

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**BARRON COUNTY HIGHWAY DEPARTMENT EMPLOYEES,  
LOCAL 518, AFSCME, AFL-CIO**

and

**BARRON COUNTY (HIGHWAY DEPARTMENT)**

Case 165  
No. 67939  
MA-14057  
(Brodt Suspension)

and

Case 166  
No. 67940  
MA-14058  
(Brodt Discharge)

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**Appearances:**

**Steve Hartmann**, Staff Representative, AFSCME Council 40, appearing on behalf of the Union.

**Andrea Voelker**, Attorney, Weld, Riley, Prenn and Ricci, S.C., Attorneys at Law, appearing on behalf of the County.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter the Union and County or Employer, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide two grievances involving discipline imposed on David Brodt. Case 165 involves his suspension and Case 166 involves his discharge. A hearing on both grievances was held on August 20, 2008 in Barron, Wisconsin, at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievances. The hearing was not transcribed. The parties filed briefs on October 29,

2008. The record was closed on November 7, 2008, when the parties notified the arbitrator that they would not be filing reply briefs. Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned issues the following Award.

### **ISSUES**

The parties stipulated to the following issues:

1. Did the County have just cause to suspend the grievant? If not, what is the remedy?
2. Did the County have just cause to terminate the grievant? If not, what is the remedy?

### **PERTINENT CONTRACT PROVISIONS**

The parties' 2007-09 collective bargaining agreement contains the following pertinent provisions:

#### **ARTICLE 12 – DISCIPLINE AND DISMISSAL**

Section 12.01: The Employer agrees that it will act in good faith in the dismissal of any employee. Should the Union present to the Employer a grievance in connection with the dismissal of any employee within the (10) days of such dismissal, the dismissal shall be reviewed under the terms of the grievance procedure, as specified in Article 13.

Section 12.02:

*Standard:* The parties recognize the authority of the Employer to initiate disciplinary action against employees, provided such disciplinary action is for just cause only.

*Appeal:* A regular employee who has completed his/her probationary period shall be entitled to appeal any disciplinary action through the grievance and arbitration procedure.

*Copies:* If any disciplinary action is taken against an employee, both the employee and the Union shall receive copies of this disciplinary action.

*Progressive Discipline:* The Employer recognizes the principle of progressive discipline when applicable to the nature of the misconduct giving rise to the disciplinary action.

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**ARTICLE 26 – MANAGEMENT RIGHTS**

Section 26.01: The County possesses the sole right to operate the County government and all management rights repose in it subject to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

...

- D. To suspend, discharge and take other disciplinary action against employees for just cause;

...

**FACTS**

The County operates a highway department. The Union is the exclusive bargaining representative for the highway employees. The County and the Union are parties to a collective bargaining agreement for the years 2007-2009. The grievant herein, David Brodt, was in the bargaining unit. This Award involves discipline imposed on Brodt. As noted in this decision's prefatory paragraph, Case 165 involves his suspension and Case 166 involves his discharge.

Brodt worked for the Highway Department for 25 years prior to his discharge. He was a fuel truck driver. Insofar as the record shows, he had not been formally disciplined until he received the discipline involved here.

In 2006, Brodt was accused of making a threatening statement in the workplace. The statement in question involved the phrase "bullets flying". The record does not contain any additional facts about this matter (including exactly what was said), or give any context to it. When the Employer investigated the matter, Brodt denied making a threatening statement. Additionally, the person to whom Brodt made his statement told management that he did not feel threatened by it and did not perceive the statement as a threat. For these reasons, the Employer decided that Brodt's conduct did not warrant discipline. Afterwards though, the County's Human Resource Director did counsel Brodt to not use inappropriate language or make threatening statements in the workplace.

Jerry Pich is the Shop Superintendent in the Highway Department. He has had that job for eight years. He is a former bargaining unit member who at one point served as the local union president. He supervises the bargaining unit employees. In that capacity, he was Brodt's immediate supervisor. Insofar as the record shows, prior to the incident involved here, he had not had any altercations with Brodt or vice-versa.

On October 31, 2007, Pich gave Brodt a letter from the County's Human Resource Director, Rachel Richie. This letter informed Brodt that an investigatory meeting had been scheduled for the next day to investigate what the letter characterized as "an issue. . .related to [his] use of work time."<sup>1</sup> Upon getting this letter from Pich, Brodt exclaimed "What the fuck is the Union doing to me now?" Pich replied that the meeting set for the next day had nothing to do with the Union.

