned at the end of the April 1 "inquisition", he was under duress and being mentally coerced into resigning. To support that contention, it cites Pound's statement to Horwath that he (Horwath) would find it hard to find another job in food service should he not resign. The Association avers that the grievant did not want to be "blackballed" from future employment, so he said he resigned. Fourth, notwithstanding the District's assertion to the contrary, the Association alleges that the College did not rely on Horwath's resignation (to its detriment) when it filled the position of Cafeteria manager. To support that contention, it notes that the

instant grievance was filed April 12 – six days prior to the appointment of Horwath’s replacement on April 18. It also notes that the Employer filled the position internally “from the staff who wanted the grievant gone.” The Association argues that when the foregoing context is considered, it becomes clear that Horwath did not really resign. That being so, his resignation should be treated as a discharge for the purpose of arbitral review.

Next, the Association comments on two matters which, in its view, give more context to what happened.

It notes initially that while the grievant was hired as the supervisor for the café and given a supervisory title (i.e. Cafeteria manager), he was not given any real supervisory authority because he was in the same bargaining unit as the other two Cafeteria workers. Thus, he did not have the authority to discipline those employees. The Association submits that whatever authority Horwath did have over the two Cafeteria workers was undermined by Price when she went behind his back and held clandestine meetings with them.

It also notes that Horwath’s previous work experience involved operating kitchens for profit. Here, though, the College “did not care if the operation made a profit and, in fact, would rather subsidize the operation. . .”

Next, the Association argues that the Employer did not have just cause to discharge the grievant on April 1, 2005. In its view, discharge was excessive and unwarranted under the circumstances. It elaborates on this contention as follows.

First, the Association acknowledges that Price had numerous conversations with Horwath in the Café about the operation of the Café. It also acknowledges that Horwath knew that Price was unhappy with his work in November, 2002 and June, 2003 because on those occasions she sent him letters about various work matters. As Horwath saw it though, as time went by, he thought Price’s concerns were forgotten because she (Price) only raised them with Horwath on an “occasional basis”. According to the Association, following the June, 2003 letter, Price “never confronted the grievant at his work site, never pointed out any short comings, never pointed out anything wrong at the work site while the grievant was there.” Building on that premise, the Association argues that the grievant logically concluded “that he had met Price’s demands for change and things were OK and progressing smoothly.” The Association avers that while Horwath learned that was not the case at the April 1, 2005 meeting, he did not know that until then because Price failed to adequately impress upon him that he was to follow her directives, and if he did not, he faced discharge. The Association maintains that Horwath should not have had to read between the proverbial lines; instead, Price should have met with Horwath one on one and told him outright what the ramifications were for his continuing to be “uncooperative” in carrying out her (Price’s) directives. As the Association sees it, the Employer failed to do that.

Second, the Association contends that the Employer did not give the grievant procedural due process before discharging him. To support that contention, it notes that when

the grievant was (essentially) fired on April 1, 2005, the Employer did not give him a written list of reasons for the discharge. Additionally, it maintains that prior to discharging the grievant, his supervisor (Price) had just two formal meetings with him to talk about problems with the café. The Association asserts that the rest of their meetings and comments were done informally when Price would mention things to Horwath in the kitchen. The Association argues that the informal nature of Price's comments to Horwath (about how to run the Café) did not impress upon him the seriousness of her comments. As a result, he took her comments to be suggestions and recommendations – not directives. Additionally, it notes that Horwath was not given a timeline for improving and/or changing by management. The Association notes that when employers fail to give an employee procedural due process, arbitrators have not hesitated to overturn the discipline imposed. The Association urges this arbitrator to do likewise and overturn the grievant's discharge.

As part of its procedural due process argument, the Association acknowledges that the Employer conducted an investigation, but it contends that it was “anything but fair”. According to the Association, Price's investigation was not fair because: 1) she never came to the kitchen while Horwath was there to investigate; 2) she got her information secondhand in a clandestine fashion from the two foodservice workers who the grievant never had the chance to confront; and 3) her secondhand information clouded her “judgment to the point where she felt it was not necessary to get any firsthand information and accepted the employees' version which ultimately resulted in the grievant's demise.” The Association avers that given Price's clandestine investigation, Horwath did not know of Price's dissatisfaction (with him) directly and at the time.

Another contention that is subsumed into the Association's due process argument is that the April 1 meeting was flawed for the following reasons. First, the Employer did not tell Horwath the purpose of the meeting, so he did not know it was a disciplinary meeting. Second, the Employer did not give Horwath a (written) list of the charges against him at the start of that meeting. Third, Horwath was not given the opportunity to talk to his union representative about the purpose of the meeting. Fourth, the Employer did not say that termination was being considered until the end of the meeting. Fifth, that there really were no answers that Horwath could have given at that meeting that would have saved him: if he admitted to the allegations, that was a reason to dismiss; if he denied the allegations, then he was lying and that was reason to dismiss.

