

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**POYNETTE AREA SUPPORT TEAM**

and

**POYNETTE SCHOOL DISTRICT**

Case 17  
No. 66863  
MA-13665

---

**Appearances:**

Wisconsin Education Association, by **Nancy J. Kaczmarek**, Legal Counsel, 33 Nob Hill Road, PO Box 8003, Madison, Wisconsin, 53708-8003, appearing on behalf of the Association

Lathrop & Clark, LLP, by **Shana R. Lewis**, 740 Regent Street, Suite 400, Madison, Wisconsin, 53701-1507, appearing on behalf of the District.

**ARBITRATION AWARD**

Poynette Areas Support Team, herein referred to as the “Association” or “PAST,” and Poynette School District, herein referred to as the “Employer” or “District,” are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. The Association requested the Wisconsin Employment Relations Commission (WERC) to appoint a staff member to serve as impartial arbitrator to hear and decide the instant grievance. The WERC appointed Coleen A. Burns as Arbitrator and, with the agreement of the parties, a hearing was held on July 24, 2007 and August 3, 2007. The hearing was transcribed and each party filed post-hearing briefs, the last of which was received November 2, 2007.

**ISSUE**

The parties stipulated to the following issues:

1. Did the District have just cause to suspend the Grievant without pay for 12 hours?
2. If not, what is the appropriate remedy?
3. Did the District have just cause to terminate the Grievant?

4. If not, what is the appropriate remedy?

### CITED CONTRACT PROVISIONS

#### Article XXVI. Employee Evaluation

Employee evaluations shall occur annually and shall among other things include a conference between supervisor and employee and a summary document. In the event the employee believes the evaluation to be incomplete or inaccurate, that employee may put any objections in writing and have the objections attached to the evaluation report. The employee shall sign the written evaluation indicating that he/she has read it. Signing the evaluation does not indicate agreement. The employee shall be given a copy of any and all written evaluation items placed in that employee's file within ten (10) working days of its placement.

. . .

#### Article XXVIII. Discipline and Discharge

##### Probation

All newly hired employees shall serve a period of probation for 120 days which may be extended an additional 60 days with written notice to PAST. Probationary employees may be disciplined or terminated from employment by the District and such discipline or termination will not be subject to the grievance arbitration provisions of this agreement or to the Wisconsin Employment Relations Commission. Except as expressed herein, all provisions of this agreement shall apply to an employee as of the first day of employment. If an employee quits or is terminated during the probationary period no accrued leave, vacation or other benefits shall be due him/her.

Employees who have completed the probationary period satisfactorily and are continued thereafter shall be entitled to all rights and protections afforded by this agreement retroactive to the original day of employment. Such employees may be disciplined or discharged for just cause.

#### Article XXIX. Management Rights

The Board retains the rights and responsibilities to operate and manage the school system and its programs, facilities and properties, and to manage and control the activities of its employees. The Board recognizes and agrees that nothing herein shall be construed to permit or authorize the exercise of management rights in a manner inconsistent with the terms of this agreement or applicable state or federal constitutions or laws.

It is expressly recognized that the Board's operational and managerial responsibility includes:

...

- G) The hiring, supervision, evaluation, discipline and discharge of all personnel, including the conditions of their continued employment.

...

### **BACKGROUND**

The Association is the collective bargaining representative of various employees of the District, including Kathleen Sullivan, hereafter Grievant. The Grievant has been employed by the District since March 5, 2001. From the time of her hire until the time of her discharge, the Grievant worked as a high school night shift Custodian.

Supervisor Egger performed his first annual evaluation of the Grievant in January of 2002 and his last annual evaluation in January of 2006. Supervisor Egger did not evaluate the Grievant, or any other Custodian, in January of 2007.

The District's evaluation form contains thirteen (13) categories applicable to Custodians. Each category was to receive a "Performance Appraisal" rating of Very Good, Satisfactory, or Needs Improvement. The Grievant received a "Very Good" rating more often than a "Satisfactory" rating and never received a "Needs Improvement" rating. The Grievant's evaluations establish that, as of January 2006, the District considered the Grievant to be a good employee.

In a note dated October 2, 2006, Supervisor Egger advised the Grievant as follows:

Re: checking activity board

I need you to start your work shift from the custodial room #125. This is where the activity board is located and is the first thing that should be checked. You currently have been parking out front and going to the custodian room #160. You can park where you want to but at the start of your shift you will need to come to the custodial room #125 by the Kitchen and read what is needed for activity setup. Possibly you could make a change in your route and clean the kitchen first as long as you are in the same area. This also allows me to meet with all night custodians at one time if needed. (Dist. Ex. #6)

At the start of the 2006-2007 school year, Mark Egger, the District's Maintenance Supervisor, advised District Administrator Wolfe that there were issues with the high school custodial staff. In response, District Administrator Wolfe interviewed high school custodians,

as well as other District staff. Supervisor Egger supervises the Grievant, as well as the other District Custodians.

The District Administrator discussed the results of her employee interviews with PAST representative John Horn. On November 2, 2006, following her discussions with PAST representative Horn, the District Administrator and Supervisor Egger held a custodial meeting that was attended by PAST President Gilbertson and the high school Custodians who worked at least part of the night shift, *i.e.*, the Grievant, Ron J, Mickey N, and Jean E. At this meeting, each Custodian acknowledged, in writing, that each had attended the meeting and received a copy of the following memorandum from District Administrator Wolfe and Supervisor Egger dated November 1, 2006:

RE: Custodial Areas of Concern and Actions Required

Several issues were brought to the attention of administration as difficulties in the high school custodian/maintenance department during the night shift. Mark Egger and Barb Wolfe heard from each custodian individually about concerns. The following is provided to address four concern areas. This memo and the discussion at our November 2 meeting will address the concerns identified. In the hope of Administration and PAST leadership this will resolve the concerns. The following procedures are in effect immediately upon receipt of this document.

1. Jean, Kathleen and Ron will meet at 3:00 p.m. each day in the "custodial room". Mickey will also meet as needed. Mark Egger (or another administrator in Mark's absence) will be present most days. At this time each individual shall obtain walkie-talkie and check working status, and address the night's activities. This shall include a written checklist of procedures. An assigned time to meet to complete activities requiring group work will be stated. Mark Egger shall direct equitable division of duties. On days that Mark cannot meet at 3:00, Jean, Kathleen and Ron shall still arrive and obtain walkie-talkies, check working order and board for duties. A sheet to record this check-in will be in the custodial room. Randy Gilbertson, PAST President, will attend these meetings on occasion if his schedule allows.
2. Communication with each other is required. This means that walkie-talkies must be working and turned on. Each individual must be responsive to calls from others at all times. This includes both co-workers, administration and the supervisor. Interactions shall be courteous and in the spirit of cooperation and getting the job done. It is required that the other co-workers be notified when any individual leaves the building. This includes leaving for supplies, lunch/dinner, at the end of shift, to the K-8 building or any other reason.

3. It is Mark's expectation that he be contacted according to the following process when he is not in the building. First use the district cell phone (number given). If he does not answer his cell phone and contact is essential you may contact his home phone (number given). If it is not possible to reach him leave a message on his district phone extension 302. Contacts should be made for required purposes only. Required purposes include: illness, medical emergency and building emergencies.
- 4 Work orders are needed for all maintenance requests. Forms are available in each building office/teacher work room. It seems that some confusion exists. Ms. Wolfe will send e-mail clarification to all staff.

The purpose of this document is to provide clear understanding of the items identified as concerns. It is not intended as disciplinary. Mark Egger is responsible to monitor the implementation of the items in this memo. Randy Gilbertson, PAST President, will observe implementation of these items and assist in communication as needed. A review to ensure that these items are clear and prior concern areas addressed will take place before February 1, 2007.  
(Dist. Ex. #10)

...

PAST President Gilbertson acknowledged, in writing, that he attended the meeting, had received a copy of the above memorandum, and "agree with the items contained herein as appropriate expectations within the PAST Agreement."

The minutes of this November 2, 2006 meeting, prepared by District Secretary Meg Hanson, include the following:

...

Barb stated that Mark and she had met with each custodian to discuss any concerns/problems they had. These issues were then discussed with Randy Gilbertson, PAST President and John Horn, PAST Union representative.

Barb distributed the attached memo and gave a brief outline of the concerns hat were brought to her and Mark's attention. She and Mark stated they hoped all areas of custodial concern were covered by the memo.

Mark handed out the checklist that is to be used each day by the evening custodians. There seemed to be a clear understanding of what was expected where the checklist is concerned. It was stressed that this checklist is subject to change. Custodians should use the list for two weeks and make notes of anything they feel needs to be changed/added. It will be discussed and changes made as needed.

Item 1 was read and discussed. There were no concerns stated by those present. Mark further stated that he expected the custodians to decide who would do what tasks between themselves. They should set up a time to meet to work together at athletic area cleanup. This should be done in an equitable manner making sure that all areas are covered. If they cannot come to an equitable agreement between themselves then Mark will make the decision for them. Mark stated that covered areas include any place students, coaches, etc. use as well as snow and ice removal of main entry areas.

Item 2 Communication was gone over. Walkie-talkies will be checked at the start of each shift to be sure they are in working order. Each walkie-talkie will do a check with Mickey to be sure it can send and receive. Mickey will communicate he is leaving at the end of his shift. At the end of the shift, all custodian (sic) will communicate the area the (sic) have checked and have locked to the other custodians. (i.e. Ron will state "all my doors are secured" and mark the time on his checklist.) Custodians need to communicate anytime they are leaving the building for whatever reason. All custodians are expected to answer another custodians communication.

Item 3 contacting Mark was discussed. Mark should only be contacted for "serious" issues (i.e. water shooting, sparks flying). Call Mark first. For specific maintenance issues call Randy. Other issues should be written on a work order and left for the following work day. Mark should be first contacted on his cell phone and 2<sup>nd</sup> contacted at home. If not available for a serious item, call Randy. For other calls leave a message on Mark's school voice mail.

These items will be reviewed before February 1, 2007. If needed there will be an earlier meeting. If someone is not following the items covered on the attached outline and in these notes, the other custodians need to communicate that to Mark. If Mark cannot resolve the issue it will go to Barb. Randy and John Horn are also available for any union issues. Go the proper authority.

This is not a disciplinary action. By implementing these procedures we hope to avoid any discipline. It is hoped that this will be a positive change. We want to have a productive and comfortable work environment.

Randy stated that the memo had been reviewed by himself and John Horn and found to be in order. All parties present signed the memo that is (sic) had been discussed with them. The procedures covered by the memo will be implemented on Monday, November 6, 2006, and reviewed as appropriate.  
(Dist. Ex. #11)

The check list handed out by Supervisor Egger contained the following items:

Start of shift radio check – check battery charge level – response from co-workers

Check activity/board/calendar-schedule athletic area clean time

Check supplies on cleaning carts-stock up at start of work shift

Cleaning of athletic areas: radio and meet at agreed time and area

gymnasiums:

locker rooms:

bathrooms:

main entry point: (snow/ice removal)

End of shift radio check while securing building-response from co-workers

Time doors are secured: (Dist. Ex. #9)

Following each item, was a box for each day of the work week. This box was to be checked or filled-in with the appropriate information.

Supervisor Egger issued a November 14, 2006 letter to the Grievant that states as follows:

The purpose of this letter is to convey to you actions related to your tardiness on November 6, 2006. The meeting held on November 2, 2006, with all high school night custodians addressed concerns and actions that would be required to correct the problems. In this meeting we talked about communications and work areas. Item number 3 on the sheet discussed calling me on my cell phone as the first line of communication. On November 6, 2006, you did not call me on my cell phone as directed and signed by you as understanding the rules.

You left a message on my office phone at 2:19 p.m. telling me you had a doctor's appointment and were running late. When you did arrive at 3:30 p.m. you told me you had a doctor's appointment and would use personal time for that half hour. I asked for a doctor's excuse for that time. The next night I asked if you had the doctor's excuse, you told me that you did not go to the doctor and did not have a excuse. You also indicated that you had not told me that you had a doctor's appointment. I played the recording of the voice mail you left verifying that you had said a doctor's appointment. This all occurred only 3 working days after our meeting and the first night using the checklist created.

You did not follow procedures and failed to comply with work rules. The district has decided to allow use of 30 minutes of personal time, although the PAST agreement clearly allows disapproval. This disciplinary letter will be

placed in your personnel file. Further violations will be subject to additional disciplinary action up to and including discharge. (Dist. Ex. #12)

...