Later that day, Brodt went into co-worker Clay Paulson's office and complained to Paulson about the (investigatory) meeting set for the next day. Paulson could tell that Brodt was angry, but he (Paulson) didn't know what Brodt was angry about. Without giving Paulson any context or saying anything else, Brodt handed Paulson the letter he had received from Pich and said: "look at what your fucking buddy did to me... I'm sick of his bullshit and management's bullshit." Paulson understood that the phrase "your fucking buddy" was a reference to Local Union President Larry Mazel. After Paulson read the letter, he told Brodt that the matter being investigated the next day didn't have anything to do with the Union or Larry Mazel, so he (Paulson) didn't want to hear about it. As Brodt walked away, he told Paulson that it was still "bullshit".

Early the next day, November 1, 2007, Pich approached Brodt at the highway shop and asked him to try on a type of coat which Pich had to order. Insofar as the record shows, this was the first interaction of the day between the two men. Brodt's response was as follows. In an angry voice, he yelled at Pich: "You've been on my ass since I got this fucking fuel truck (job)...I'm so fucking sick of this fucking place." In response, Pich tried to calm Brodt down, and told him that if he didn't calm down, he was going to get himself into trouble. Brodt replied to that statement by saying that he (Brodt) had been in "fucking trouble here for 25 fucking years you little fucking prick" and "I don't give a shit if you don't like it." As Brodt was yelling at Pich, Pich was standing on a pallet. Brodt got onto the pallet too. Then Brodt moved into Pich's body space and aggressively pushed his weight into Pich and belly bumped him (meaning that Brodt pushed his belly into Pich). In doing so, Brodt's belly intentionally touched Pich. As this happened, Pich moved backwards and stepped off the pallet. Thus, Pich was forced off the pallet by Brodt's pushing/belly bumping. At that point, Pich again told Brodt that his conduct was going to get him in trouble. Brodt then walked away muttering to himself. This incident was witnessed by several employees, two of whom testified about it. Both Larry Mazel and Roger Kaiser testified that Brodt was angry and yelled at Pich, and that in response, Pich was calm and did not raise his voice to Brodt. Both also testified that Brodt said the word "fuck" numerous times. Both were surprised by Brodt's aggressive behavior (i.e. what he said and did). Both testified that Brodt "bumped" into Pich.

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<sup>1</sup> The record indicates that the "issue" in the last quote involved a citizen's complaint that Brodt had been at one of his (fuel truck) stops "too long". Pich planned on counseling Brodt at that meeting to not stay at that stop so long in the future. While the suspension letter makes a passing reference to this matter, it was not part of the case which the parties litigated herein. Neither side presented any facts related to same. As a result, it is not addressed in the discussion which follows. That means this "issue" will not be used as a basis for deciding whether there was just cause for the discipline imposed herein.

Insofar as the record shows, the incident just identified was the first time Pich had an employee swear at him, belly bump him, and act aggressively toward him. Pich felt threatened by what Brodt said and did. He was also embarrassed because “a lot” of the employees who he supervises saw it.

Following the incident, Pich informed his supervisors about it. They decided they would discuss the incident with Brodt at the investigatory meeting that was scheduled to occur later that day.

When the investigatory meeting was held later that day, the meeting’s focus changed from the original topic (i.e. the allegation that Brodt had been at one of his stops “too long”) to the incident with Pich which had occurred earlier that day. When he was asked about it, Brodt denied that he physically bumped into Pich, and also denied using profanity and/or inappropriate language towards Pich.

Following that meeting, Human Resource Director Richie conducted an investigation into the November 1, 2007 incident. After doing so, she concluded that Brodt engaged in “threatening workplace behavior” towards his supervisor on November 1, 2007, and that this misconduct warranted a ten-day suspension. The suspension letter, which was dated November 6, 2007, stated thus:

This letter is in follow-up to the 11/1/07 investigatory meeting held with County Administrator Hebert, Shop Superintendent Pich, Human Resource Director Scribner, attorney Mike Ablan (listened via telephone conference) and yourself. As a result of the meeting and subsequent investigation you will be issued 10 days (80 hours) of unpaid suspension as a result of your inappropriate and threatening workplace behavior exhibited on 11/1/07 and misuse of staff time. Your suspension shall be served Tuesday, November 6, 2007 through Monday, November 19, 2007.