Third, the Association avers that the Employer failed to give Horwath progressive discipline as it should have. It acknowledges, of course, that the grievant received the two letters dated November 21, 2002 and June 26, 2003. However, as the Association sees it, neither letter explicitly said that it was a disciplinary letter, or a written reprimand, or a written warning. The Association characterizes the first letter as a memorialization of the conversation that Price and Horwath had the previous day, and specifically notes that the letter said that disciplinary action could occur if improvement did not occur. It summarizes the second letter as dealing with just one issue: “complaints about the taste of food and Price's allegations that leftover food was being used and it was to be thrown out.” The Association

submits that since neither letter said it was a written warning or a disciplinary letter, Horwath did not consider either of them to be disciplinary in nature. Building on that premise, the Association asserts that prior to being discharged, the grievant was never formally disciplined with a written warning. The Association implies that even if those two letters were written warnings, the next step under progressive discipline is a final warning followed by a suspension. The Association notes that the grievant was never suspended prior to being discharged. Since he had not received a final warning or a suspension prior to the April 1 meeting, the Association alleges that the grievant did not realize “the gravity of the situation” and did not know he faced discharge when he was called into the April 1 meeting. He was “flabbergasted” when that happened. The Association avers that if the Employer had given him a severe letter of reprimand or a suspension, “the grievant would have, in all likelihood, have changed the practices and conformed to the wishes of the College.” The Association notes that when employers fail to follow progressive discipline, arbitrators have not hesitated to overturn the discipline imposed. The Association urges this arbitrator to do likewise and overturn the grievant’s discharge.

Fourth, the Association argues that the matters addressed at the April 1 meeting were insufficient to justify the grievant’s discharge. Here’s why. According to the Association, there really were not numerous issues with the grievant; instead, “the same issues were used numerous times to build a case against the grievant.” Building on that premise, the Association avers that most of the topics which management raised at the April 1 meeting were not new topics. Instead, they were old topics that Price had previously addressed with Horwath in her letters to him dated November 21, 2002 and June 26, 2003. According to the Association, those two letters addressed different topics with one exception: reusing old food. With regard to that issue, the Association believes the grievant made it clear at the April 1 meeting that while the food in the refrigerator might not have been labeled, it was not used beyond safe serving dates. To support that assertion, it cites the following facts: that nobody got sick from eating old or spoiled food; that nobody complained about old or spoiled food; that Pound and his wife regularly ate at the Café; and that the Café was inspected regularly by the State Department of Health and there were no major infractions. Having addressed that topic (old food), the Association acknowledges that some topics which were addressed at that meeting were new (and had not been addressed in either of the two aforementioned letters). As the Association sees it, there were just three topics which were new. They were 1) the spilled meat matter; 2) the thawing chicken matter; and 3) putting returned food back on the serving line. The Association responds to them as follows. With regard to the spilled meat matter, the Association avers that the Employer never proved that any of the meat that hit the floor was subsequently served. With regard to the thawing chicken matter, the Association asserts that the Employer never proved that the way the grievant thawed the chicken violated safe food practices. With regard to the returned food matter, the Association contends that the Employer never proved that the grievant put the returned food back on the serving line. The Association therefore argues that the Employer did not substantiate the three new charges. While the Employer credited the Cafeteria workers’ accounts of those three matters, the Association submits that the Employer should not have done that (i.e. credited their accounts over the grievant’s) because the two Cafeteria workers “had everything to gain” by getting the grievant in trouble and dismissed. Finally, with regard to the three food storage matters,

the Association did not address them except to dismiss them as “red-herrings”. To support that contention, it notes that none of those matters (i.e. the food storage matters) was ever written up in State health inspections.

In sum, it is the Association’s position that the Employer did not prove that it had just cause to discharge the grievant. The Association therefore requests that the grievance be sustained, the grievant reinstated, and a make-whole remedy issued.

College

The College contends that the grievance should be denied for two basic reasons. First, according to the College, the grievant voluntarily resigned his employment. Even if the grievant resigned under duress, which the College believes he did not, it is the College’s view that its detrimental reliance upon the grievant’s resignation and the grievant’s failure to rescind his resignation in a timely fashion negate any possible claim. Second, the College vigorously disputes the Association’s claim that the grievant was fired without just cause. The College maintains that there is clear and convincing evidence which shows that the grievant was given ample warning of the nature of his performance problems and an opportunity to correct his performance issues, that the grievant’s performance did not improve, and that the grievant’s misconduct was so egregious that termination was warranted.

The College elaborates as follows on its first basic reason that the grievance should be denied. It argues that the arbitrator need not treat this case as a discharge because the grievant voluntarily resigned on April 1, 2005. It notes in that regard that all the witnesses at the April 1, 2005 meeting, including the grievant, said he resigned after Pound gave him the choice to resign or be fired. According to the Employer, the grievant understood the choices before him and he chose to resign. That was his call to make. The Employer notes that in their brief, the Association conceded that the grievant resigned. As the Employer sees it, his resignation was voluntary and was not made under duress. The Employer submits that the fact that Pound told Horwath at that meeting that the College would respond honestly to reference checks about him is insufficient to support the Union’s conclusory allegation that Horwath resigned under duress. The Employer also avers that Pound did not pressure, coerce, or threaten Horwath into resigning. Building on the premise that Horwath resigned, the Employer cites various arbitrators who have found that when an employee voluntarily resigns, and severs the employment relationship, the just cause rules for termination of employment do not apply. The Employer asks this arbitrator to hold likewise.