Supervisor Egger issued a January 11, 2007 letter to the Grievant that states as follows:

At our meeting on November 2, 2006, you were provided with written and oral directives. There continues to be issues with the quality and quantity of your work. After conducting my morning inspections and our daily meetings, you are not following each through with the written and verbal directives. Your check off sheets are not turned in each day and when reviewed do not reflect what my inspections find. You indicate that your tasks are completed to standard and they are not. Our walk through in your areas that needed more cleaning and maintenance on December 4, 2006, provided you with specific information about expectations. You acknowledged that you understood. Tasks that you are supposed to do by yourself are not done by you and get done when your co-workers do them.

Specific examples of problems related to the November 2 agreement are as follows:

1. Meetings at 3:00 have largely occurred as directed. Monday, November 6 you did not comply. Please refer to letter to you dated November 14. In addition, we recognize that you have not been in attendance approximately 4 or 5 days since and as of January 8<sup>th</sup>, 2007 begin work at 7:30 p.m. This change in schedule requires that you still begin in the custodial room and get walkie-talkie, check off sheet, and look to the board for special duties.
2. Communication is not completed as directed.

You do not always check in when you take breaks as was directed. Monitoring by Mark Egger shows that you do not check in consistently. Specific problem dates include:

- a. January 9, 2007 – no contact at start of day. In addition you did not notify your co-workers about your breaks.
- b. November 7 – you were reminded to communicate with co-workers by Mark Egger



- c. November 8 – specific reminder from Mark with direction about lunch and break times
- d. November 9 – miscommunication with Ron Jacobson about leaving building as heard by Mark.
- e. November 22 – You were directed to return the truck key to Ron Jacobson that you borrowed after your's was damaged. You did not. Ron was then required to ask you to have the key returned. You did not meet the cooperation standard expected.
- f. November 30 – You switched radios with Kathy Mesiter and Kathy then needed to replace assigned radios.

In addition, there have been reports from your co-workers, when they are specifically asked by me, that you have not notified them of breaks or when you are leaving the building.

This is unacceptable behavior for which you have had at least 6-10 reminders and have been given assistance.

- 3. You have not followed the contacts system to reach Mark Egger. The letter you received on November 14 describes some specifics in this area.
  - a. January 4 – contact 10:10 on home phone rather than process directed by district cell phone first, home second.
  - b. November 17, 2006 – you called Meg Hanson at her home to report an open door in the administrative office. This also does not comply with directives.
- 4. Work orders -

One work order has been received since our meeting. You have not changed light bulbs. Since you have not completed a work order, we have not been alerted to see if there is another issue requiring maintenance attention.

On November 29, 2006, an additional memo of directive was provided. This letter addressed your lunch and other breaks and lack of communication with co-workers and cleaning areas that are not assigned to you.

This continues to be problematic. An example is on Tuesday, January 9, 2007, when you cleaned the front entry (per your statement) and that was an area not assigned to you during your medical restrictions.

The following items are also unacceptable:

- You have not completed your check off sheets on a number of days. Specifically, none have been received since before the holiday break.
- The written statement of duties to be done on December 27 and 28 has not been received by me to date.
- Light bulbs have been out for at least 4 weeks without being changed. They are changed when others do it. (Mickey and Jean have changed some in your area.)
- The “old locker rooms” have not been cleaned to standard on the days that you alone are assigned to clean them.
- The glass above the doorway of the south hall entry point has not been cleaned for almost 2 months.
- You do not consistently secure the buildings (examples: showers running, inside doors not locked, gym doors left open, lights on in areas such as chorus room storage)
- You have not completed documentation required and as directed by your supervisor. For example the science eye-wash emergency shower cleaning station and testing documentation has not been completed as directed. The last date done was 12-18-06 when you were reminded to do so by your supervisor. Per your job duties the eye-wash cleaning must be done and documented weekly and the emergency shower cleaning station must be cleaned and tested monthly.

Another serious concern is your behavior to your supervisor. You may not use profanity nor the degree of disrespect and disregard you did on January 9, 2007. This will not be tolerated.

You have also confronted Ron Jacobson in an inappropriate manner when you used profanity on January 9<sup>th</sup>. This will not be tolerated. Mr. Egger will ask your co-workers about night activities each day to understand work completion and prioritize duties. Your co-workers are required to answer their supervisor. You have no right to attempt to create an environment for them where they are uncomfortable answering specific questions.

Because of your lack of compliance with directives, I am recommending to Ms. Wolfe, District Administrator, that you be on unpaid suspension for the days of January 12, January 15 and January 16 for the 4 hours you would normally be working per your medical restriction. (Dist. Ex. #20)

...

On January 11, 2007, the District Administrator issued a letter to the Grievant stating:

I have met with Mark Egger regarding the enclosed letter he will be giving to you this evening. I am in full concurrence with Mark's recommendation. Therefore, you are on unpaid suspension for the 4 hours each of the days of January 12, 15 and 16 you are currently working due to your medical leave. (Jt. Ex. #4)

...

Supervisor Egger issued a February 1, 2007 memorandum to the Grievant. When the Grievant advised Supervisor Egger that she had lost her copy of this memorandum, he provided her another copy of this memorandum, with added statements, as follows:

Re: Kitchen Floor

My inspection this morning found the kitchen floor in front of the serving line not cleaned to the standards that is needed. My shoes had the sticky noise and I saw a spot about mid way that you missed with the mop.

I met with you on Friday, January 26<sup>th</sup> and showed you area by the kitchen office that needed more thorough mopping. We talked at that time about the dilution of the cleaner that your using as well as possibly varying the cleaning solutions all together. I reminded you to change mop water frequently and make sure to pick up the mats. I found that Monday morning the 29<sup>th</sup> the floor looked good and then on Tuesday morning the 30<sup>th</sup> the floor was not cleaned to the standards that is needed. I talked with you on Tuesday night before the board meeting and told you to make sure the floor is cleaned properly and talked about using clean hot water for the final mopping. You truly need to improve on this problem and do a more thorough cleaning and do it on a consistent basis.

Please don't leave the mats with edges flipped back as this is a trip hazard.

Kathleen: 2-7-07

You requested a copy of the above memo after losing the original. I asked that you put your request in writing and put it in my mail box. I have not received a written request as of yet, but feel this is important to you and will help you improve cleaning of the Kitchen area. (Dist. Ex. #21)

Supervisor Egger issued a February 27, 2007 letter to the Grievant stating:

Although numerous directives and specific training have been provided to you either verbally or in writing, your performance continues to be unacceptable. The following is a summary of some of the most recent issues that have occurred since you were given the January 11 letter of discipline and the unpaid suspension was implemented.

Monitoring of communication by Mr. Egger from outside of the building documents that you do not consistently follow the directive given to communicate with co-workers or the document agreed to you by you and your co-workers. You did not respond to break notices on February 8 and February 9. Monitoring at 5:20 when Ron called was not acknowledged, yet at 5:22 monitoring revealed that you responded to Jean. You also did not acknowledge Mickey when noticed he was leaving. Your co-workers confirm this inconsistency when they are asked. You have received multiple warnings and each day you check that your walkie talkie is working with Mark and/or Randy present.

You have yet to fulfill your responsibilities to notify maintenance of problems through work orders. One specific example is a broken door closer in the locker room that has not been addressed (since before January 11, 2007 when the disciplinary letter was written). You have been given clear directives that this is your responsibility.

You have been inconsistent with completion of your check off sheet. You have turned them in most days (none for 2-16-07) but your work record is not accurate. You indicate that you complete tasks that were completed by your co-workers. You indicate break times that do not match actual breaks, and often you leave times off. You are untruthful in your reporting of the nights activities and your work schedule. In addition, you have reported or been observed on several breaks (you are only entitled to 2 – 15 minute breaks and your 30 minute lunch). You were directed to take lunch/dinner from 7:00 – 7:30. You report and have been observed having lunch at other times. This is a violation of your supervisor's directive. You reported that you are to eat from 7:00 – 7:30 when asked, after telling me you sat by Sue Laib at 8:00“ish”. You have been given clear directions about accurate reporting on check off sheets.

You continue to perform below acceptable standards although you have been provided numerous reminders and specific directions. Examples include cleaning the kitchen, the windows on the south entry, and the shower rooms. Specifically, the shower room had footprints in the shower area, cobwebs are still in the entry that have been there for months, the eye wash has not been cleaned, tested and documented weekly and the south entry windows were

cleaned once following the January 11 letter and not again. This performance continues to be unacceptable.

You have also defied specific directives from your supervisor and the principal. For example, on the night administration was alerted of a possible break-in, you were directed not to tell anyone. You told the community members from the wrestling organization. You told your co-workers that they had the right to know. You had no right to defy this directive. It was given as a part of our efforts with that incident. Your actions could have tipped off the burglars and interfered with our investigation. This is a serious issue.

The second serious example of this also occurred on February 2, 2007, when the fire alarm went off. There was a chronology of events prior to the incident to be described; however, when I was attempting to explain the process to address fire alarms to Jean, Ron and you, you were not listening. You apparently wanted to complain about Ron because you kept interrupting to tell how you didn't appreciate the disrespect. I asked you multiple times to be quiet and became frustrated when you did not, and eventually told you to "shut up". This type of interaction is not acceptable when working with staff. This is another example of your disrespect, and disregard. I asked Ms. Wolfe to investigate this issue for possible discipline.

The district cannot continue to have an employee who does not fulfill the duties of the position, disobeys directives and creates a generally difficult environment. For this insubordination and unacceptable work, I will recommend to the district administrator additional discipline. (Dist. Ex. #24)

...

On March 2, 2007, District Administrator Wolfe issued a letter to the Grievant that states as follows:

As a follow-up to our meeting on February 28, 2007, this letter serves as your written notice that your employment was terminated effective at 3:30 p.m., February 28, 2007. The termination was for cause based on the January 11, 2007 letter of discipline, the issues presented in the February 20, 2007 letter, the investigation report dated February 28, 2007 and follow-up meeting February 28, 2007. These documents are attached.

If you have not submitted your last time sheet, please mail it to Mr. DeYoung. You will receive payout for any unused vacation. The check will provide a description for time paid. (Jt. Ex. #3)

...

Thereafter, grievances were filed alleging that the Grievant's suspension and discharge are without just cause. The grievances were denied at all steps and, thereafter, submitted to arbitration.

### **POSITIONS OF THE PARTIES**

#### **District**

The Grievant, who was hired in 2001, performed her custodial duties satisfactorily until 2005. In the Spring of 2005, the Grievant's supervisor, Mark Egger, began receiving complaints from her co-workers alleging that she was divulging personal information about another employee and not helping her co-workers. Supervisor Egger responded by meeting with all Custodians, reminding them that private information should not be shared outside of the workplace and that each person must perform their fair share of work. As reflected in Supervisor Egger's notes of this meeting, he stated a number of job expectations, including working as a team and communicating with Supervisor Egger and co-workers.

In January 2006, Supervisor Egger received further complaints that the Grievant was failing to communicate with her co-workers and not working as a team. Supervisor Egger met with the Custodians and directed them to work together.

In the Spring of 2006, there was an issue regarding the Grievant's use of a bathroom that had been previously cleaned; the Grievant's initial untruthfulness about using this bathroom; and her failure to reasonably explain either the need to use this bathroom or her failure to clean the bathroom following this use. The Grievant was not disciplined, but was advised to use her own bathroom in the future.

Supervisor Egger received numerous emails from the Head Cook indicating that areas assigned to the Grievant were not being mopped properly. Supervisor Egger met with the Grievant to emphasize his expectations regarding clearing. At an April 2005 meeting, Supervisor Egger again identified his expectations regarding communication and working as a team.

In the summer of 2006, Supervisor Egger continued to receive complaints from fellow Custodians regarding the Grievant's unwillingness to work as a group. Supervisor Egger investigated these complaints and found that the Grievant was not working with others. Supervisor Egger addressed these complaints at a meeting with the Custodians.

The Grievant's job performance continued to deteriorate. Although required to meet with fellow Custodians at the start of the work shift to review the calendar of the day's activities and discuss duties, including when and where group cleaning would be performed, the Grievant went directly to her work area; which necessitated Supervisor Egger having to locate the Grievant and provide separate work instruction. On October 2, 2006, Supervisor Egger provided the Grievant with a document notifying the Grievant that she needed to start her shift in Custodial Room #125.