You have been made aware that disrespectful, threatening and inappropriate work behavior towards other employees and your supervisor(s), to include inappropriate language, is not acceptable. You are also aware of the County’s policy related to workplace violence and personal conduct and work standards as you signed - these policies on 1/1/07. Attached is a copy of the policies as another reminder of the expectations of the County. The County notes that you have violated or have not met the expectation of the following standards:

- #1. Insubordination of any form
- #5. Failure to exercise good judgment or being discourteous when dealing with fellow employees clients or general public.
- #19. Threatening or using abusive language to others.

This document shall serve as your final reminder as to the required appropriate workplace behavior. In addition, this document shall serve as your final reminder that you shall only spend the necessary time needed to conduct your fuel truck functions as unnecessary time spent doing non-work related activities will result in work rule violations and may result in further disciplinary action, up to and including termination of employment.

Article 26, Part D of the contract states management has the “right to suspend, discharge and take other disciplinary action against employees for just cause.” Article 13 outlines the grievance procedure. Further disciplinary action may be taken, up to and including termination of employment, for similar actions which may occur in the future. This document will be placed in your personnel file.

Barron County values you as an employee and it is our intent to make you fully aware of our expectations and provide any assistance you may require. Enclosed are contact numbers for the Employee Assistance Program.

Brodt subsequently filed a grievance challenging his suspension. At some point (the record does not indicate when), the County directed Larry Mazel, Roger Kaiser and Clay Paulson to write statements concerning what they saw on October 31 and November 1, 2007. They complied with the directive and wrote up statements. Paulson’s statement dealt with his interaction with Brodt on October 31, 2007 and Kaiser’s and Mazel’s statements dealt with what they saw of the Brodt/Pich altercation on November 1, 2007.

When Brodt returned to work on December 6, 2007 (following the suspension and his use of sick and vacation days), he met with management officials. At that meeting, they reviewed a formal Performance Improvement Plan with him. That plan identified the County’s expectations of him going forward. It provided in pertinent part:

**Performance Improvement Plan**

Dave Brodt

December 6, 2007

The following areas have been identified as needing immediate attention and improvement related to the recent disciplinary action. You are expected and directed to take immediate steps to correct and address these deficiencies and concerns. You are put on notice that unless there is significant and substantial improvement in your performance in these areas, additional disciplinary action, up to and including termination, may be taken. Follow-up meetings on these issues will be scheduled to determine progress and compliance.

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**B. Use of profanity and threatening language, tone and demeanor.**

Example: The verbal altercation with your supervisor, the language used, your demeanor and tone of voice were inappropriate.

Action Required:

1. You will not use profanity that is directed at others.
2. You will not use a threatening tone of voice, threatening demeanor or threatening language.
3. You will not call any co-worker, supervisors, vendor, citizen or anyone else associated with County business an inappropriate name.
4. You will not threaten to sue or take legal action against other County employees, organizations or entities on work time, in County vehicles or on County property.

**C. Anger and temper is inappropriate in the work environment.**

Example: The altercation with your supervisor stemmed from your inability to control your anger and temper.

Action Required:

1. You will control your anger and temper and keep it at an appropriate work level.
2. You are required to attend an anger management course or related training approved by, the County within forty-five (45) business days of receipt of this document (by 2/7/08). The County will pay for the course but attendance will occur outside of work time unless approved by the Highway Commissioner and County Administrator.

**D. Negative physical contact is not acceptable including, but not limited to, contact intended to intimidate or harm others.** Example: You made physical contact with your supervisor during the altercation.

Action Required:

1. You will not make negative physical contact with any person connected with the work of the County including co-workers, supervisors, vendors, citizens and others.

**E. You must follow your supervisor's directives and provide truthful information to your supervisors and others in the organization when asked.**

Example: The investigation identified several areas where your statements were not consistent with the statements of several others and evidence collected during the investigation.

Action Required:

1. You will provide truthful information at all times while working for the County.
2. You will comply with the directives of your supervisors.

Brodt was required to sign this document. He did. In doing so he acknowledged, among other things, that he was not to threaten, touch, or swear at co-workers.

On January 3, 2008, various County officials met with Brodt and various union officials to discuss Brodt's suspension grievance. In that meeting, Brodt was provided with copies of the written statements that Mazel, Kaiser and Paulson had made.