The Employer argues in the alternative that even if the grievant’s resignation was tendered under duress or in haste, and he decided on second thought to not resign, he had an obligation to promptly withdraw his resignation. The College avers that the grievant failed to do that (i.e. rescind his resignation in a timely manner) because he did nothing to contact the College or let the College know he wanted to rescind his resignation. It cites several arbitrators who have found that when an employee fails to rescind a resignation in a timely

fashion, the resignation stands. The Employer contends that even if the grievance which was filed by the Association is viewed as a rescission of the resignation, that was 11 days after the resignation. According to the Employer, that time span is simply too long for an effective rescission to occur.

Finally, the College argues that the grievant's resignation should stand because the College relied on it (i.e. the grievant's resignation) to its detriment because it refilled the vacant Cafeteria manager position after the grievant resigned. The College avers that it would not have refilled the Cafeteria manager position if it had received any indication that the grievant had changed his mind about the resignation.

Next, the College elaborates as follows on its second basic reason that the grievance should be denied. It contends that even if the arbitrator finds that the grievant did not voluntarily resign, the Employer had just cause to end his employment. In support thereof, it cites the seven just cause factors identified by Arbitrator Daugherty years ago and applies them to the instant facts.

First, the College contends that the grievant had been put on notice of his work performance problems by his supervisor and had been given the opportunity to correct them (i.e. his work performance problems). To support that premise, the College maintains that during his employment, the grievant was repeatedly told by his supervisor to follow basic food sanitation and safety procedures, but he did not, so the Employer took the following steps: first, Price verbally counseled the grievant about numerous work performance issues; second, when those verbal counselings did not change his food safety and sanitation practices, Price gave him two written warnings. One was on November 21, 2002 and the other was on June 27, 2003. According to the Employer, those two letters identified numerous problems with food safety and sanitation that the grievant was to correct. As the Employer sees it, those counselings and written warnings put the grievant on notice that his work performance was unacceptable and needed to improve. Additionally, the College maintains that the grievant was given ample time and opportunity (i.e. three years) to improve his work performance.

Second, the College avers that its expectations and directives that the grievant follow basic and commonly-accepted food safety and sanitation procedures was reasonable. To support that premise, it notes that Price's labeling, food storage and safety directives to the grievant mimicked its ServSafe course and the state sanitation code. The College asserts that it was reasonable for it to expect the grievant to practice good safety and sanitation habits after he received progressive discipline for these issues. It also calls the arbitrator's attention to the fact that the grievant never maintained that the College's expectations of him were unreasonable or that he could not have met them if he tried. Finally, the College contends it was reasonable for it to attempt to avoid liability for health issues created by poor food safety and sanitation.

Third, the College submits that Pound conducted an investigation prior to the April 1, 2005 meeting. To support that premise, it cites the following facts: that Price did an on-site

investigation of the Cafeteria; that Pound interviewed the two Cafeteria workers concerning their claims about the grievant; and that Pound then set up a meeting wherein he gave the grievant the opportunity to respond to the allegations made by the other Cafeteria workers as well as the Employer's work performance concerns.

Fourth, the College claims that its investigation was both thorough and fair. To support that premise, it relies on the following: that Price supplied Pound with documentary evidence of Horwath's food safety and sanitation violations; that Pound interviewed the two Cafeteria workers concerning their claims about the grievant and found them to be credible; that Pound informed the Union president of the allegations against the grievant two weeks before the (April 1, 2005) meeting, thus giving the Union notice about the meeting's purpose; that when Pound met with the grievant on April 1, 2005, Pound gave him the opportunity to respond to the allegations made against him and the Employer's work performance concerns; and that Pound waited to hear the grievant's side of the story before he made a decision about disciplinary action. The College contends that the Union's claim that the April 1 meeting "flabbergasted" the grievant is disingenuous, at best. As the College sees it, the grievant was not caught by surprise with respect to the issues discussed at that meeting.

Fifth, the College argues that its decision to end the grievant's employment was supported by substantial evidence. To support that premise, it relies on the many admissions which the grievant made during the April 1, 2005 meeting, to wit: that he dropped a pan of meat onto his shoes and the floor and subsequently served some of the meat; that he had not always labeled food; that he reserved food that was three days old, contrary to Price's directive to not serve leftovers; that he served food that was undercooked; that he stored dirty umbrellas with food items, despite knowing that it was a safety violation and despite Price's directive to not store the umbrellas in the food storage area; that he stored food items directly on the floor, despite knowing that food items must be stored off of the ground; and that he stored food near Ice Melt, despite knowing that it is unacceptable to store food near potentially hazardous products like that. The College characterizes all these admissions as incriminating admissions of misconduct which alone substantiate the College's decision to end his employment. The College also argues that the grievant's misconduct was compounded by his willful refusal to rectify these issues over a substantial period of time, despite Price's counseling and disciplinary action. In the Employer's view, this made the grievant's behavior textbook insubordination.

