

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SEIU LOCAL #1

and

MADISON CONCOURSE HOTEL AND GOVERNOR'S CLUB

Case 4

No. 66874

A-6285

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Nathan D. Eisenberg**, 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin 53212, on behalf of the Union.

Ms. Bridget Hinton, Human Resources Director, Madison Concourse Hotel and Governor's Club, 1 West Dayton Street, Madison, Wisconsin 53703 on behalf of the Employer.

ARBITRATION AWARD

SEIU, Local #1 (herein the Union) and the Madison Concourse Hotel and Governor's Club (herein the Employer) are parties to a collective bargaining agreement dated covering the period from January 1, 2005 to December 31, 2007, which provides for arbitration of certain disputes between the parties. On April 2, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the discharge of Myrna Czoschke (herein the Grievant) from her position as a dishwasher. The undersigned was selected from a panel of WERC staff members to hear the dispute and a hearing was conducted on August, 16, 2007. The proceedings were not transcribed. The parties initial briefs by October 1, 2007, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the Employer terminate the Grievant, Myrna Czoschke, for just cause?

If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 7 – DISCHARGE AND DISCIPLINE

- 7.1 Just Cause. The Employer shall have the sole right to discharge, suspend, or otherwise discipline for just cause any employee who has completed his/her probationary period, subject to the grievance procedure. Prior to any disciplinary meeting, employees will be advised of their right to have a Union Steward present.
- 7.2 Progressive Discipline. Any employee, except probationary employees, may be disciplined for just cause. Ordinarily, such discipline would include the sequence of verbal warning, written warning, suspension and termination. Certain actions, such as gross negligence, sabotage, gross insubordination, theft, drunkenness on duty, or physical altercations, may require immediate progression to discipline including suspension and termination. In all cases, written notification shall be provided to the employee which will indicate the current step of the disciplinary process and the reasons for the disciplinary action. General Counseling may, but need not, also be used as a basis in the process of correcting and improving employee performance.

BACKGROUND

The Madison Concourse Hotel and Governor's Club is a hotel and restaurant facility located in downtown Madison, Wisconsin. The food service aspect of the operation consists of two restaurants – the Dayton Street Café and Ovations Restaurant – as well as a cafeteria, banquet facilities and room service. The food operations are managed by Executive Chef Charles Lazzareschi and the Concourse employs 30 employees in its food service operation, including 26 members of SEIU Local #1.

Myrna Czoschke, the Grievant herein, was hired by the Madison Concourse Hotel and Governor's Club as a dishwasher on June 29, 1999. She worked on the day shift, which ran from 9:00 a.m. to 5:00 p.m. throughout her tenure with the Employer. At all times pertinent hereto, Lazzareschi was her overall supervisor. Prior to the events set forth herein, she had no disciplinary record.

Prior to January 2007, the Concourse became aware from customer complaints, as well as staff observation, that there was a problem with dishes not getting completely clean in the washing process. To address the problem, on January 17, 2007 the Concourse installed a new dishwashing machine in the kitchen and Lazzareschi and Executive *Sous* Chef Jeffrey Bach received training from the manufacturer in how to properly operate it. On January 18, Lazzareschi and Bach, in turn, conducted a training session with the Grievant and two other dishwashers to instruct them in the new standard operating procedure for the new machine,

which included demonstrations on how to use, disassemble and clean the machine and how to properly add the cleaning chemicals. The primary difference in washing silverware was the necessity of sorting it and loading it onto flat racks for one wash cycle, inspecting it after washing to see if there was still food material on the silverware, rewashing it if there was, then putting it in upright cones for an additional wash cycle, which was a more time consuming procedure than in the past. At that time, the Grievant argued with Lazzareschi and Bach that the new procedure would be more work, but was told that the new procedure was necessary to insure the dishes were properly cleaned and to do the washing as she had been instructed.

On January 21, 2007, there was an incident in which several dishes had broken in the restaurant and the Grievant was instructed to pick them up by Banquet Chef Tim Cairnes. The Grievant began picking them up by hand and she was instructed by Cairnes to pick them up with a broom and dustpan for safety reasons. Another employee brought the Grievant a broom and dustpan in order that she could follow his directions, but she continued to pick up the dishes by hand contrary to Cairnes' instructions. Cairnes observed her do this. On January 22, Cairnes issued the Grievant a verbal warning for insubordination for her refusal to follow his instructions. The Grievant refused to sign the discipline, but did not grieve it.