By his own admission, these written statements made Brodt angry. After the meeting, he confronted Mazel and Paulson about their statements.

Brodt first walked up to Mazel and calmly but sarcastically said: "It's really nice that fellow union members are making out statements on me." Then he walked away. Mazel said he could tell that Brodt was very mad and upset when he said this.

Brodt then walked up to Paulson (who apparently had not seen the interaction between Brodt and Mazel). Paulson was looking at his paycheck stub when Brodt walked up and said: "I read your fucking statement but you left out the administrator and Jerry" (Note: his reference to "the administrator" was County Administrator Duane Hebert and the reference to "Jerry" was Shop Superintendent Jerry Pich). As Brodt made his statement to Paulson, Brodt took an envelope (that apparently contained Paulson's statement) and "flicked" him in the chest with the envelope. Then Brodt walked away. Paulson was taken by surprise at what Brodt had just said and done to him, so he asked "What, Dave? What, Dave?" Paulson described Brodt as being mad and angry when this happened.

After management learned of the incident just referenced, it held another investigatory meeting with Brodt and his union representatives to determine what had happened. Following that meeting, the Employer concluded that Brodt's conduct on January 3, 2008 violated the Performance Improvement Plan which had been imposed on him December 6, 2007, and warranted discharge.

The discharge letter, which was dated January 17, 2008, provided thus:

This letter is in follow-up to the 11/9/07 investigatory meeting held with County Administrator Hebert, Human Resource Director Richie, attorney Mike Ablan (listened via telephone conference), Local union Steward Mike Flach, and yourself. As a result of the meeting and subsequent investigation it has been determined that you are in violation of the performance improvement plan issued to you on 12/6/07 in which you signed on 12/7/07. Section B of the



performance improvement plan outlines that the use of profanity is not acceptable and it was gathered that you used at least one swear word in your communication to another co-worker on 1/3/08. Section B also outlines that you will not exhibit a threatening tone of voice or demeanor and it was gathered from co-workers that it was obvious that you were very angry based on your facial expressions and tone exhibited towards other co-workers the afternoon of 1/3/08. Section C outlines that your anger and temper must be controlled and at an appropriate work level. Based on the information gathered, it is felt that your anger was not portrayed at an appropriate work level. Section D outlines that the use of negative physical contact is not acceptable and it was gathered that you used an envelope to make negative physical contact with another co-worker on 1/3/08.

As you are aware, you were issued an unpaid suspension of ten (10) days as a result of your inappropriate and threatening workplace behavior exhibited on 11/1/07 towards your supervisor along with misuse of staff time. During both of the investigatory meetings it became apparent that you were not truthful in your communication with the County.

You have been made aware that disrespectful, threatening and inappropriate work behavior towards other employees and your supervisor(s), to include inappropriate language, is not acceptable. You are also aware of the County's policy related to workplace violence, personal conduct and work standards as you signed these policies on 1/1/07. As a reminder of the County's expectations, you were provided with an additional copy of the workplace violence, personal conduct and work standards on 11/6/07. The County notes that you have again violated or have not met the expectation of the following standards:

*#3 Failure to provide accurate and complete information when required by an authorized person.*

*#5 Failure to exercise good judgment or being discourteous when dealing with fellow employees clients or general public.*

*#10. Inability or unwillingness to work amicably and cooperatively with County personnel.*

*#19. Threatening or using abusive language to others.*

The document issued to you on 11/6/07 stated that it served as your "final reminder as to the required appropriate workplace behavior." In addition, the document indicated that future work rule violations will result in further disciplinary action, up to and including termination of employment.

The collective bargaining agreement in Article 26, Part D states that management has the “right to suspend, discharge and take other disciplinary action against employees for just cause.” Article 13 outlines the grievance procedure.

Barron County has provided you with opportunities to improve your work behaviors; however you have not met the criteria outlined in your performance improvement plan nor the expectations of the County. As a result of your continued inappropriate work behavior and violation of the performance improvement plan, you are being terminated from employment with the Barron County Highway Department effective January 18, 2008. You must return any and all Barron County property immediately.

Brodt subsequently filed a grievance challenging his discharge. Both this grievance and the one challenging his suspension were processed through the contractual grievance procedure and appealed to arbitration.

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At the hearing, Brodt testified that he did not bump into Pich, or swear at him, or use the word “fuck” in the November 1, 2007 incident.