The Grievant continued to have problems cleaning the kitchen properly. Supervisor Egger met with the Grievant in the kitchen and provided instruction on what to clean and how to clean. In his October 11, 2006 memo, Supervisor Egger advised the Grievant that she was not cleaning the kitchen areas, as had been discussed; that the Grievant was expected to improve upon the quantity and quality of work; and that further action would be taken if the cleaning issue was not resolved. Supervisor Egger provided this document to the Grievant while she was in the kitchen and, at that time, showed the Grievant which areas were of specific concern. Supervisor Egger had not been required to show any other custodian how to clean.

Contrary to the argument of the Association, the effect of the change in the Grievant's cleaning duties from the library to the kitchen was negligible. This change was related to the change in hours for the kitchen staff. The Association did not establish that Association witnesses Atkinson, Kopf or Sommers had any relevant experience upon which to form an opinion regarding the Grievant's cleaning performance. Given this fact, as well as the lack of evidence that any of these witnesses spent much time observing the Grievant perform her duties, their opinions should not be given any weight. The most relevant evidence regarding the Grievant's job performance is that provided by her supervisor and fellow Custodians.

The Grievant's deficient work performance caused her fellow Custodians to inquire about submitting a grievance concerning the Grievant. Supervisor Egger responded by meeting with the Union and Custodians to discuss concerns and expectations. The discussions are reflected in the minutes of this meeting. On November 1, 2006, District Administrator Barb Wolfe and Supervisor Egger issued a letter establishing procedures to be effective November 6, 2006.

The PAST President agreed that the items contained in this letter were appropriate expectations within the PAST agreement. Each of the night Custodians, including the Grievant, acknowledged receipt of this letter.

Contrary to the argument of the Association, requiring compliance with these procedures does not place form over substance and the procedures are substantially related to the Grievant's job. The procedures, which were agreed upon by both parties, were not intended only to improve communication, but rather, were intended to address a number of concerns raised by the Custodians, *i.e.*, working cooperatively, following directives, maintaining security, abiding by break and lunch periods, avoiding gossip, ensuring teamwork and pulling one's own weight, and maintaining communication. The Association's claim that these procedures were not working is not supported by the record.

At PAST's suggestion, the District prepared a check-off sheet to document the work being performed by the Custodians and the time the work was performed. Each Custodian was required, each day, to complete this check-off. The Custodian's testimony demonstrates that the Custodians knew of this requirement.

The Grievant failed to follow these procedures when she did not arrive in time for the first meeting on November 6, 2006 and did not notify Supervisor Egger of her late arrival by calling his District cell phone. The events of November 6, 2006 resulted in the issuance of a written reprimand, dated November 14, 2006, which was not grieved by the Grievant. Statements made at the November meeting and in the November 14, 2006 disciplinary letter should have placed the Grievant on notice that subsequent failure to abide by expectations would subject the Grievant to discipline.

A variety of incidents in November and December, 2006 provide evidence of the Grievant's performance problems, *e.g.*, the Grievant's use of another employee's truck key; the Grievant's failure to follow walkie-talkie and check-list procedures; the Grievant's failure to clean her work areas as expected; and the Grievant's failure to prepare to-do lists as requested by Supervisor Egger; The Grievant, unlike the other night Custodians, failed to follow Supervisor Egger's instructions to submit check-off sheets. Supervisor Egger repeatedly met with the Grievant about her performance problems.

On January 9, 2007, the Grievant failed to follow Supervisor Egger's work instruction to start at 7:30 p.m. so that she would be available for a group cleaning later that night. When Supervisor Egger began describing alternative methods to improve her cleaning of the kitchen floor, the Grievant responded that Supervisor Egger was "fucking crazy." At the time of this remark, the kitchen door was open and there were people in the hall and cafeteria. When Supervisor Egger asked the Grievant to come into the back room, the Grievant would not listen to Supervisor Egger, but rather continued to vent and used profanity when discussing Supervisor Egger's relationship to Custodian Jacobson. Supervisor Egger responded by telling the Grievant that her conduct was not acceptable and that he would be recommending discipline.

On that same night, when the Grievant went into the gym to assist with the group cleaning, the Grievant confronted Custodian Jacobson and called him a "back stabbing bastard." (T. 156 ) Custodian Jacobson responded by telling the Grievant to get out of his face. Custodian testimony corroborates Supervisor Egger's testimony that such profanity is not allowed.

On January 9, 2007, the Grievant was suspended for three days, *i.e.*, January 12, 15, and 16. Due to the Grievant's medical restriction, she was scheduled to work four hours each day. Thus, the suspension was for 12 hours.

The Association's attempt to draw a correlation between workplace restrictions placed upon the Grievant in January 2007 and the District's suspension is based solely upon speculation. The Grievant's duties were adjusted in response to her work restrictions and the Grievant made no claim that her duties were too cumbersome.

When the Grievant returned from her disciplinary suspension, the Grievant's performance problems continued, *e.g.*, she did not turn in check-off sheets as directed or clean



up to the expectations expressed to the Grievant by Supervisor Egger. On February 2, 2007, the Grievant initiated a fight with a co-worker and repeatedly interrupted her supervisor as he was providing training regarding the fire alarm and, when he finally told her to "shut up," she walked away. On that same date, the Grievant disregarded a directive to keep certain information involving police activity confidential.

After February 2, 2007, the Grievant was discovered taking longer breaks and not taking lunch during her designated lunch period. The Grievant continued to have problems returning the check-off sheets and communicating with her co-workers. In a February 14, 2007 inspection of the kitchen, supervisors discovered areas that were not cleaned to expectations.

The Grievant's conduct following her return to work provided the basis for Supervisor Egger's February 27, 2007 recommendation that the Grievant be terminated. On March 2, 2007, the District Administrator issued the letter terminating the Grievant's employment with the District.

The collective bargaining agreement requires just cause for discipline. Under the just cause requirement, the arbitrator must first decide if the employee is guilty of the actions complained of. If the answer is yes, then the arbitrator must decide if the punishment is appropriate to the offense. The discipline should stand unless it is clearly excessive, unreasonable or management has abused its discretion. Recognizing the principles of progressive discipline, an arbitrator will generally uphold a suspension where the employee previously received a written warning for similar conduct.

The misconduct which gave rise to the progressive discipline was similar, *i.e.*, issues involving quality or quantity of work; issues involving failure to follow written or verbal work directives; and inappropriate behavior toward her supervisor and co-workers. The District provided the Grievant with notice that her failure to correct her job performance failures could lead to discipline.

The Association's criticisms that the District has not followed progressive discipline or that the Grievant did not have fair warning that her conduct could lead to discipline is without merit. The Association's argument that the District tolerated performance imperfections of Custodian Meister which it did not tolerate in the Grievant has no support in the record evidence, but rather, is based upon speculation. The District's decision to postpone the evaluations of the Custodians has no significance to this case.

The Grievant has committed the acts cited as the reasons for the suspension and discharge and the disciplines imposed reasonably reflect the seriousness of the Grievant's misconduct. The District has just cause to suspend the Grievant and to terminate the Grievant's employment. The grievance must be denied.

## Association

Contrary to the argument of the District, the Grievant's work performance did not begin to change in 2005. Rather, during her first five years of employment with the District, the Grievant's formal evaluations were satisfactory or very good; she had not received any discipline; and she interacted well with staff.

In August, 2006, the Grievant was assigned to clean the kitchen area, with adjoining bathroom and office, in place of her regular cleaning duties in the library. Previously, the kitchen had been cleaned by the day shift. This change resulted in more work for the Grievant. Additionally, the work was of a type that differed significantly from that previously performed by the Grievant. This was the first major change in the Grievant's cleaning duties and required more time.

The record does not support the District's claim that the Association and the District established the November 2006 work place procedures in order for the District to have a "fair and reasonable assessment of each custodian's work performance." Rather, the parties negotiated procedures to help manage communication issues among the high school Custodians, including the Grievant. The focus of this process was not disciplinary in nature; as stated in the November 1, 2006 memorandum.

On January 8, 2007, the Grievant was placed on a restricted medical leave (4 hours per day) for approximately one month. This medical leave was due to a workplace injury. On January 11, 2007, the Grievant was suspended without pay for alleged failure to comply with work directives. On February 28, 2007, the Grievant was notified that her employment with the District was terminated for alleged failure to fulfill her duties, disobeying directives and creating a difficult work environment.

Cutting through the rhetoric, the Grievant's termination was based upon her alleged failure to fulfill her cleaning duties, primarily as they related to the kitchen, and her alleged failure to comply with the new workplace procedures negotiated to improve communications among custodial staff. These workplace procedures were to be reviewed by the District and the Association prior to February 1, 2007. Although these procedures were not reviewed, they remained in effect despite their lack of effectiveness in improving custodial communications. The procedures held no substantial relationship to the essence of the Grievant's job as a night Custodian and, in many respects, did not necessarily define her actual job performance.

This case involves the District's decision to suspend and the, in short order, to terminate the employment of the Grievant. The District has the burden of proving that just cause existed for the Grievant's suspension and termination of employment.

Given the lack of a uniform definition of what constitutes "just cause," it is the function of the arbitrator to define the parameters upon the particular facts of this case. The arbitrator should review the factual elements of this case *de novo*, rather than give controlling weight to the Board's decision, and the required quantum of proof should be substantial.

Progressive discipline, inherent in the just cause provision, involves the meting of progressively greater discipline for infractions of a very similar nature, rather than grouping dissimilar infractions as the just cause for discipline. The purpose of progressive discipline is to provide the employee with notice of conduct that is not acceptable and an opportunity to correct inappropriate behavior.

Progressive discipline does not require that each succeeding disciplinary action must be more severe than the preceding one. Rather, the degree of the penalty must reflect the severity of the offense.

The Grievant's suspension was, in part, based upon her alleged failure to clean the glass above the doorway of the south hall entry point, her failure to change light bulbs, and her failure to clean the old locker rooms properly. It was not reasonable for the District to expect the Grievant to improve her cleaning of these areas when her workplace responsibilities did not even encompass the same for the one month period subsequent to her suspension. One can only speculate as to why the three day suspension coincided with the period on which the Grievant was on medical restrictions.

With limited exception, the Grievant was not forewarned of the consequences of her alleged conduct. The October 11, 2006 document related solely to cleaning the kitchen area and does not document the disciplinary consequences of a failure to improve. The vague reference to "further actions", from the perspective of a long-term employee without any disciplinary record who had recently been assigned kitchen duties, could be construed to mean reassignment to an area other than the kitchen. A warning involving a failure to clean the kitchen is not progressive discipline for the cleaning failures that gave rise to the suspension.

The District's claims were directly refuted by several credible teacher witnesses who corroborated that the Grievant performed her classroom cleaning functions well and that she was approachable and receptive to cleaning requests. One of these witnesses testified that, after the Grievant's discharge, her room was less clean and her garbage bag had not been replaced. The Grievant credibly testified that the District did not apprise her of any teacher complaints regarding the cleanliness of her work areas and that she never received such complaints from teachers or the public.

The only other disciplinary warning received in advance of the three-day suspension was the written letter of reprimand relating to an incident on November 5, 2006 in which the Grievant mistakenly called Supervisor Egger's office phone, rather than his cell phone and, apparently, was not forthright with respect to her reason for her tardiness. On January 4, 2007, the Grievant apparently contacted Supervisor Egger via his home phone. This type of innocent mistake does not rise to a level of a three day suspension.

The District violated the progressive discipline system by amassing a series of widely varying types of infractions as just cause for the Grievant's suspension. The corrective value of this discipline was lost as a result the amalgamation of these widely varying types of infractions.

With the possible exception of use of profanity with a supervisor, the District cannot credibly claim that any one of the myriad of offenses listed as a basis for her suspension were so serious as to warrant discipline outside of the normal progression. Additionally, this use of profanity was a one-time incident, mitigated by the Grievant's frustration with her supervisor's continued scrutiny of her kitchen cleaning and perceived favoritism towards certain custodial staff. The Grievant acknowledges that it was wrong and apologized to her supervisor. Her conduct was not sufficiently egregious to warrant bypassing the normal sequence of disciplinary actions and, given her amends, not required to impress upon her that her behavior was serious.