On January 28, 2007, both Lazzareschi and Bach observed the Grievant washing a large quantity of silverware in upright cones and noted it was still dirty coming out of the machine. They asked the Grievant if she had first washed the silverware on flat racks and she stated she had not because it took too much time. She became argumentative and told Lazzareschi to not tell her how to do her job. Lazzareschi instructed her to wash the silverware using the proper method. A short while later, Lazzareschi again saw the Grievant washing silverware in upright cones. He again asked her if she had first washed it on flat racks and she said she had not because it took too much time and again began arguing with him in front of the other kitchen staff. Lazzareschi then ordered her to leave the premises and told her she was suspended until further notice. On January 30, the Grievant was terminated for gross insubordination. She filed a grievance and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Employer

The Employer asserts that the Grievant, s actions of arguing with her supervisor and refusing his instructions regarding proper dish washing procedure constituted gross insubordination and justified her termination under Article 7.2 of the labor contract. The Grievant argued with the supervisor at the training session on January 18, and asserted that the new procedure would take too long. On January 28, when the supervisor discovered she was not using the new procedure and told her to do so, she refused because she said it would take too much time. Later that same day, the supervisor again found her using the old procedure for washing silverware and told her to do it as instructed. She refused and began yelling at him in front of other employees, at which time she was sent home and told she was suspended pending an investigation.

The Grievant was properly and clearly instructed on the new dish washing procedure, which was not difficult or hard to understand. She understood the procedure, but refused to use it, even after having been instructed to do so many times. Sanitation is extremely important in the food service industry and proper procedures must be complied with. Her refusal to use the prescribed procedure, along with her defiant and hostile attitude toward her supervisor constituted gross insubordination and merited her termination.

The Union

The burden is on the Employer to show just cause for discharge, which is the “death penalty” in employment relations. The burden is to prove just cause by a substantial preponderance of the credible evidence. The Employer has failed to meet its burden.

A charge of insubordination requires that the supervisor’s instructions were clear and were clearly understood and, further, that the instructions were in the form of an order and the Grievant was informed that discipline would follow from refusal to obey. Here, there is considerable doubt that the supervisor’s instructions were clear and he failed to put her on notice that failure to follow instructions would lead to discipline. This procedure had been in place for ten days and the employer should have had a shakedown period for the employees to become familiar with it. Instead, the first time the Grievant failed to use the procedure she was fired. Had she been properly instructed in the procedure, she would have complied. Under the circumstances, her actions cannot be considered insubordination.

Further, there is no evidence that the Grievant’s conduct was threatening or abusive, which is a requirement for a finding of gross insubordination. There was no egregious conduct here, such as threats, use of profanity, violence or refusal to work. Even accepting the supervisors’ version of events, at most the incident was a minor argument. A one time disagreement with a supervisor about the best method for washing silverware is not gross insubordination. To merit termination outside the normal progression of discipline more must be shown. There is a presumption in favor of using progressive discipline, which can only be overcome by extraordinary circumstances. No such circumstances were present here. At most, the Grievant’s conduct deserved progressive discipline in the form of a reprimand. The Grievant should be reinstated and made whole.

DISCUSSION

In this case, the operative language in Article 7.2 of the contract permits the Employer to discipline employees for just cause, but codifies a practice of progressive discipline in the ordinary course, which, under most circumstances calls for incrementally increasing discipline from verbal warning to written warning to suspension to termination. The provision also states, however, that certain offenses are considered by the parties to be so serious that where a violation is established the Employer is justified in bypassing the normal progression and imposing more severe discipline, including suspension and discharge, for a first offense. The violations that merit this treatment include gross negligence, sabotage, gross insubordination,

theft, drunkenness on duty, and physical altercations. In just cause cases it is the Employer's burden to establish the elements of the offense meriting the discipline and that the degree of discipline was appropriate to the seriousness of the offense. This is not to say, however, that the arbitrator may substitute his judgment as to the appropriate degree of discipline for that of the Employer unless the discipline administered is unreasonable in light of the seriousness of the offense.

In this case, the Grievant, Myrna Czoschke, was terminated from her position as a dishwasher on January 30, 2006 for what the Employer termed "gross insubordination," arising from a series of arguments between her and her supervisor over her failure to use the prescribed procedure when operating the new dishwasher. She had also received a verbal warning eight days earlier from another supervisor for refusal to follow his instructions for proper safety procedures in cleaning up some broken dishes. These were the only disciplines she received in her seven years of employment by the Concourse. It is the Employer's contention that the Grievant's refusal to follow the standardized procedure, along with her belligerence toward her supervisors when corrected and directed to wash dishes according to the prescribed method, constituted gross insubordination and merited her summary termination outside the normal progression of discipline. The Union argues that the Grievant's actions were the result of a misunderstanding, not insubordination, in that she did not understand the new washing procedure or the supervisor's instructions and did not intentionally disobey. Alternatively, the Union contends that even if the Grievant's actions could be characterized as insubordinate, they do not rise to the level of gross insubordination and, thus, only merit, at most, a written warning.