Sixth, the College asserts that the grievant received equal treatment. To support that contention it notes that the Association offered no evidence that the College treated any similarly situated employee more favorably than it treated him when it asked him to resign because of admitted safety and sanitation code violations.

Additionally, the College contends that the grievant received due process and that it satisfied all procedural requirements prior to deciding to end the grievant's employment because: 1) the grievant had previously received notice of the performance complaints against him by Price via her verbal counselings and two written warnings so he had received

progressive discipline; 2) Pound had notified the Union two weeks in advance what the purpose of the April 1 meeting was to be, what complaints were going to be discussed at that meeting and the possibility that the meeting could result in disciplinary action against Horwath, up to and including termination; and 3) it discussed all of the complaints about Horwath's food safety and sanitation practices with him at the April 1 meeting and he was given the opportunity to tell his side of the story.

Seventh, the College maintains that the penalty which it imposed on the grievant (i.e. termination) was appropriate given the severity of his sanitation and safety code violations, his admitted misconduct, and his insubordination. To support that contention, the employer repeats its assertion that the grievant had received progressive discipline even though none is required under the collective bargaining agreement. It is the Employer's view that it had tried to correct the grievant's work habits and performance deficiencies through verbal counselings and disciplinary warnings to no avail. The Employer felt that given that history, more progressive discipline would be futile and serve no purpose, would not change his behavior or work habits, and would not rehabilitate him. The Employer also submits that it did not have to risk its health and reputation before ending the grievant's employment. It further avers that during the April 1 meeting, the grievant showed no remorse or indication that he would change his behavior and begin to follow Price's directives, or accepted any responsibility for his actions; instead, he remained in a state of denial with respect to his poor food safety and sanitation habits. Putting all the foregoing together, it is the College's position that termination of the grievant's employment was appropriate and warranted because of his repeated, willful and admitted disregard of his supervisor's directives, his admitted violations of food safety codes, or both.

It therefore asks that the grievance be denied, and the discharge upheld.

DISCUSSION

My initial focus of inquiry is on what happened at the end of the April 1, 2005 meeting when Pound gave Horwath the following Hobson's choice: resign or be fired. There is no question what happened next: Horwath said he resigned.

As noted in the POSITIONS OF THE PARTIES section, both sides made numerous arguments about this matter (i.e. Horwath's statement that he resigned). The reason the parties are fighting about it is because when an employee resigns, concepts associated with discharge are not generally applicable. However, I am not going to address any of those arguments. Not one. The reason is this: I have decided that I am going to analyze this case as a discharge – not as a resignation. My rationale for doing so will become apparent at the end of my discussion.

Having found that this case is going to be analyzed as a discharge, the focus now turns to the applicable contract language. Article XVI of the parties' collective bargaining agreement contains what is commonly known as a "just cause" provision. Section A of that

article provides that “after serving a . . . probationary period, no bargaining unit employee may be discharged except for just cause.” This clause requires the College to have just cause to discharge non-probationary employees. Horwath was a non-probationary employee. That being so, the obvious question to be answered is whether the College had just cause to discharge him.

The threshold question is what standard or criteria is going to be used to determine just cause. 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, procedural due process, and disparate treatment. I am going to apply that standard here rather than the “Daugherty” standard for determining just cause. I only apply the “Daugherty” standard if the parties agree to it, and that did not happen here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee’s misconduct. In making that call, I will address two separate components: did the employee do that which was alleged, and if so, was that misconduct? These two components will be addressed in the order just listed.

Normally at this part of the discussion in a discharge case, the arbitrator reviews the employee’s discharge letter for a listing of what the employee allegedly did and why he was fired. I am not going to do that here for one simple reason. There is no discharge letter. While an employer would usually be faulted for not providing a discharge letter to a discharged employee, I will not do so here because Horwath told the Employer’s representatives at the April 1, 2005 meeting that he resigned. Given his statement that he resigned, and the Employer’s reliance on same, there was no need for the Employer to provide him with a discharge letter stating what it was that he allegedly did and why he was fired.

Although there is no written discharge letter which identifies what Horwath allegedly did and why he was fired, it is nonetheless clear that at the April 1, 2005 meeting Pound questioned Horwath about numerous alleged instances of unsafe food and sanitation practices which had been attributed to him by co-workers Humpal and Sperberg, as well as by supervisor Price. As was noted in the **FACTS** section, Horwath’s responses to the various matters at the April 1, 2005 meeting can be categorized as either admissions, denials or do not remember.

For the purpose of discussion herein, I am only going to rely, with one exception that will be noted later, on those matters that can be categorized as admissions (i.e. the matters that Horwath admitted to at the April 1, 2005 meeting). My reason for doing so is twofold. First,

by doing this, there is no dispute about this part of the facts because Horwath admitted that he did those things at the April 1, 2005 meeting. Second, it is my view that the remaining matters raised at the April 1, 2005 meeting (i.e. those matters that Horwath either denied or could not remember) do not affect the outcome of this case. That being so, no other comments will be made about those matters.