The Grievant completed the check forms truthfully and as time permitted; occasionally taking them home. Admittedly, the Grievant made errors, but the record, as a whole, demonstrates that the Grievant is capable of change and conforming to the District's expectations. She followed her supervisor's instruction that she double-check the kitchen and spent more time cleaning because she wanted to get it right.

The Grievant did not fail to return the key, but rather, returned the key on the same day that it had been provided. The Grievant's January suspension, in part, was based upon her alleged failure to complete her check-off sheets on a daily basis, but in February, the District acknowledged that she had turned them in on most days, but was terminating the Grievant, in part, because her sheets were not accurate. The termination letter states that "some of the tasks" that the Grievant reported doing were actually done by co-workers, but does not cite examples. A significant amount of credible evidence directly contradicts the central elements of the District's case, suggesting almost a willful refusal to view the Grievant's performance in a balanced manner.

The District's decision to terminate the Grievant was based upon the conduct for which the Grievant previously had been suspended, thus subjecting the Grievant to double jeopardy. The District held the Grievant to a higher standard of work performance than that of the Grievant's predecessor.

After only one month into her kitchen assignment, Supervisor Egger issued the Grievant a written reprimand for a work performance that, by all accounts, closely matched that of her predecessor; who was the subject of complaints as far back as 2005. Supervisor Egger was so focused on monitoring the Grievant's use of her walkie-talkie, reviewing her check-off form for discrepancies, and documenting her every transgression of the new workplace procedures, that somewhere along the line he lost sight of the big picture, *i.e.*, that the Grievant was a long-term employee with a good work record.

It is much less believable that, over the course of approximately four months, that the Grievant changed from a model employee to an unredeemable employee, than that workplace tension and infighting among the night-shift staff precluded the Grievant's colleagues from remaining objective. The arbitrator must reconcile the conflict between the testimony of the District's witnesses and the Association's witnesses, who have less reason for bias, in favor of the Association.

The timing of the District's decision to discharge the Grievant did not provide the Grievant with a reasonable opportunity to correct any inappropriate behavior. In view of the Grievant's many years of positive work performance, as documented in her five (5) evaluations, the District should have afforded the Grievant an adequate time to adjust to her increased responsibilities, an adjustment that was compounded by her workplace injury and medical restrictions.

Notably, the District failed to formally evaluate the Grievant pursuant to the terms of the collective bargaining agreement for her last year of employment with the District, *i.e.*, January 2006 to January 2007. Had the District truly been interested in improving the Grievant's job performance, then the annual evaluation a conference would have been in order.

The record, as a whole, does not show the kind of proven and serious incompetence or misconduct that would warrant the severe disciplinary action of termination. The District has seriously overemphasized elements which are not determinative of the Grievant's overall competency, while overlooking her positive accomplishments and contributions. The District has not weighed the Grievant's employment performance, as a whole.

Assuming *arguendo* that the Grievant had engaged in the alleged inappropriate conduct, discharge was too severe a penalty. The Grievant should be reinstated to her former position, with back wages and benefits, with interest; her personnel file should be expunged of all documents pertinent to her suspension and termination; and the arbitrator should award any other relief deemed appropriate.

### **DISCUSSION**

In the spring of 2005, Supervisor Egger noticed that there was friction between the high school night Custodians and met with these Custodians to provide directives intended to foster communication and team work. (Dist. #3, 4) Supervisor Egger's testimony indicates that, at that time, he received complaints from Custodians regarding the Grievant. (T. 29-30) The Grievant's annual evaluations reasonably establish, however, that as of January 2006, Supervisor Egger considered the Grievant to be a good employee. (Assoc. #1)

#### **The Grievant's Cleaning of the Kitchen Areas**

In the fall of 2006, the Grievant was assigned to clean various areas in and around the kitchen in lieu of cleaning the library. (T. 108-9) At the point in time that the Grievant was assigned to clean the kitchen area, it was being cleaned by Custodian Mickey N. (T. 109)

According to Supervisor Egger, he exchanged the Grievant's library cleaning duties and Custodian Mickey N's kitchen cleaning duties because a change in the hours of the kitchen staff left Custodian Mickey N with insufficient time to clean the kitchen. (T. 108-9) It is not evident that Supervisor Egger assigned the Grievant to the kitchen area for any reason other than to meet legitimate operational needs of the District.

The kitchen area required approximately fifteen more minutes to clean than the library. (T. 198) It is not evident that this additional time prevented the Grievant from cleaning the kitchen area in a manner that was satisfactory to Supervisor Egger.

The Grievant recalls that she once told Supervisor Egger that her work assignment was not equitable. (T. 323) Supervisor Egger states that the Grievant did not tell him that she did not consider the custodial assignments to be equitable. (T. 139)

According to Custodian Ron J, Supervisor Egger's division of the rooms was equitable. (T. 145) Custodian Jean E states that the workload was not equitable because the Grievant and, periodically, Ron J would not do what they were supposed to do. (T. 177-8). Custodian Jean E further states that, after Supervisor Egger had numerous talks with Custodian Ron J, Custodian Ron J eventually pulled his own weight. (T. 180)

Supervisor Egger states that, after the Grievant was assigned to the kitchen areas, he received numerous emails from the Head Cook in which the Head Cook complained that the room was not mopped properly and that areas were being neglected. (T. 35) The Grievant recalls that the District had notified her that the Head Cook had complained about the Grievant's cleaning. (T. 361)

The Head Cook did not testify at hearing. District Cook Cross recalls that the Head Cook had the same complaints about the way the kitchen had been cleaned by Custodian Meister. (T. 262-3) The Grievant recalls that, one summer, the Head Cook, who is also a summer Custodian, made a comment in the presence of the Grievant and other Custodians to the effect that Custodian Meister should clean the floor better. (T. 319)

It is not evident that District Cook Cross or the Grievant were privy to communications between the Head Cook and Supervisor Egger. Neither District Cook Cross' testimony, nor any record evidence, establishes that the Head Cook made the same complaints to Supervisor Egger about Custodian Meister and the Grievant.

In District Cook Cross' opinion, the Grievant and Custodian Meister's cleaning of the kitchen floor was comparable. (T. 262) Teacher witnesses stated that they were satisfied with the Grievant's classroom cleaning and considered the Grievant to be receptive to cleaning requests. (T. 254-5; 327-30; 240-1)

Neither District Cook Cross's opinions regarding the relative performance of Custodian Meister and the Grievant, nor any other record evidence, reasonably establishes that there was no significant difference between the Grievant's and Custodian Meister's cleaning of the kitchen areas; that Supervisor Egger held the Grievant to a higher standard of work performance than other custodians who had the regular assignment of cleaning the kitchen areas; or that Supervisor Egger otherwise held the Grievant to an unreasonable cleaning standard.

On October 11, 2006, the Grievant acknowledged receipt of Supervisor Egger's written note of the same date that states as follows:

Re: High School Kitchen Cleaning

I find that your cleaning is not to the standards that I expect in the kitchen area. I met with you on Thursday September 14<sup>th</sup>, 2006 and showed you the areas that need to be improved on. I asked that you mop the floors better, move anything on wheels and clean under serving line better, move various other things to clean under. I reminded you of my expectations as well as head cooks' expectations. We also discussed the cleaning of the bathroom off of the kitchen.

We also met on Tuesday, September 26, 2006 and asked that you improve the way you mop the floor and to make sure that you move items in the kitchen so you can clean thoroughly. I specifically showed you areas that were (sic) not cleaned properly. Now today I find that areas that we discussed in past meetings not getting cleaned. You are fully aware of what my expectations are for cleaning kitchens and bathrooms. I expect the quality and quantity of your work to improve. I have done inspections on a regular basis and will continue to do so. I expect this to be resolved immediately or further actions will taken. I will be giving a copy of this to PAST president. (Dist. Ex. #7)

This note confirms that the Grievant was provided with notice that her cleaning of the kitchen areas was deficient and that Supervisor Egger identified deficiencies. When asked if he provided the Grievant with specific training in cleaning kitchen areas, Supervisor Egger responded that he physically went through and discussed areas that needed to be addressed thoroughly, as well as using the products that he had purchased to clean floors. (T. 116)

The October 11, 2006 note confirms that the Grievant was provided with notice that management expected her to improve her cleaning of the kitchen areas and that failure to do so would result in further action. The content of this note, including the statement that a copy of the note would be provided to the PAST president, provided the Grievant with reasonable notice that continued failure to meet the Supervisor Egger's cleaning expectations could result in discipline.

Supervisor Egger's notes of October 12, 2006 indicate that, at the time he gave the Grievant the note of October 11, 2006, the Grievant stated that she felt that she was doing a good job. (Dist. Ex. #8) At hearing, the Grievant states that she cleaned the kitchen to the best of her ability. (T. 383) The Grievant does not claim and the record does not establish, as the Association argues, that the Grievant required more time to learn her kitchen area cleaning duties.

Supervisor Egger's contemporaneous notes reflect that on Friday, December 1, 2006, his inspection lead him to conclude that more time needed to be spent on the kitchen bathroom,

especially behind the door on the wall and the floor. (Dist. Ex. #15) These notes do not reflect that Supervisor Egger discussed his conclusions with the Grievant.

Supervisor Egger's contemporaneous notes reflect that on Monday, December 4, 2006, he inspected the kitchen areas at approximately 6:15 a.m. and discovered food (a tater tot) on the floor; that this food was from the previous Friday's lunch and should have been seen by the Grievant; and that, in the presence of the PAST President, he did a walk through with the Grievant in which Supervisor Egger showed her where the food had been found and pointed out the areas, including the kitchen bathroom, where the Grievant was not cleaning as thoroughly as she should. (Dist. Ex. #16)

### **The Memorandum of November, 2006**

Supervisor Egger recalls that, in the summer of 2006, when all of the District's Custodians were working days, a number of Custodians complained that the Grievant was not assisting with the group project of stripping and waxing floors. (T. 37) Supervisor Egger's after the fact "summary" indicates that, in August of 2006, some of the Custodians wanted to file a grievance against the Grievant. (Dist. Ex. #5)

The District Administrator recalls that, at the beginning of the 2006-2007 school year, there were a lot of rumblings about things not going well with Custodians and that she and Supervisor Egger decided to meet individually with the Custodians, as well as other District employees, to find out what was going on. (T. 207) The District Administrator recalls that, when initially interviewed, the Grievant did not seem to have any concerns. (Id.)

Following the employee interviews, the District Administrator asked the Grievant to meet with her and to bring a union representative; which the Grievant did. (Id.) The District Administrator recalls that, during this meeting, she told the Grievant that the Grievant did not seem to have any issues; that the other Custodians indicated that there were issues; that the issues of the other Custodians seemed to revolve around the Grievant and, at that point, the Grievant listed her concerns. (T. 207-08)

According to the District Administrator, she and PAST representative John Horn met in an attempt to reach a positive resolution to the custodian problems. (T. 208) PAST representative John Horn recalls that, in September 2006, PAST President Gilbertson contacted him to advise him that there were issues between members of the bargaining unit and that, during the course of this discussion, PAST representative Horn determined that the issues were with the night Custodians at the High School. (T. 270-1) PAST representative Horn recalls that the PAST President, as well as the Custodians, were articulating that work was not a positive place for any of the Custodians. (T. 276-7)

PAST representative Horn recalls that, in early October 2006, after the District had interviewed the employees, he and the PAST President met with Supervisor Egger and the District Administrator to share information. (T. 275) PAST Representative Horn recalls that



Supervisor Egger mentioned that there were performance issues with the Grievant, but that PAST Representative Horn did not think that such issues were relevant to the overall issue that the District and PAST were seeking to resolve. (T. 296) In PAST Representative Horn's view, the collaborative process between the District and PAST was intended to improve communication between the Custodians and with management; which communication PAST viewed as a key component to the District's articulated concern that the Custodians needed to work better as a team. (T. 275-7)

PAST representative Horn confirms that PAST was involved in negotiating the procedures contained in the District Administrator's memorandum of November 1, 2006 and that PAST considered the expectations contained therein to be reasonable. (T. 292) PAST representative Horn did not consider the November 1, 2006 memorandum to be a performance improvement plan for any employee; but acknowledges that the District did not waive any right to discipline an employee for failing to meet the expectations stated in the November 1, 2006 memorandum. (Id.)