As noted above, the language in Article 7.2 lists a number of "capital offenses" that merit discipline outside the normal progression, up to and including summary termination. Some of these, such as theft, sabotage, drunkenness on duty and physical altercation are *per se* offenses which don't require an assessment of severity. That is to say, if the elements of the offense of theft are established it may constitute a dischargeable offense whether the item stolen was \$100 from a cash register or a ballpoint pen. A charge of gross insubordination, however, involves an assessment of degree, because by definition gross insubordination is a more serious offense than simple insubordination. Thus, to support a discharge, the Employer must not only establish that the Grievant was insubordinate, but that her insubordination was of a most serious kind, or else the term "gross" modifying the insubordination loses meaning.

The evidence produced by the Employer is to the effect that the Grievant was instructed in the new procedure for washing silverware in the new dishwasher, and in particular "flat-racking" the silverware in the first cycle, on January 18, 2006. At that time, she argued with her supervisor, Executive Chef Charles Lazzareschi, about the fact that she didn't want to use the new procedure because in her opinion it would take too much time. At that time she was told that time was not an issue and that in order to assure that the dishes were properly cleaned she was to use the new procedure. Ten days later, on January 28, Lazzareschi and Bach discovered her washing silverware in upright cones and asked her whether she had flat-racked it first. She said she had not because it took too long. Lazzareschi told her to flat-rack the

silverware as instructed. A short while later, Lazzareschi again found her using upright cones and told her to flat-rack the silverware, which she refused to do. She again argued that the new procedure took too long, refused to use it and became loud and argumentative toward Lazzareschi. This second incident was also witnessed by Executive *Sous* Chef Jeffrey Bach and the other kitchen staff on duty at the time. Relevant to this matter, as well, is the fact that seven days earlier, on January 21, the Grievant refused to use a broom and dustpan when picking up broken dishes when instructed by a supervisor to do so, instead using her hands, which violated proper safety procedures and for which she received a verbal warning from Banquet Chef Tim Cairnes. As a result of this sequence of events, the Grievant was initially suspended indefinitely and ultimately terminated on January 30.

The testimony of the Grievant was markedly different. She testified that she didn't remember the need for flat-racking silverware being discussed at the January 18 training session. At one point she recalled Lazzareschi saying something about "flat-racking," which she didn't understand, but she didn't ask for clarification. As to the January 28 incident, the Grievant agreed that Lazzareschi asked whether she had flat-racked the silverware and she denied it, but claimed to not have understood that Lazzareschi expected her to do so. She stated that another employee had sorted the silverware into cones and she didn't want to waste his effort. She did not remember ever being told before January 28 that she needed to flat-rack silverware. She also stated she did not recall stating that flat-racking the silverware took too much time, refusing to do it, or arguing with Lazzareschi. As to the January 21 incident, the Grievant denied refusing to use the broom and dustpan when instructed, as set forth in the verbal warning she received. She did not grieve the discipline, however, nor did she explain her failure to do so.

With respect to the incidents in question, there is no way to reconcile the different versions of the witnesses and, in my view, the testimony of Charles Lazzareschi and Jeff Bach is more credible than that of the Grievant. Largely this is because the Grievant contradicts herself at several points. First, her statement that Lazzareschi said something about "flat-racking" during the training, but she didn't understand it or hear it completely is not believable because other employees also went through the training at the same time and apparently had no difficulty understanding and applying the new protocol. Also, Lazzareschi and Bach were quite clear that the Grievant argued about the amount of extra time flat-racking would take, which belies her contention that she didn't understand what was expected. Likewise, as to the incidents on January 28th, she first said she didn't know she was supposed to flat-rack the silverware, but later said she knew she was supposed to flat-rack the silverware but did not do so because another employee had already put the silverware in cones and she didn't want to waste his effort. Further, her testimony about the training and the incidents on January 28th indicated more of a lack of recall about what was said by both herself and the supervisors, rather than a denial that Lazzareschi and Bach's testimony was true. Finally, as to the January 21st incident, her denial of the circumstances as set forth in the discipline is weakened by her failure to grieve the discipline at the time if it was deemed unjustified. Notable, too, is Bach's testimony regarding the broken dish incident. Bach did not witness the incident, but was present at the discipline meeting with Cairnes and the Grievant. He testified that the

Grievant didn't seem to care about the warning and expressed an intention continue to operate as she always had.