At the April 1, 2005 meeting, Horwath admitted to the following: 1) that he dropped a pan of meat onto his shoes and the floor and subsequently served the meat that had not fallen out of the pan; 2) that he had not always labeled old food in the refrigerator and/or freezer; 3) that he reserved food that was three days old; 4) that on occasion, he had served meat that was undercooked; 5) that he had stored food items near dirty umbrellas; 6) that he had stored food items near Ice Melt; and 7) that he had stored food items directly on the floor.

The Association offered several defenses for the matters just referenced which, in its view, should excuse or justify Horwath's actions. Those defenses are addressed next.

First, with regard to the spilled meat matter, the Association contends that the Employer never proved that any of the meat that hit the floor was subsequently served. That argument misses the mark because it implies that the only "bad meat" was the meat that spilled onto the floor. Of course the meat that spilled onto the floor was discarded. The problem was what Horwath did with the rest of the meat in the pan. He served it. He should not have done so. That meat was also contaminated and should have been discarded, too.

Second, with regard to the old food matter, the Association avers that Horwath made it clear during the meeting that old, unlabeled food was not used beyond safe serving dates. Horwath's assertion in that regard was not substantiated. One of the Employer's ongoing concerns was that someone could get sick from eating the old food that Horwath continuously served. While that apparently did not happen, the Employer's concerns about health risks and liability were legitimate and well-founded.

Third, with regard to the three food storage matters, the Association characterized them as "red-herrings" and notes, in support thereof, that none of those matters was ever written up in State health inspections. In my view though, the fact that none of the three food storage matters was ever written up in State health inspections proves nothing. What matters is this: Horwath admitted at the hearing that all three of the food storage matters (which were documented with pictures) were food service code violations. Part of the Cafeteria manager's job is to ensure that food service codes are complied with. Horwath failed to do that when he stored food items near dirty umbrellas and Ice Melt, and when he stored food items directly on the floor.

I am now going to address the so-called returned food matter. The reason I am addressing it separately from the matters referenced above is because Horwath did not admit it at the April 1, 2005 meeting, but he eventually did at the hearing. Here's what I mean. At the April 1, 2005 meeting, when Pound asked Horwath about the returned food matter, Horwath

said he could not remember if he ordered the returned food put back on the serving line. At the hearing, when he was asked about it on direct examination, he said he told Ira Sommerville to “put it aside” (referring to the returned food). On cross-examination, he said he told Sommerville to “put it (i.e. referring to the returned food) out there, out on the counter out there.” In my view, Horwath’s last statement on the matter constitutes an admission that he told Sommerville to put the returned food back on the line.

As a defense, the Association contends that the Employer never proved that Horwath put the returned food back on the serving line. That argument misses the mark for the following reason. The returned food was not, in fact, returned to the line, but that happened in spite of Horwath’s actions – not because of them. Here’s why. As noted above, Horwath told Sommerville to put the returned food back on the line. He should not have done so. Instead, he should have discarded the food himself or directed someone else to do so. Sperberg overheard Horwath’s directive to Sommerville to put the returned food back on the line and interceded. She threw out the food herself on her own volition.

Since Horwath admitted to those actions referenced above, the next question is whether those actions were acceptable for a food service manager. My discussion on same is divided into two parts.

The first part concerns the so-called new matters which were raised at the April 1, 2005 meeting (i.e. those matters that Price had not talked with Horwath about prior to April 1, 2005). Insofar as the record shows, Price had never previously told Horwath that if he dropped a pan of meat onto the floor, all of the contents of the pan were to be discarded. Ditto for food that was returned. Be that as it may, both matters involve such basic food sanitation and safety procedures that Horwath, as an experienced food service manager, should have known that. The same is true of serving undercooked meat. The same is true of storing food items in the storage room near dirty umbrellas, Ice Melt and on the floor.

The second part of my discussion concerns the so-called old matters which were raised at the April 1, 2005 meeting (i.e. those matters that Price had talked with Horwath about prior to April 1, 2005). As noted in the **FACTS**, Price had directed Horwath on numerous occasions to label food in the refrigerator/freezer, and throw old food away and not reserve it. Thus, unlike the matters referenced above, these two matters (i.e. Horwath’s practice of not labeling food and not throwing old food away) had an extensive history. When Price had previously directed Horwath to label food and throw old food out, it was not merely a “suggestion” or a “recommendation”, as the Association put it in their brief; it was an order. Horwath should have followed her orders concerning same. He did not. This was problematic because employers have a legitimate and justifiable interest in ensuring that employees obey work orders and directives issued by supervisors. When employees fail to obey them, it undercuts the authority of supervisors. That, in turn, is detrimental to the working environment. Horwath’s failure to follow Price’s directives concerning these two matters had become, over time, a test of wills between the two. What I mean is that Price had directed Horwath to do those things numerous times, and he intentionally refused to follow her

directives. As such, Horwath's conduct on these matters amounted to insubordination. Here's why. *Robert's Dictionary of Industrial Relations* defines "insubordination" 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. Horwath's conduct in refusing to label food and throw old food away after being repeatedly directed to do so by Price certainly fits into the first category of proscribed insubordinate conduct (i.e. "failure to obey a management directive").