The November 1, 2006 memorandum was distributed to all employees, including the Grievant. (Dist. Ex. #10) Consistent with the testimony of Supervisor Egger, the minutes of the November 2, 2006 meeting attended by the High School Custodians that worked evening hours, including the Grievant, indicate that the procedures contained in this memo, which are work directives, were to be implemented on November 6, 2006. (T. 54; Dist. Ex. #11)

Supervisor Egger recalls that, on November 6, 2006, everyone was in the "custodian room" at 3:00 p.m., in accordance with the new procedures, except for the Grievant; that, contrary to the new procedures, the Grievant had left a telephone message on Supervisor Egger's office phone, rather than his cell phone; that this message stated that the Grievant had a doctor's appointment and would be running late; that when the Grievant arrived at work, Supervisor Egger said he would like to have a doctor's excuse; and that, on the following day, Supervisor Egger reiterated that he needed to have a doctor's excuse. (T. 54-56).

Supervisor Egger's investigation of the events of November 6, 2006 resulted in the issuance of the disciplinary letter of November 14, 2006. (T. 56-7; Dist. Ex. #12) The disciplinary letter of November 14, 2006 was not grieved.

As set forth in this letter, Supervisor Egger disciplined the Grievant for not following procedures and failing to comply with work rules. In this letter, Supervisor Egger states that, when the Grievant denied that she had stated that she had a doctor's appointment, he played the voice recording that verified that the Grievant stated she had a doctor's appointment. According to Supervisor Egger, he replayed this voice recording in the presence of the Grievant and the PAST President. (Id.; Dist. Ex. #5)

The Grievant states that, when she called Supervisor Egger, she was at the doctor's for a job interview. (T. 386) According to the Grievant, she told Supervisor Egger she was at the doctor's because she did not know how he would take it if he knew the truth. (T. 386-7)

The Grievant acknowledges that, under the new procedures, she was supposed to call Supervisor Egger on his cell, but that she was so used to doing it the old way, that the new procedures “slipped her mind.” (T. 339)

Supervisor Egger’s contemporaneous notes of November 22, 2006 state his belief that the Grievant is “playing games” with the other two night Custodians. (Dist. Ex. #13) Supervisor Egger issued a November 29, 2006 memorandum to the Grievant that states as follows:

RE: First 2 weeks of check-off sheet

After reviewing everyone’s check-off sheets and meeting with you at 3:00 p.m. each day as we discussed at our November 2 meeting some issues need to change. The first item is your lunch time. Lunch will be from 7:00 p.m. to 7:30 p.m. unless an activity requires your attention. This means that it cannot be done at any other time other than 7:00 – 7:30. Second, you are to let your co-workers know when going to break and returning or leaving the building. This has not been happening consistently. You are failing to follow written directives you were given.

Another issue that has occurred is recleaning of areas already done by your co-workers. If you are working together and communicating this will not happen. Last, you must communicate with your co-workers regarding start time to clean the athletic areas. (Dist. Ex. #14)

Supervisor Egger recalls that, prior to issuing the above, he had monitored the use of the walkie-talkies and concluded that, for the most part, Custodians Ron J and Jean E were following the written procedure of notifying the other Custodians of when they were leaving and returning from lunch, but that the Grievant seldom provided such notification. (T. 65) This testimony is consistent with that of Custodian Jean E, who states that she complied with the communication directives, but that there were numerous times in which the Grievant would take a break and not notify the other Custodians or would take longer breaks than she reported. (T. 181-2) The Grievant states that she typically notified the other Custodians of when she left and returned from break, but that sometimes she would forget, as would other Custodians. (T. 341)

Supervisor Egger states that the Grievant would report on her check-off sheet that she had cleaned the front entry way when it had already been cleaned by another Custodian; which was a waste of time. (T. 76-77) Custodian Ron J agrees that the Grievant would clean the front entrance after it had been cleaned. (T. 152) The Grievant states that the front entry was cleaned by anyone who saw that it needed to be cleaned; that on one occasion Custodian Jean E told the Grievant that the front entry had already been vacuumed; and that the Grievant would not have cleaned an area if she had known that it had already been cleaned. (T. 341-2)

Supervisor Egger's contemporaneous notes indicate that, on November 29, 2006, he had received complaints regarding the cleaning of the old locker rooms and discovered hair, paper and dirt; that on November 30, 2006, his inspection of the old locker rooms revealed that they were in the same condition as the day before; that the Grievant stated that she had been cleaning these rooms and that she had been cleaning them thoroughly; and that lights in the south hallway needed replacing. (Dist. Ex. #15) Supervisor Egger recalls that there was quite a bit of dirt under the mats near the showers. (T. 67)

Supervisor Egger's contemporaneous notes indicate that, on December 1, 2006, he inspected the old locker room; learned that the other two Custodians had swept under the mats; that the Grievant was supposed to mop the floors; and that the floors did not look like they had been mopped. (Dist. #15) These notes also indicate that lights in the south east hallway remained out and the light was out in girl's locker rooms, but there was no work order to change the ballast.

According to Custodian Jean E, she is not aware of other Custodians having a problem with submitting work orders; that the Grievant did not always submit the work orders for which she was responsible; and that certain of the Grievant's rooms had bad ballasts for months. (T. 183-4) The Grievant knows that she was supposed to prepare work orders for problems that she could not fix, such as ballasts, but states that she would not always remember to do so or would tell Randy verbally, rather than placing a work order in his mailbox. (T. 347-8)

Supervisor Egger's contemporaneous notes indicate that, on December 4, 2006, he did not find the Grievant's check-off sheet on the board; that, as discussed more fully above, he discussed with the Grievant that the kitchen area was not cleaned as thoroughly as it should be; that he showed the Grievant areas which needed to be cleaned in the old locker room; that the Grievant asked why the day shift did not clean these areas; that Supervisor Egger responded that they cannot be cleaned while they are being used; and that the glass above the hallway doors was not cleaned. (Dist. #16) These notes also indicate that the Grievant had been returning her walkie-talkie to the charger as early as 10:00 p.m.; that Supervisor Egger reminded all of the Custodians to keep their radios on until 11:30 p.m.; and that his monitoring indicated that the Grievant, unlike the other Custodians, was not consistently using the walkie-talkie to notify that she was leaving and returning from breaks. (Id.)

Supervisor Egger's contemporaneous notes indicate that, on December 5, 2006, he rechecked the areas that he had asked the Grievant to clean more thoroughly and found cob webs in the entry to the boy's shower; that lights in the south east hallway remained out; and the glass above the hallway doors was not cleaned, but had become dirtier. (Dist. #16) Supervisor Egger's contemporaneous notes indicate that, on December 6, 2006, the Grievant did not put her check off sheet on the board; that the cob webs found on December 5<sup>th</sup> were still there; and that the glass above the hallway doors was not cleaned. (Id.)

Supervisor Egger states that the Custodians were supposed to leave their check-off sheets on the bulletin board so that he could review their work. (T. 69) Custodian Ron J confirms that the Custodians were expected to submit a check-off sheet at the end of each shift and that, on this sheet, the Custodian was supposed to accurately report the work that had been performed that night. (T. 149) According to Ron J, he did not have trouble submitting his check-off sheet, but that frequently the Grievant did not submit her check-off sheets. (T. 150-151) Custodian Jean E states that the Custodians were supposed to put their check-off sheets on the board every night for Supervisor Egger's review; that the Grievant's check-off sheets were not always there; and that the other Custodians did not have a problem with submitting their check-off sheets. (T. 184-5) According to Custodian Jean E, these check-off sheets were supposed to reflect what was done and how long it took to do it. (Id.)

The Grievant states that she understood that she was supposed to complete the check-off sheets on a daily basis and that, at some point, Supervisor Egger required the Custodians to put the completed check-off sheets on the bulletin board. (T. 343). According to the Grievant, initially, she did not have time to write down all the things she did so she would take them home to finish, but that a lot of times, she did not return the form the next day. (T. 343-44)

Supervisor Egger states that, after December 6, 2006, most of the time the Grievant's check-off sheets were not available for review. (T. 69) Supervisor Egger's records indicate that check-off sheets between December 18 through December 28, 2006 were not submitted by the Grievant until January 4, 2007 and that check-off sheets between January 1 and January 12, 2007 were not submitted by the Grievant until January 19, 2007. (Dist. Ex. #18, 19)

According to Supervisor Egger, when he discussed her failure to submit timely check-off sheets, the Grievant's only explanation was that she forgot. (T. 73-4) Supervisor Egger states that, when he did receive a check-off sheet, his inspections lead him to conclude that she was not doing the work that she claimed she was doing. (T. 74)

Supervisor Egger recalls that, as in the past, he requested that the Custodians write down a "to do list" for the 2006 Christmas break. (T. 70-71) Supervisor Egger further recalls that Custodian's Ron J and Jean E each provided such a list in a timely manner; but that the Grievant did not provide such a list until well after the Christmas break. (Id.; Dist. Ex. #17)

Supervisor Egger recalls that, on January 9, 2007, the Grievant, who was working four hour days due to medical restrictions, was instructed to start at 7:30 p.m. so that she would be available for a group clean later that evening; that the Grievant came in at 7:00 p.m. and did not communicate this to anyone; that Supervisor Egger found the Grievant in the kitchen at 7:45 p.m.; that he reminded her that she had been directed to start at 7:30 a.m.; that, when he began to instruct her on how to improve her kitchen cleaning, the Grievant told Supervisor Egger "You are fucking crazy;" that Supervisor Egger responded that she should hold it down because the doors were open and people were in the hallway; that Supervisor Egger stated that there was no need to talk like that; that when Supervisor Egger asked her move away from the doors, she "just went off" and made a statement that Custodian Ron J and Supervisor Egger

were “fucking buddies;” and that Supervisor Egger told her that her behavior was not allowable and that he would be contacting the PAST President. (T.78-9)

The Grievant recalls that she was in the kitchen; that Supervisor Egger was not happy with the way she was cleaning the kitchen; that they got into a heated argument; she used a profanity; that she should not have used the profanity; and that she apologized to Supervisor Egger. (T. 323) According to the Grievant, she was stressed; that Supervisor Egger was always negative and never positive; that she was sick of how she was being treated; and that she was sick of Supervisor Egger playing favoritism towards certain people. (T. 323-4) The Grievant does not deny making the statements attributed to her by Supervisor Egger.

Custodian Jean E states that she did not hear the total conversation between the Grievant and Supervisor Egger; that she did hear the Grievant say that Supervisor Egger must think that she is fucking nuts; that Supervisor Egger did not respond with profanity, but rather, said no I am not and that this had to be cleaned; and that, since Custodian Jean E did not want to hear anymore, she left. (T. 188)

Supervisor Egger states that profanity is not allowed and no other Custodian has directed profanity towards him. (T. 80; 137) Custodian Jean E states that she does not believe that profanity on the job is tolerated; that she has used profanity while on a break; and that she has never used profanity toward a supervisor. (T. 189) Custodian Ron J states that, while he was working for the District, profanity was not tolerated and he never used profanity towards a supervisor. (T. 165)

Custodian Ron J recalls that, in January of 2007, the Grievant confronted him about discussing her with Supervisor Egger and that, during this conversation, the Grievant told Custodian Ron J that he was a backstabbing bastard. (T. 155-6) Custodian Ron J states that he responded by saying he did not know anything about it and he had work to do. (T. 156) The Grievant does not deny making the statements attributed to her by Custodian Ron J.

Custodian Ron J believes that he mentioned this incident to Supervisor Egger. (Id.) Supervisor Egger confirms that, on the evening of January 9, 2007, the Grievant confronted Custodian Ron J and used a profanity towards Custodian Ron J (T. 80) Supervisor Egger could not recall the profanity. (Id.)

It is evident that Custodian Ron J and Jean E were not happy with the Grievant’s work behavior. However, neither their testimony, nor any other record evidence, provides a reasonable basis to conclude that either Custodian is unable to remain objective or that their testimony is otherwise unreliable. Given the evidence that the Grievant has been untruthful to Supervisor Egger, as well the evidence that she denied messing up Custodian Ron J’s cleaned bathroom until told that he would review the security cameras, it would not be reasonable to resolve credibility issues in favor of the Grievant. (T. 156-58;185-88)

Supervisor Egger indicates that the incidents of January 9, 2007 lead him to impose discipline upon the Grievant. (T. 83) According to Supervisor Egger, he met with the Grievant to discuss the letter of January 11, 2007; that the Grievant did not provide a reasonable explanation for why she was not meeting his expectations; and that he recommended to the District Administrator that the Grievant be suspended. (T. 84-5) The District Administrator confirms that she discussed the January 11, 2007 letter with Supervisor Egger and concluded that it was appropriate to suspend the Grievant for three four-hour days. (T. 212)

The District Administrator states that she considered lesser discipline but ruled it out. (T. 213) According to the District Administrator, she wanted the suspension to be significant enough to make the Grievant understand that she needed to change and comply with directives and improve her work performance. (Id.)