I am satisfied, therefore, that the Grievant did, in fact, understand the directive to flat-rack silverware and argued with her supervisors at the January 18th training about the need to do so. I am further satisfied that her failure to flat-rack the silverware on January 28th was willful, particularly after she was specifically directed to do so, and that she did again argue with Lazzareschi about whether she needed to follow the prescribed procedure. This behavior is consistent with her actions on January 21st in refusing to use a broom and dustpan to pick up broken dishes after having been instructed to do so. If she felt the procedure was poorly conceived, ineffective, or unduly burdensome she was within her rights to say so at the training on January 18th, which she did. Nevertheless, after having had her say, once she was directed by her supervisor to use the flat-racking procedure she was obliged to obey. In my view, therefore, her refusal to use the procedure and confrontations with Lazzareschi and Bach on January 28th clearly constitute insubordination.

The Union contends that the Grievant's actions did not merit discipline, however, because the Employer did not adequately inform her that her actions could result in discipline. I find this argument unpersuasive. The Union's argument is based on the assumption that the Grievant was terminated for not properly flat-racking the silverware when she had not been adequately trained or instructed and was unaware of the disciplinary consequences of failing to do so. I have already determined, however, that the Grievant did understand the procedure, but didn't agree with it. Further, it is clear from the record that it was not the Grievant's failure to flat-rack the silverware that resulted in her termination; rather it was her repeated refusal to do so after receiving a direct order from Lazzareschi. Having found that the Grievant refused a direct order from her supervisor, not once but twice, and directly challenged his authority in front of other employees, it is inconceivable that the Grievant would not know that such behavior would likely have disciplinary consequences. This is especially so since she had been disciplined for disregarding a supervisor's order only a week before. In labor relations, when an employee disagrees with a directive from management the general rule is "obey now, grieve later." The Grievant did not do this and her failure to do so constituted insubordination.

Having found that the Grievant was insubordinate on January 28th, I now turn to the question of whether her actions on that date rose to the level of gross insubordination. The Union asserts, and cites supporting authorities, that gross insubordination requires egregious or outrageous behavior involving threats, violence, abusive or profane language, refusal to work, or a challenge to the supervisor's authority. It maintains that none of those elements are present here and also points out that the termination notice only cites refusal to perform her job as a reason for discharge. The Employer maintains that the Grievant's refusal to follow Lazzareschi's orders, coupled with her defiant attitude, evidenced by her yelling at him, constitute gross insubordination and justify termination.

The termination notice does, as the Union states, describe the Grievant's behavior as "refusal to perform job as directed," but also refers to written statements by Lazzareschi and

Bach, which were appended to the notice. Lazzareschi's statement regarding the January 28 incident was as follows:

"On January 28th at 4:30 pm I witnessed Myrna washing the flatware improperly. I asked her if she first ran the flatware first on flat racks, she said no and then started yelling at me telling me that she did not have time to do it the proper way. I again told her that she needed to do it properly with a flat rack first. Myrna went back to work. At 4:45 pm I noticed two more racks of flatware coming through the machine in vertical cups. I again asked her if she washed them first on the flat rack and she told me no and started to argue again at this time I asked her to leave the property and that she was suspended until further notice."

Bach's s written account of the January 28th incident was as follows:

"On January 28th I was retrieving some clean dishes from the end of the dish machine when I saw a rack of silverware coming out of the machine that looked very dirty. I asked Myrna if she had run the silverware through on a flat rack first. Charles walked by and asked Myrna the same question. She said she hadn't used a flat rack first. Charles asked her why, and she argued with Charles saying she didn't need to because it was just more work. Charles again told her that she needed to it properly with a flat rack first."

Bach did not witness the second confrontation between Lazzareschi and the Grievant and, thus it was not referenced in his statement. Nevertheless, it is clear from the statements that the Grievant's termination was not just due to her refusal to follow directions, but also her hostile and defiant attitude toward her supervisors.

Standing alone, the Grievant's failure to flat rack the silverware after having been trained to do so might constitute negligence. The fact that she had argued with Lazzareschi and Bach about the need to do it, however, raises her conduct to the level of insubordination because it shows that she understood what was expected and chose not to do it. This is consistent with her behavior in the broken dish incident where she ignored a directive from a supervisor because she didn't agree with it. Her insubordination was further aggravated by her arguing with Lazzareschi on January 28th, refusing to follow his directive at that time, yelling at him and challenging his authority in front of the other kitchen employees. In my view, this repeated and increasingly defiant behavior raised the Grievant's misconduct to the level of gross insubordination. The contract is clear that gross insubordination is a "capital offense," for which the Employer may bypass progressive discipline and impose more severe sanctions, such as suspension or discharge. Here, the Grievant's consistently defiant behavior convinced management that progressive discipline would not be effective and led them to discharge her as they had the contractual right to do. Having found no extenuating circumstances in the record that either explain or mitigate the Grievant's behavior, I decline to remit the penalty imposed by the Employer.

For the reasons set forth above, and based upon the record as a whole, I hereby issue the following

AWARD

The Employer terminated the Grievant, Myrna Czoschke, for just cause. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 14th day of February, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