Aside from that, there is nothing in the record which establishes that Price's food service directives to Horwath were unreasonable, unattainable or unrealistic. To the contrary, Price's directives that Horwath follow basic and commonly-accepted food safety, handling and sanitation procedures were objective, achievable and within the employee's control. That being so, it is held that the standards of performance which the Employer expected of Horwath were reasonable. Additionally, I am not persuaded that the Employer's food and sanitation expectations changed over time. Horwath failed to meet the Employer's food and sanitation expectations when he did the acts referenced above. His unsatisfactory work performance in that regard constituted misconduct for which he could be disciplined.

The second part of the just cause analysis being used here requires that the Employer establish that the penalty imposed for the employee's misconduct 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, procedural due process and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. discharge). These matters will be addressed in the order just listed.

Before I address those matters though, I have decided to make the following preliminary comments. Unsatisfactory work performance can generally be attributed to one of the following causes: 1) simple or gross carelessness; or 2) lack of skill or knowledge; or 3) having a disability or physical handicap. The latter two categories are inapplicable here. With regard to the second category, the grievant has worked in food service for almost 40 years. He is an experienced food service manager who is familiar with the codes relating to food service. With regard to the third category, there is nothing in the record that indicates that the grievant's unsatisfactory work performance can be attributed to a disability or physical handicap of some sort or that non-work problems were a contributing factor. That being so, the grievant's unsatisfactory work performance can be attributed to simple or gross carelessness.

In unsatisfactory work performance cases that are attributable to carelessness, most arbitrators agree that following the standard progressive discipline model is appropriate since the poor performance can be "blamed" on the employee. The undersigned will do likewise.

The focus now turns to the question of whether the Employer used progressive discipline here in an attempt to improve the grievant's work performance. The Association

asserts that prior to being discharged, the grievant was not formally disciplined so the Employer failed to give the grievant progressive discipline. The following facts show otherwise.

First, it is undisputed that prior to November, 2002, Price had verbally counseled Horwath about various work performance problems related to sanitation and food safety that Price wanted Horwath to correct. What is disputed is how often this happened. Price testified that it happened numerous times while Horwath testified that it happened just a couple of times. Price's account is supported by the November 21, 2002 document (which will be reviewed next) wherein she wrote: "You and I have discussed many of these issues on numerous occasions and you have been unwilling to take the corrective actions I have directed." If that statement was inaccurate, and it had not happened "on numerous occasions" as Price stated, the grievant could have challenged it at the time. He did not. That being so, the statement just referenced in the November 21, 2002 document is relied upon to establish that prior to November, 2002, Price had verbally counseled Horwath numerous times about work performance problems related to sanitation and food safety that Price wanted Horwath to correct.

Second, in mid-November, 2002, Price inspected the Café and found numerous food safety and sanitation problems. Afterwards, she met with Horwath and reviewed all these problems and identified what he was to do to remedy those problems. Afterwards, she sent him a letter with the caption "Problems with the Lakeside Café" wherein she documented, in great detail, what she had found and what corrective action she had directed him to take. In that letter, she told Horwath that he was to label food; that food could not exceed its normal freezing life cycle; that expired food should not be served; that the food storage area was in an unacceptable condition; that the Café was constantly in a state of disrepair; that food was being kept too long before it was thrown away; that the Cafeteria employees were not working well together; that the staff was not motivated; and that he was to follow her directives. The Association does not challenge anything contained in the letter, but instead correctly notes that the letter does not expressly say it is a disciplinary letter, or a written reprimand, or a written warning. It should have, just to make it crystal clear. Notwithstanding that omission though, the letter was far more than what the Association characterized it as (i.e. the "memorialization of the conversation that Price and Horwath had the previous day.") Any letter that ends like this one did (i.e. saying that "This memo is to put you on notice that your performance is unacceptable", and "If I do not see immediate and sustained improvement in all the areas mentioned above, you will be subject to disciplinary action") is a written warning. Horwath's opinion to the contrary (i.e. that this was not a written warning) is not dispositive.

Third, on June 26, 2003, Price met with all the members of the Cafeteria staff and addressed numerous food safety and sanitation concerns with them. At the end of that meeting, Price singled Horwath out and told him directly that if he ignored her directives, he would be subject to disciplinary action up to and including termination. The next day (June 27, 2003), Price sent Horwath a letter with the caption "Leftovers from the Lakeside Café" wherein she documented, in great detail, what problems had been discussed at their

meeting the previous day and what corrective action she had directed him to take. In that letter, she told Horwath that there were complaints about the quality of food served in the Café; that leftovers were not to be served and were to be thrown out unless they were going to be used in the next day's soup, chili or barbecue; that old food was to be thrown out on a daily basis; and that if Horwath did not throw out the leftovers, the other two Cafeteria workers had permission to do it (i.e. throw out the old food). Once again, the Association does not challenge anything contained in the letter, but instead correctly notes that the letter does not expressly say it is a disciplinary letter, or a written reprimand, or a written warning. It should have, just to make it crystal clear. Notwithstanding that omission though, the letter ends with the following two sentences: "Up to this point, you have elected to ignore my directives concerning leftover food. Further failure on your part to comply with my directives will result in disciplinary action up to and including termination of your employment." Any letter that ends like this one did is a written warning. Once again, Horwath's opinion to the contrary (i.e. that this was not a written warning) is not dispositive.