### Summary

Contrary to the argument of the Association, the suspension that was the subject of the January 11, 2007 letter is not based upon a series of widely varying types of infractions. Rather, a reasonable analysis of the letter of January 11, 2007 indicates that the Grievant was suspended for engaging in three types of misconduct, *i.e.*, failing to comply with written and oral work directives, most particularly those set forth in the November 1, 2006 memorandum; failing to perform her work to District standards; and using profanity towards Supervisor Egger and Custodian Ron J.

Notwithstanding the Association's argument to the contrary, the November 1, 2006 work directives developed by the District and PAST are substantially related to the Grievant's job as a Custodian. Indeed, the importance of these work directives is established by the time and effort expended by PAST and the District in developing them. Compliance with these work directives provides a reasonable basis to judge the Grievant's work performance.

On the first day that these work directives were to be implemented, *i.e.*, November 6, 2006, the Grievant failed to comply with the work directive that she meet with the other Custodians at the start of her shift and that she contact Supervisor Egger by calling his cell phone. The Grievant also lied about why she was not available to meet with the other Custodians at the start of her shift. On November 14, 2006, the Grievant received a written warning for this misconduct; which written warning provided the Grievant with specific notice that any further failures to follow procedures or comply with work rules would subject her to disciplinary action up to and including discharge.

The January 11, 2007 letter contains a number of allegations against the Grievant. A number of these allegations preceded the November 14, 2006 letter and a number of these allegations occurred after the November 14, 2006 letter. The referenced allegations include those that were the subject of the November 14, 2006 discipline, *e.g.*, that the Grievant was tardy on November 6 and did not call Supervisor Egger on his phone. As the Association

argues, under the just cause standard, the Grievant cannot be disciplined in January, 2007 for conduct that was the subject of the November 14, 2006 discipline.

Also, it was not reasonable for the District to discipline the Grievant in January, 2007 for non-compliance with work directives that should have been addressed when the District disciplined the Grievant on November 14, 2006 for misconduct stemming from a failure to comply with work directives. To that end, the District did not have just cause in January 2007 to discipline the Grievant for “problems” that occurred on November 7, 8, or 9, 2006

With respect to the “problem” of November 22, 2006, it is unclear that the Grievant was dilatory in returning the truck key to Ron J. Nor is it clear that, on November 30, 2006, the Grievant had a reasonable basis to know that it was not acceptable to switch phones with Kathy Meister.

It is evident that the Grievant had a continuing problem with notifying the other Custodians when she left for and returned from breaks. The January 11, 2007 letter identifies only one specific instance that occurred after November 14, 2006, *i.e.*, that which occurred on January 9, 2007. The record provides no reasonable basis to discredit Supervisor Egger’s assertion that, on that day, the Grievant did not comply with the work directive to notify the other Custodians when she left and returned from breaks. This incident occurred after Supervisor Egger informed the Grievant on November 29, 2006, in writing, that she had not been consistently notifying her co-workers of when she left for and returned from break and that she was failing to comply with written directives. (Dist. Ex. #14)

It is evident that the Grievant had a continuing problem with completing and returning check-off sheets in a timely manner. The January 11, 2007 allegation that no check-off sheets were received before the holiday break is substantiated by the record as discussed above. The record provides no reasonable basis to discredit Supervisor Egger’s assertions that, on November 17, 2006 and January 4, 2007, the Grievant did not follow the work directive confirmed in his letter of November 14, 2006, *i.e.*, that the Grievant call his cell pursuant to Paragraph 3 of the November 1, 2006 memo.

It is evident that the Grievant had a continuing problem with preparing work orders to correct problems in her assigned areas. However, the January 11, 2007 assertion that the Grievant has not prepared work orders is not an allegation of misconduct unless it is linked to evidence that a work order was required. The record substantiates that, on December 1, 2006, ballast needed to be changed in the Grievant’s work area, but no work order had been submitted.

On November 29, 2006, the Grievant was provided with reasonable notice that she should not be recleaning areas that had been cleaned by other Custodians. (Dist. Ex.#14) The record does not establish that, following that date or at any other time, the Grievant recleaned any area which she knew, or should have known, had been cleaned by another Custodian.

In his January 11, 2007 letter, Supervisor Egger alleges that the Grievant did not submit the written statement of duties to be done on December 27 and 28. The record establishes that Supervisor Egger requested this “to do” list and that the Grievant did not comply with this request in a timely manner.

The second type of misconduct involves a failure to perform work to standards. Specifically, Supervisor Egger alleges that the Grievant had not cleaned to standards in the locker rooms; had not changed light bulbs for at least four weeks; had not cleaned the glass in the south entry hall for almost two months; did not consistently secure the building; and had not completed required documentation, such as science eye wash.

It is evident that, on a number of occasions after the issuance of the November 14, 2006 letter, the Grievant did not clean the locker room to standards. The record establishes that the glass in the south hallway had not been cleaned for some period of time; but it is not clear that this period of time was almost two months.

The record does not establish that the Grievant did not consistently secure the building. Supervisor Egger’s notes of December 5, 2006 indicate that eye wash in the Grievant’s work area needed to be cleaned and tested, but also notes that all of the Custodians had the same failure. The record is silent on the issue of whether or not Supervisor Egger faulted any of the other Custodians for this performance failure.

The record establishes that the Grievant had been provided with notice that she was expected to follow work directives and work to standards. The record further establishes that the Grievant was provided with an opportunity to meet District expectations. It is not evident that the work directives or the work standards were unreasonable.

As discussed above, not all of the allegations of failure to follow work directive or work to standards are substantiated by the record evidence. Those for which there is substantiation warrant the conclusion that Grievant engaged in misconduct which provided the District with just cause to discipline the Grievant.

With respect to the unsubstantiated allegations, the record is insufficient to reasonably judge whether or not the Grievant engaged in misconduct. Neither the District’s consideration of these unsubstantiated allegations, nor any other record evidence, provides a reasonable basis to conclude that the Grievant has been the subject of unfair, disparate or discriminatory treatment.

The third type of misconduct involves her conduct towards Supervisor Egger and fellow Custodian Ron J on January 9, 2007. It is evident that, on January 9, 2007, the Grievant used profanity towards Supervisor Egger and, in a separate incident on January 9, 2007, used profanity towards fellow Custodian Ron J. As the witnesses confirmed at hearing, the District does not tolerate the use of profanity towards fellow employees.



The Grievant's use of profanity towards Supervisor Egger was particularly egregious in that the Grievant exhibited a lack of respect for his role as supervisor in the presence of witnesses and, also, the Grievant exhibited unwillingness to accept legitimate work direction. The District has established that the Grievant used profanity towards Supervisor Egger and fellow Custodian Ron J. and, thus, engaged in misconduct which provided the District with just cause to discipline the Grievant.

Notwithstanding the Association's argument to the contrary, the Grievant's use of profanity towards Supervisor Egger is not mitigated by the fact that the Grievant perceived favoritism toward other staff or was frustrated by Supervisor Egger's continued scrutiny of her kitchen cleaning. It is not evident that, in disciplining the Grievant for her use of profanity on January 9, 2007 that the District was subjecting the Grievant to unfair, discriminatory or inappropriate disparate treatment.

A reasonable employee would understand that the Grievant's January 9, 2007 use of profanity was inappropriate and could result in discipline. Accordingly, it was not incumbent upon the District to provide the Grievant with a prior warning against engaging in such conduct.

At or about Christmas 2005, the Grievant had knee surgery. (T. 310-311) Early in January 2006, the Grievant fell at work and sustained a shoulder injury. (T. 357-8) Between July 18, 2006 and February 20, 2007, the Grievant had six individual psychotherapy appointments in which she displayed symptoms related to job stress. (Assoc. Ex. #8) The record does not establish that, as of January 11, 2007, the Grievant had any medical or psychological condition that prevented the Grievant from complying with the District's work directives, performing work to standards, or that the Grievant had any medical or psychological condition that mitigated any Grievant misconduct that was the subject of the January 11, 2007 suspension.

By January 2007, the Grievant had been provided with reasonable notice of District expectations and had received considerable District feedback with respect to the issue of whether or not she was meeting the District's expectations. The failure of the District to perform an evaluation of custodial staff in January 2007 does not provide a reasonable basis to overturn the District's discipline decision.

As the Association argues, progressive discipline does not require that each succeeding disciplinary action be more severe than the proceeding action. However, the Grievant's conduct towards Supervisor Egger on January 9, 2007 was sufficiently egregious to warrant an immediate suspension. Additionally, given the November 14, 2006 warning letter, the Grievant's repeated failures to comply with work directives, particularly the work directive to submit check-off sheets, warranted a suspension.

The District has just cause to suspend the Grievant for misconduct referenced in the January 11, 2007. Given the District's consideration of misconduct that should have been

addressed in the November 14, 2006 letter, as well as the District's consideration of misconduct that was the subject of the November 14, 2006 disciplinary letter, the undersigned has reduced the suspension from three four-hour days to two four-hour days.

### **Grievant's Discharge**

The Grievant served her three four-hour day suspension on January 12, 15 and 16, 2007. Supervisor Egger recalls that, when the Grievant returned on January 17, 2007, he provided her with a new check-off sheet, which she did not return because she "forgot." (T. 86) On February 1, 2007, Supervisor Egger provided the Grievant with a written note indicating that, on January 26<sup>th</sup> he met with the Grievant and directed her attention to areas in the kitchen that required more thorough mopping; that the floor looked good on January 29<sup>th</sup>, but not on January 30<sup>th</sup>; and that the Grievant had left mats with edges flipped back, which was a hazard. (Dist. Ex. #21)

Supervisor Egger recalls that, on February 2, 2007, he was at the 3:00 p.m. Custodial meeting when the Grievant, Custodian Ron J and Custodian Jean E relayed a conversation in which a police officer had told them it was possible that there would be a break in at the school to steal computers and that the Custodians should not say anything, but keep on their toes. (T. 87-88) Supervisor Egger further recalls that he responded by telling all three Custodians that they should not say anything and should keep it to themselves. (T. 88) According to Supervisor Egger, after he received a report that the Grievant had told a member of the public about a possible break-in, he told the Grievant that she was not to have said anything and the Grievant commented that people have a right to know if they are in the building with kids. (T. 91) Supervisor Egger states that he did not give the Grievant permission to disclose the fact that there was a possibility of a potential break-in in order to protect children and is not aware that anyone else gave her such permission. (T. 92)

Custodian Jean E recalls that a Police Officer came to school and informed the Custodians that there was a threat to break in the school to steal computers; that, during the meeting with Supervisor Egger that occurred the following day, Supervisor Egger told the Custodians, including the Grievant, that they were supposed to keep this information to themselves. (T. 189-90) According to Custodian Jean E, thereafter, the Grievant told her that the Grievant had told a parent who was in the school for a wrestling meet about the break-in threat because the Grievant believed the parent should know for safety reasons. (T. 190-91)

Custodian Ron J recalls that, in February 2007, Supervisor Egger told the Custodians not to say anything about the possible break-in and to make sure that the building was secure when the Custodians left for the night and that, as the building Principal was moving the computers, the Principal said don't say anything about the break-in. (T.159-60) According to Custodian Ron J, the Grievant told him that she had told a lady from youth wrestling about the possible break-in. (T. Id) In his handwritten statement, Custodian Ron J states that on February 2, 2007, Supervisor Egger and the Principal said to keep the possible break-in confidential; that, within a short time, the Grievant told a woman in the school about it; that

Custodian Ron J told the Grievant she was supposed to keep it quiet; and that the Grievant got mad because Custodian Ron J had showed disrespect to her. (Dist. #25)

The Grievant recalls that Custodian Mickey N and Principal McCallum told the Custodians not to say anything about the break-in. (T. 349-50) According to the Grievant, thereafter she told a Panther's coach who was bringing in food that she would probably get in trouble, but there might be a possible break-in so he should make sure the doors are secured. (T. 351) The Grievant states that she told Principal McCallum that she had told the coach and that Principal McCallum did not have much of a response. (T. 351)

The Grievant recalls that, on this same night, Custodian Mickey N told the Grievant not to touch any of the light switches in the office. (T. 350) The Grievant recalls that, when the fire alarm went off at the high school, she and Custodian Ron J went to the office; Custodian Ron J switched the light on; the two of them began looking at the panel to determine the location of the alarm; that Custodian Ron J found the room and told the Grievant that he thought it was in her area; that the Grievant responded that she did not think so; that Custodian Ron J said you have been here the longest, you should know where the rooms are; that the Grievant said no, its more in your area; that Supervisor Egger joined them in the room, figured out what had set off the alarm, and cleaned off the dust; that she went back to work; that she came back a little later; that Supervisor Egger was explaining what to do; that, when Supervisor Egger was done talking, the Grievant said something about being disrespected by a co-worker; then Custodian Ron J said something; that the Grievant said she did not like the way she was being talked to; that Supervisor Egger said "Shut up," and then the Grievant walked away. (T. 350-53)

Custodian Ron J recalls that the Principal had reset the lights to help see who was walking around; that Custodian Ron J went into the office to check on the fire alarm; that he turned on the office lights so that he could see; that the Grievant said that he was not supposed to monkey with the lights; that he responded that he knew that; that the Grievant restated that he should not monkey with the lights because the Principal had them set; that Custodian Ron J stated that he knew what he had done with the lights and that, when the Grievant continued to tell him not to monkey with the lights, Custodian Ron J stuck his fingers in his ears so he could concentrate on the read-out; that Custodian Ron J stated where the alarm was; that the Grievant asked where that was; that Custodian Ron J said that the Grievant should know some of this, that she had been there longer; that Supervisor Egger began explaining the fire alarm process; that the Grievant disappeared for a while; that the Grievant returned while Supervisor Egger was explaining the fire alarm process and the Grievant hollered something about disrespect; that Custodian Ron J told her that he was trying to listen to Supervisor Egger; and that several times Supervisor Egger had to tell the Grievant to be quiet; and that, finally, Supervisor Egger said "Would you shut up." (T. 161-4) Custodian Ron J's written statement is consistent with this testimony, except that he does not state that Supervisor Egger told the Grievant to shut up. (Dist. Ex. #25)

Supervisor Egger recalls that, in response to a call from Custodian Jean E, he returned to the high school and went to the high school office to check an annunciator panel; that, as he entered the office, he could hear Custodian Ron J ask the Grievant to please be quiet, I am trying to silence the alarm; that, at that point, the Grievant was telling Custodian Ron J that he can't mess with the lights, that the Principal did not want the lights messed with; that, in response to Supervisor Egger's query, Custodian Ron J said he was trying to silence the alarm; that Supervisor Egger began training the custodians on the operation of the fire alarm system; that the Grievant continued saying that you can't mess with the lights; that Supervisor Egger responded that the lights were not a problem, that they would be put back to the way they were; that Supervisor Egger, the Grievant and Custodian's Ron J and Jean E went to the room that was the source of the alarm; that Supervisor Egger continued with his training on the fire alarm system; that the Grievant left and returned; that, when the Grievant returned, she expressed a concern that Custodian Ron J was disrespectful; that Supervisor Egger responded that he was trying to explain thing and asked her to please quiet down; that Custodian Ron J said something and Supervisor Egger told them to knock it off; that the Grievant just did not stop and Supervisor Egger asked her to shut up. (T. 92-4)

Supervisor Egger's contemporaneous notes of these events are consistent with his testimony. (Dist. #22) These notes include the following:

. . .She started to holler about Ron not talking to her properly-Ron responded that he was trying to figure out what to do and all you did was keep me from concentrating. I told them to stop it and listen but Kathleen kept harping on him. I asked her to please stop it. She just kept getting louder and would not listen to me-I finally told her to shut up-she turned and walked away. . .

Supervisor Egger states that he normally does not speak that way to Custodians, but that he said it because the Grievant would not stop. (T. 94-5) According to Supervisor Egger, the Grievant's interruptions were a problem because responding to fire alarms is a custodial responsibility; the other two Custodians were trying to listen to his explanations of the fire alarm process; and the Grievant was not listening to these explanations. (T. 95)

Custodian Jean E recalls that, when the fire alarm went off, Custodian Ron J and the Grievant went into the office and she went into the custodial room to call Supervisor Egger. (T. 191) Custodian Jean E further recalls that when she returned to the front, Custodian Ron J had figured out where the alarm was; that the custodians went to that room and were joined by Supervisor Egger; that Supervisor Egger silenced the alarm and demonstrated how to blow the dust out; that the Grievant came to the hallway they were in and told Custodian Ron J that he did not have to treat her that way; that Custodian Ron J replied that he was trying to listen to Supervisor Egger, be quiet; that the Grievant continued talking and Custodian Ron J repeated that he was trying to listen to Supervisor Egger, be quiet; that the Grievant then told Supervisor Egger that she did not have to put up with that; and that, after telling her five or six times to be quiet and the Grievant refusing to do so, Supervisor Egger told the Grievant to please shut up. (T. 191-2)

Custodian Jean E prepared a written statement dated 2/2/06, but states that it should have been dated 2/2/07. (T. 193; Dist. Ex. #26) In this written statement, she states that the Grievant interrupted Supervisor Egger while he speaking to Custodian Jean E and Custodian Ron J to say that Custodian Ron J did not have to disrespect her like that; that Custodian Ron J asked the Grievant to be quiet, that he was trying to listen to Supervisor Egger and he was not going to fight with the Grievant; that the Grievant then became angry and started yelling; that Supervisor Egger told the Grievant to be quiet, that he was explaining the fire alarms; that Supervisor Egger's statement did not stop the Grievant; and that after the fifth time of telling her to be quiet nicely, Supervisor Egger, in a direct tone, told the Grievant to shut-up. Custodian Jean E ended her written statement with "I do feel that Mark handled this in a professional manner."

Supervisor Egger states that, after this incident, the Grievant's work performance did not improve and he continued to take notes. (T. 96) On February 8 and 9, 2007, Supervisor Egger monitored communications and concluded that the Grievant did not have consistent communications. (Dist. Ex. #5) Supervisor Egger states that the Grievant told him that if he thought she was taking her breaks wrong, then he should check the cameras; that he took her advice and viewed all of the Custodians; and that the Grievant did not always take her lunch at 7:00 to 7:30 p.m. as directed and, at times, would take longer than her fifteen minute breaks. (Id., T. 96)

Supervisor Egger recalls that, on February 14, 2007, he met with the Grievant and the PAST President to walk through the kitchen; explained that the kitchen was not being cleaned to his expectations; and showed the Grievant exactly what had to be done. (T. 99) According to Supervisor Egger, he reminded the Grievant of the February 1, 2007 memo and told the Grievant that he would follow through with the continuation of discipline. (Id) Supervisor Egger states that the Grievant did not provide a reasonable explanation for not improving her kitchen cleaning. (T. 99-100)

Supervisor Egger provided the Grievant with a copy of his letter of February 27, 2007. (Dist. Ex. #24) In this letter, Supervisor Egger states that he is summarizing some of the most recent issues that occurred since the Grievant was given the January 11, 2007 disciplinary letter.

Supervisor Egger's summary includes the following: that Supervisor Egger's monitoring of communications establishes that the Grievant is not consistently following communication directives and identifies non-compliance on February 8 and 9, 2007; that the Grievant has not fulfilled her responsibilities to prepare work orders and identifies that there has been a broken door closer in the locker room since before January 11, 2007; that the Grievant has been inconsistent in submitting check-off sheets, *i.e.*, no sheet was submitted for February 16, 2007; that submitted check off sheets have inaccurately reported the night's activities, including reporting tasks that have been completed by co-workers and inaccurately reporting break times; that the Grievant has taken lunch at times other than the 7:00 to 7:30 p.m. time directed by her supervisor; that the Grievant continues to perform below

acceptable standards, *e.g.*, kitchen cleaning, leaving footprints in the showers and cobwebs in the entry, and not cleaning windows and not cleaning, testing and documenting eye wash weekly; defied Supervisor Egger and the Principal's directive to not tell anyone of the break-in; and disrespected and disregarded her supervisor on February 2, 2007 by not listening to and, on multiple occasions, interrupting her supervisor's explanation of the fire alarm process. In this letter, Supervisor Egger concluded:

The district cannot continue to have an employee who does not fulfill the duties of the position, disobeys directives and creates a generally difficult environment. For this insubordination and unacceptable work, I will recommend to the district administrator additional discipline.

Supervisor Egger states that he had not seen any improvement; did not think that it would improve and made the decision to recommend that the Grievant be discharged. (T. 101) Supervisor Egger further states that he does not have authority to discharge an employee, but has authority to make a disciplinary recommendation to the District Administrator. (T. 134)

The Grievant provided Supervisor Egger with a written statement dated February 28, 2007 that includes the following:

Reaction to Letter of 2/27/07

Paragraph 2 – I do let co-workers know when I am going on break, but occasionally forget to report that I am back. Co-workers are likewise negligent about contacting me. When I report in Ron only acknowledges about getting my message by clicking the button, Jean will actually say something. When vacuuming it is impossible to hear the radio, thus I tell co-workers when I am vacuuming.

Paragraph 3 – Not sure about the door closer, however other custodians work in the locker rooms and someone else should have noticed and reported the problem.

Paragraph 4 – They have been completed and placed on the board as directed, but what happens to them beyond that is out of my control. Do they “accidentally” get moved? I do not know!

Paragraph 5 – My cleaning practices have not changed since I have been working here. Stats. from my Work Appraisals:

Mar 01-Jan 02: very good 54%. satisfactory 46%  
Jan 02-Jan 03: very good 54%, satisfactory 46%  
Jan 03-Jan 04: (do not have this one at this time)  
Jan 04-Jan 05 good 17%, very good 58%, satisfactory 25%  
Jan 06-Jan 07: very good 77%, satisfactory 23%

Paragraph 6 – Possible break-in. That night the Panthers were using the school. I told a parent about the potential break-in and to please observe security and keep eyes open. I reported this to Mr. McCallum and he was OK with it.

Paragraph 7 – Fire alarm went off and we were trying to locate the alarm. It was in Rm 120, Davey Tomlinsons area. Fire alarm was dusty and probably led to it going off. I did listen to Mark's comments about how the alarms work and can be set off. Ron got rather belligerent about me not knowing where Rm 120 is, claiming that it is in my area of responsibility. It is actually nearer to his, in Kathy Meisters hallway to Administration. Mark began talking to me about respect and Ron said he did not have to listen to that. I told him that he should listen. That is when Mark told me to shut up. The last part of this paragraph pertains to whom, me or Mark??? (Dist. Ex. #24)

District Administrator Wolfe recalls that she investigated the incident in which Supervisor Egger told the Grievant to shut-up because she had received conflicting stories, *i.e.*, the Grievant said that she waited until everything was done and wanted to resolve her issue and move on, while the other Custodians were alarmed at the Grievant's behavior towards her supervisor. (T. 215) District Administrator Wolfe prepared a written "Incident Investigation Summary," dated February 28, 2007, which states that her investigation process included interviews with Supervisor Egger and Custodians' Ron J, Jean E and the Grievant and that these latter interviews were in the presence of the PAST President. (Dist. #28) This "Summary" has the following

### **Conclusion**

Mr. Egger told Ms. Sullivan to "shut up" after multiple attempts to obtain compliance to his directive to be quiet while he explained fire alarm procedures. This was reported by Mr. Egger and confirmed in writing and verbally by Mr. Jacobson and Ms. Elsing. Only Ms. Sullivan reports that she discussed the disrespect after the explanation about the fire alarm had been completed and that she had not interrupted Mr. Egger.

Ms. Sullivan demonstrated disrespect for her supervisor by not complying with his requests to listen. Mr. Egger reports that this behavior of not listening to his requests or directives has occurred on other occasions.

Previous direction and discipline have not changed this behavior. Additional discipline is warranted.

Discipline will be forthcoming.