Fourth, the Association avers that following the June, 2003 letter just referenced, Horwath thought that Price's concerns with his work performance were forgotten because she "never confronted the grievant at his work site, never pointed out any shortcomings, never pointed out anything wrong at the work site while the grievant was there." Building on that premise, the Association contends that the grievant logically concluded "that he had met Price's demands for change and things were OK and progressing smoothly." Those contentions are just plain wrong because they ignore the formal disciplinary meeting held June 17, 2004. Prior to that date, Price had documented about a half dozen concerns she had with Horwath's work performance which she reduced to writing. Price submitted a report to Pound, who then met with Horwath on June 17, 2004 and discussed those matters with him. After Pound heard Horwath's responses, Pound told Horwath he (Pound) did not find his (Horwath's) responses acceptable. Pound then told Horwath that if he was going to continue to work at the College, he had to change his attitude and comply with Price's work directives. This statement put Horwath on notice in plain and understandable terms that he was on very thin ice job-wise, and if he failed to carry out Price's directives, he would be discharged. In essence, Pound gave Horwath a final warning to change his behavior. Horwath's response to Pound made it emphatically clear that he understood that because he (Horwath) said he would (henceforth) comply with Price's directives and change his work behavior. Horwath then asked Pound for another chance. This last comment is particularly telling because it shows that Horwath understood the gravity of the situation. Employees do not ask their boss for another chance when things are "OK and progressing smoothly" as the Association put it in their brief. Instead, it is a comment which recognizes the converse (i.e. that things are not OK and not progressing smoothly).

At the hearing, Horwath offered his take, so to speak, on the half dozen matters addressed at the June 17, 2004 meeting. Not surprisingly, he tried to excuse and/or justify them, or make them out to be minor incidents that had been blown out of proportion. I am not going to go through those incidents though and make determinations on what happened. Here's why. In my view, the most important part of that meeting is what happened at the end

after all of the incidents had been discussed. I am referring, of course, to Pound telling Horwath, to his face, that if he did not carry out Price's directives he would be discharged; to Horwath's response that he understood; and to Horwath's response that he would change his (workplace) behavior. As previously noted, that verbal exchange put Horwath on clear notice that if he did not improve his work performance, he would be discharged. There was nothing obtuse about what Pound told Horwath, or which required Horwath to read between the proverbial lines.

Set against that backdrop, Horwath should not have been "flabbergasted" to learn at the April 1, 2005 meeting that he faced discharge because he had been progressively disciplined. As noted above, he had received two written warnings which were still in full force and effect. 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. Additionally, he had received the equivalent of a final warning on June 17, 2004 from Pound. These warnings put Horwath on notice that his work performance was unacceptable and he needed to follow the basic food safety and sanitation procedures. Pound testified that at the end of the April 1, 2005 meeting, he concluded that another written warning or even a suspension would not change Horwath's work behavior. Given the progressive discipline which the Employer had already imposed on Horwath which had not changed his work behavior, I am hard pressed to disagree with that conclusion.

Next, the Association raises several due process arguments which it believes should result in the discharge being overturned. Those contentions are addressed below.

First, it notes that the Employer did not give Horwath a written list of reasons for the discharge. That's true. However, I addressed this point previously and found that in this instance, I was not going to fault the Employer for not giving Horwath a discharge letter. The reason was this: Horwath said at that meeting that he resigned. In my view, his resignation relieved the Employer of their obligation to give Horwath a discharge letter containing the reasons for his discharge.

Second, the Association notes that Price had just two formal meetings with Horwath during his employment. That's true. That does not mean though that Price seldom communicated with Horwath. The record indicates that she did. In fact, the Association acknowledged in their brief that Price had numerous conversations with Horwath in the Café about various food safety and sanitation problems. While Price's communications with Horwath were informal, they were nonetheless sufficient to bring his work performance problems to his attention so that he could address and change them.

Third, the Association notes that management never set a timetable for Horwath to improve and/or change his work habits. Once again, that's true. Neither Price nor Pound ever said to Horwath "improve or change by x date." However, while timelines for improving and/or changing work habits are sometimes effective in prodding employees to change their work behavior, timelines can also be disadvantageous to employees who, for whatever reason,

need more time to change than is set by the employer. In this instance, I think it was to Horwath's advantage that no timeline for change was imposed by the Employer. This gave him ample time to implement the food safety and sanitation changes Price directed of him and improve his work performance.