The District Administrator recalls that, in the presence of the PAST President, she presented her "Incident Investigation Summary" to the Grievant and that this "Summary" states "Discipline will be forthcoming" because she was working with Supervisor Egger on his

letter of February 27, 2007. (T. 217) According to the District Administrator, she met with the Grievant to provide her with an opportunity to take responsibility for her behavior and to give the District Administrator some indication that she would improve; but that the Grievant basically stated that she was not responsible; that she had been respectful and waited; that it was Supervisor Egger who had been disrespectful and that it was everybody else's fault. (T. 217-18)

The District Administrator states that she had no belief that the Grievant would improve and made the decision to terminate the Grievant. (T. 218) The District Administrator states that this decision was based upon the Grievant conduct described in Supervisor Egger's letter of February 27, 2007 and her investigative report dated February 28, 2007; all of the action that had occurred; the multiple opportunities that were given to the Grievant to improve; and that management was not seeing changes to a satisfactory level. (T. 218-20) In denying that the decision to discharge the Grievant was hasty, the District Administrator states that the District spent hours working with the Grievant, hoping that she would become the employee that the District needed. (T. 220)

### Summary

The March 2, 2007 discharge letter includes the following:

. . .The termination was for cause based on the January 11, 2007 letter of discipline, the issues presented in the February 20, 2007 letter, the investigation report dated February 28, 2007 and follow-up meeting February 28, 2007. These documents are attached.

The most reasonable inference to be drawn from the plain language of this letter is that the District considered the fact that the Grievant was given the January 11, 2007 letter of discipline, but that the "issues" that gave rise to the discharge decision were those presented in the February 20, 2007 letter and the investigation report dated February 28, 2007. Such a conclusion is consistent with the testimony of the District Administrator, who made the decision to discharge the Grievant.

A review of both the February 20, 2007 letter and the February 28, 2007 investigation report establishes that the "issues presented" pertain to Grievant conduct that occurred after January 11, 2007. Contrary to the argument of the Association, the record does not warrant the conclusion that the Grievant's discharge was based upon the same conduct for which she had been previously disciplined.

In his letter of February 27, 2007, Supervisor Egger claims that the Grievant was not consistent in following the work directives regarding communications with co-worker; identifies that, on February 8 and 9 2007, the Grievant did not respond to break notices; responded to Custodian Jean E's call, but not to Custodian Ron J's call; and did not acknowledge Custodian Mickey N when he was leaving. Neither the Grievant's February 28,



2007 response, nor any other record evidence, provides a reasonable basis to discredit these claims of Supervisor Egger.

It is evident that, after January 11, 2007, the Grievant was on medical work restrictions. (T. 359) It is not evident that, while the Grievant was on these restrictions, her assigned areas included the locker room. (Assoc. #10) The record, therefore, supports the Grievant's February 28, 2007 claim that she did not have sole responsibility to report the broken door closer.

In his letter of February 27, 2007, Supervisor Egger claims that the Grievant has generally submitted her daily check-off sheets, but that the submitted sheets do not accurately report her work activities or breaks. Neither the Grievant's February 28, 2007 response, nor any other record evidence, provides a reasonable basis to discredit these claims of Supervisor Egger.

In his letter of February 27, 2007, Supervisor Egger claims that the Grievant's cleaning continued to be below acceptable standards and identifies several performance problems. In her February 28, 2007 response, the Grievant does not claim that other Custodians have any responsibility for the alleged problems, but rather, states that her cleaning practices have not changed since she started and cites her previous evaluations.

At hearing various teacher witnesses testified that they were satisfied with the way that the Grievant cleaned their classrooms and/or compared the way the Grievant performed her duties to the way that other District Custodians performed their duties. Neither this testimony, nor any other record evidence, provides a reasonable basis to discredit Supervisor Egger's February 27, 2007 claims that the Grievant's cleaning continued to be below acceptable standards.

Supervisor Egger's letter of February 27, 2007 claims that the Grievant defied specific supervisory directives to not divulge information of a possible break-in the school to steal District computers. In her February 28, 2007 response, the Grievant acknowledges that she told a member of the public of a possible break-in and offers, as apparent justification, that she reported this to Principal McCallum and he was OK with it.

The record establishes that the Grievant received a supervisory directive to not divulge information of a possible break-in to the public. At hearing, the Grievant acknowledged that she divulged such information and stated that the Principal did not have much to say when the Grievant advised him of her conduct. Neither this testimony, nor any other record evidence, establishes that the Principal was OK with the fact that she divulged confidential information.

At hearing, witnesses testified that the Grievant explained that she divulged the information for public safety reasons. The record provides no reasonable basis to conclude that keeping the information confidential posed any threat to public safety.

As Supervisor Egger notes in his letter, by divulging the confidential information, the Grievant not only defied a direct order, but also engaged in conduct that had the potential to tip-off any burglars. By failing to comply with the direct order of a supervisor, the Grievant was insubordinate and jeopardized a police sting operation.

Supervisor Egger's letter of February 27, 2007 claims that the Grievant repeatedly interrupted Supervisor Egger as he was providing instruction to the Custodians on the fire alarm system and did not listen to his instruction. In her response of February 28, 2007, the Grievant states that she did listen and that Supervisor Egger told her to shut-up when she was telling Custodian Ron J to listen to Supervisor Egger. The Grievant's version of events is contradicted by each of the three witnesses to her conduct and is not credible.

The credible evidence establishes that the Grievant ignored repeated attempts by Supervisor Egger to stop her from talking while he was providing work instruction. By engaging in this conduct, the Grievant was not only disrespectful of Supervisor Egger's supervisory authority in the presence of other Custodians, but also, interfered with Supervisor Egger's attempts to provide information, *i.e.*, the detection and maintenance of fire alarms, to District Custodians, including the Grievant, that would assist these Custodians in performing work duties related to protecting District property and the health and safety of District employees.

As PAST argues, the decision to discharge the Grievant was made within a relatively short period of the suspension. In some cases, PAST's argument that this provided insufficient time to rehabilitate would be persuasive. This is not one of those cases.

Less than two months prior to her suspension, the Grievant received a written warning that she was to follow procedures and comply with work rules. The Grievant conduct that gave rise to the suspension not only demonstrates a persistent unwillingness to follow reasonable work directives and comply with work rules, but also, exhibits an escalation of this type of misconduct when, on January 9, 2007, the Grievant responded to her supervisor's attempts to provide work direction by telling him that he was "fucking crazy."

A written warning and suspension within a relatively short period of time should place a reasonable employee upon his/her best behavior. In this case, less than a month after her suspension, the Grievant ignored a supervisory directive to not repeat confidential information to the public, thereby jeopardizing a police "sting" operation; repeatedly interrupted her supervisor as he was attempting to provide work instruction to District Custodians, including the Grievant, on matters related to health and safety; and repeatedly ignored her supervisor's directives to be silent and listen. This conduct of the Grievant, as well as other substantiated misconduct referenced in the letter of February 27, 2007, reasonably establishes that the Grievant has no respect for supervisory authority and that it is unlikely that there is any corrective discipline that will instill in the Grievant a respect for supervisory authority.

To be sure, between the time of the suspension and the decision to discharge, the Grievant had been subject to medical restrictions resulting from a worker's comp injury. It is not evident, however, that the Grievant was assigned any duty inconsistent with her medical restrictions. Nor is it evident that the Grievant had any medical or psychological condition that prevented the Grievant from complying with the District's directives, procedures, or performance requirements.

Supervisor Egger confirmed that the check-off sheets were discontinued after the Grievant was discharged and that he notified the PAST President of this fact. (T. 122-3) Supervisor Egger's testimony that the other Custodians were getting their work done; that he did not expect the subs who were filling in after the Grievant's discharge to fill-out the check-off sheets; and that he and the PAST President had an agreement to move on, reasonably explains the decision to discontinue the check-off sheets. (T. 122-23) The discontinuation of the check-off sheets is not evidence that the Grievant has been the subject of unfair, discriminatory or inappropriate disparate treatment.

As discussed above, by the end of January 2007, the Grievant had been provided with reasonable notice of District expectations and had received considerable District feedback with respect to the issue of whether or not she was meeting the District's expectations. The failure of the District to perform an evaluation of custodial staff in January, 2007 provides no reasonable basis to overturn the District's decision to discipline the Grievant.

The District Administrator states that she counseled Supervisor Egger to not use the term "shut up," but did not discipline Supervisor Egger because he had been provoked after making multiple attempts to try to do what he needed to do. (T. 216) The District Administrator's decision to not discipline Supervisor Egger was reasonable under the circumstances. The failure of the District Administrator to discipline Supervisor Egger is not evidence that the Grievant has been the subject of unfair, discriminatory or inappropriate disparate treatment.

When asked why the procedures were not reviewed on February 1, 2007, as set forth in the November 1, 2006 memo, the District Administrator responded that she did not recall that the entire group had to get back to review the process; that the intent of the review statement was to see if the procedures did not work and, if the procedures needed to be revamped, we could do so. (T. 227) The District Administrator states that, given the involvement of the PAST President, he was aware of how the process was going. (T. 229) The record establishes that the PAST President was well aware of how the process was going.

PAST Representative Horn confirms that the PAST President was the PAST representative responsible for monitoring the procedures in the November 1, 2006 memo. (T. 278-9) PAST Representative Horn recalls that both parties thought that it made sense to have a definitive date to review and see how the process was operating and that his sense was that there would be some sort of formal review. (T. 281)

Neither PAST Representative Horn's testimony, nor any other record evidence, establishes that the District had the obligation to ensure that a formal, or any other type of review, took place before February 1, 2007. The fact that neither party sought a review of the process before February 1, 2006 refutes PAST's argument that the procedures were ineffective. Indeed, one could reasonably argue that, had the Grievant consistently followed these procedures, communications between PAST members and with management would have been significantly improved.

The Grievant recalls that, following a meeting with the District Administrator, she was stressed out and wrote a document dated September 25, 2006. (Assoc. Ex. #7; T. 315) This document was addressed to the District School Board. The Grievant is not sure, but believes that she submitted this document to two or three Board members. (Id.) Neither the Grievant's testimony, nor any other record evidence, establishes that Supervisor Egger or the District Administrator received a copy of this written statement.

When asked to identify the Board members, the Grievant confirmed that she sent it to "Joe" and "Nancy;" that "Nancy" never responded to her; and that, when she discussed it with "Joe," he did not have much to say. (T. 372) Neither "Joe" nor "Nancy" testified at hearing.

In this document, the Grievant claims that she has been the subject of "harassing conditions" from her co-workers and up-line supervisors" and refers to a number of incidents. None of these incidents, individually or collectively, identify conduct that is generally considered to be "harassing."

The record is silent with respect to the issue of whether or not this document was given consideration by the Board, or any individual Board member. This silence provides no reasonable basis to conclude that any District representative has acted unreasonably.

Prior to her discharge, the Grievant was forewarned that the District expected her to follow work directives and procedures, including those related to communications with co-workers and completing and submitting check-off sheets; to be respectful towards supervisors; and to perform her custodial duties, including cleaning, to District standards. Although the January 11, 2007 letter does not expressly state the Grievant would be subject to additional discipline, a reasonable employee would understand that repeated infractions could result in additional discipline, including discharge. Contrary to the argument of the Association, the record provides no reasonable basis to conclude that the District has willfully refused to view the Grievant's work performance in a balanced matter.

The District's imposition of progressive discipline has not stopped the Grievant from engaging in the misconduct for which she was disciplined. Not only did the Grievant continue to fail to comply with work directives and follow work procedures, but also, the Grievant engaged in escalating misconduct from directing profanity toward a supervisor to defying a direct order of that supervisor. The District Administrator's conclusion that a discipline less

than discharge would not correct the Grievant's inappropriate behavior is supported by the record evidence. The District has just cause to discharge the Grievant.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following:

**AWARD**

1. The District did not have just cause to suspend the Grievant without pay for 12 hours.
2. The District has just cause to suspend the Grievant without pay for 8 hours.
3. The District is to immediately:
  - a) modify its personnel records to reflect that the Grievant's suspension without pay for 12 hours is reduced to a suspension without pay for 8 hours;
  - b) and make the Grievant whole for all wages and benefits lost as a result of its decision to suspend the Grievant without pay for 12 hours rather than 8 hours.
4. The District has just cause to terminate the Grievant.

Dated at Madison, Wisconsin, this 20th day of March, 2008.

Coleen A. Burns /s/

---

Coleen A. Burns, Arbitrator