The Association's next due process argument is that the Employer's investigation was not fair. I conclude otherwise, based on the following facts: that Price did an on-site investigation of the Cafeteria which included taking pictures of the code violations she found; that Price interviewed the three Cafeteria workers concerning their claims about Horwath; that Pound subsequently interviewed Humpal and Sperberg and found their claims about Horwath to be credible; and that Horwath was given the opportunity to respond to the allegations at the April 1, 2005 meeting. In my view, the record evidence does not establish that the Employer's investigation was botched or flawed. It instead was sufficient to pass muster. In so finding, I am aware that Price interviewed the three cafeteria workers without Horwath's knowledge or presence. An employer can do that.

The Association's final due process argument is that the April 1, 2005 meeting was flawed for the following reasons.

First, the Association avers that Horwath did not know when he walked into that meeting that it was a disciplinary meeting. Before I address the question of whether Horwath knew it was a disciplinary meeting, I have decided to call attention to the fact that the Association certainly knew that it was going to be a disciplinary meeting. They knew this because two weeks prior to the meeting, Pound told Association President Eades about Humpal and Sperberg's claims regarding Horwath's food service practices, and that the charges against Horwath were serious and could lead to his termination. Aside from that, the reason Pound talked to Eades was to arrange for a union representative to attend the April 1, 2005 meeting. When a union representative is invited to attend this type of meeting by management, this puts the union on notice that that meeting can potentially lead to discipline for the employee involved. Although the record does not indicate if Eades subsequently told Horwath what Pound told her about the upcoming meeting and its purpose, I infer that she did, because Pound did not ask her to keep the meeting's purpose a secret from Horwath. Thus, there was no reason for Eades to keep Pound's statements a secret from Horwath. Even if I am just plain wrong in that regard, and Eades did not tell Horwath that he was walking into a disciplinary meeting, the April 1, 2005 meeting was similar to the June 17, 2004 meeting in the following respect. The June 17, 2004 meeting was a disciplinary meeting because Association President Eades attended. When Horwath walked into the April 1, 2005 meeting, he saw that Chris Meyers was in attendance. Horwath knew that Meyers was a union official. Since a union official attended the June 17, 2004 meeting because it was a disciplinary meeting, Horwath should have known, as a result of seeing a union official at the April 1, 2005 meeting, that he was walking into a disciplinary meeting. If Horwath wanted to, he could have talked with Meyers about the meeting's purpose before the meeting started. He did not. That was his call to make. Likewise, at the end of the meeting, Horwath could have talked with Meyers about his options. He did not. Once again, that was his call to make.

Second, the Association notes that when the meeting started, Pound did not give Horwath a (written) list of the charges against him. The Association's point is well taken. Given the number of claims raised at that meeting, some of which were new, it would have made it easier for all in attendance to track those claims if they were in writing.

Third, the Association notes that Pound did not say anything about discharge until the end of the meeting. That's true. However, I'm persuaded that the reason Pound did not mention discharge until the end of this meeting, as opposed to the beginning of the meeting, was because Pound wanted to hear what Horwath had to say about the various claims before he decided on a course of action. That is classic due process. It was only after Pound heard what Horwath had to say about the various claims that he (Pound) concluded that Horwath was not going to improve his work performance, would not follow Price's work directives, and could not be rehabilitated. Pound based these conclusions on the admissions Horwath made during the meeting, on Horwath's lack of remorse or willingness to change his pattern of poor food storage and sanitation practices so that it was not repeated, and on Horwath's refusal to accept responsibility for the unsanitary conditions in the Café.

In light of the foregoing, I conclude that the College gave Horwath procedural due process before it fired him.

Finally, I find that Horwath was not subjected to disparate or discriminatory treatment in terms of the punishment imposed. Here's why. Horwath held a unique position at the College in that there is just one Cafeteria manager. That means that there is no one else to use for comparison purposes (i.e. who is similarly situated to him). While Horwath could certainly be compared to previous Cafeteria managers, the record does not contain any information about them, their disciplinary history, or their work performance problems. Even if Horwath is compared to the two food service specialists, the record does not establish that they engaged in the same misconduct as Horwath did or had the same work performance problems that Horwath had. In so finding, I have considered the Association's contention that Humpal and Sperberg were also responsible for throwing out old food, and that they were not disciplined for that (i.e. failing to throw out old food). However, even if they were responsible for throwing out old food, the reason they did not do so was because they were following Horwath's explicit directives in that regard. He was the one who directed them, on numerous occasions, to not throw out old food, and he was the one who became angry when they did. They wanted to throw out the old food but, not surprisingly, did not want to incur his wrath for doing so.

Accordingly, then, it is held that the severity of the discipline imposed here (i.e. discharge) was not excessive, disproportionate to the offenses, or an abuse of management discretion, but rather was reasonably related to the grievant's proven misconduct. Additionally, there are no mitigating circumstances which warrant altering this conclusion. The College therefore had just cause to discharge Horwath.

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

AWARD

That the College had just cause to discharge the grievant. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 4th day of May, 2006.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