At the hearing, Brodt implied that Pich was partially responsible for what happened on November 1, 2007 because the day before, on October 31, 2007, Pich had yelled at Brodt that he (Pich) wanted him (Brodt) to retire, and then slammed the door. At the hearing, Pich denied threatening or yelling at Brodt that day. He also denied slamming the door.

### **POSITIONS OF THE PARTIES**

#### **Union**

The Union’s position is that the County did not have just cause to suspend the grievant for ten days for his conduct on November 1, 2007 and discharge him for his conduct on January 3, 2008. As the Union sees it, that discipline was not warranted under the circumstances. It makes the following arguments to support these contentions.

First, it comments as follows on the November 1, 2007 incident between the grievant and Pich. The Union acknowledges that the grievant had what it calls a “loud and animated discussion” with Supervisor Pich about several matters (namely, the grievant’s “distrust” of Supervisor Pich and the local union). The Union further acknowledges that the grievant used what it calls “shop talk” during the course of this “discussion”. Having made those admissions, the Union turns to what it believes is the only significant point of disagreement about the incident, namely whether there was any physical contact between the grievant and

Pich. According to the Union, Brodt did not make physical contact with Pich. To support that contention, it relies on the grievant's flat assertion at the hearing that he did not make contact with Pich.

With regard to what happened January 3, 2008, the Union acknowledges that after the grievant received the employee statements at the suspension grievance meeting, he walked up to Mazel and Paulson separately and said something to each one. He told Mazel that it was a shame that fellow union members had made statements against him. Then he walked up to Paulson and said that he read his (Paulson's) statement, but that he (Paulson) forgot to mention (Supervisor) Pich or (Administration) Hebert (in it). The Union further acknowledges that when the grievant spoke to Paulson, he "tapped" Paulson with an envelope on either the back or the chest. Having made those admissions, the Union next addresses their significance. The Union first contends that the grievant's statements to Mazel and Paulson were essentially no big deal, and certainly were not threats. To support that contention, it avers that at the hearing, both Mazel and Paulson testified "that they were not scared or intimidated during or after the conversation." Second, the Union comments on how the grievant said "what he had to say". The Union avers that even if the grievant was angry with his co-workers because they had written out statements, he (the grievant) did not use profanity and did not exhibit a threatening tone or demeanor toward Mazel and Paulson. According to the Union, the grievant was calm, quiet and kept his anger/temper at "an appropriate workplace level." The Union argues in the alternative that even if the grievant did use the "f" word to describe Paulson's written statement, the grievant was not directing a profanity to an employee. Third, the Union asserts that the "tapping" of the envelope on Paulson was not intended to be intimidating or a threat. According to the Union, the grievant did it merely "to get [Paulson's] attention" so that he (i.e. the grievant) could speak to him (i.e. Paulson).

Next, the Union argues that the level of discipline which the Employer imposed on the grievant (i.e. a ten-day suspension for his conduct on November 1, 2007 and discharge for his conduct on January 3, 2008) was harsh, excessive, unwarranted and inappropriate under the circumstances. Here's why.

First, the Union emphasizes that the grievant is a long-term employee (i.e. 25 years) who had not previously been disciplined. Given his lack of prior discipline, it's the Union's view that the Employer did not follow progressive discipline as it should have. Second, the Union essentially makes a disparate treatment argument via its assertion that the grievant and other bargaining unit employees have previously used the same "type of language" which the grievant used on November 1, 2007 toward Pich, and that when they did so, there were no repercussions. Building on that premise, it's the Union's view that the grievant had no reason to believe that his "vigorous" "discussion" could result in disciplinary action. Said another way, the Union maintains there's a disconnect between the discipline imposed here for a "vigorous" "discussion" and what has previously gone on in the workplace. Third, the Union notes that neither the suspension letter nor the Performance Improvement Plan constitute a last chance agreement (as that term is traditionally used in labor relations). Building on that

premise, the Union asserts that this is not a situation where a last chance agreement was in place which “required” the grievant’s discharge for his next offense, no matter how small. Fourth, notwithstanding the Employer’s contention to the contrary, it’s the Union’s view that the grievant did not commit “even a trivial violation” of the Performance Improvement Plan. In particular, the Union focuses on the fact that the grievant tapped Paulson with the envelope and that the Performance Improvement Plan prohibits “negative physical contact.” According to the Union, “it is an incredible stretch for the Employer to characterize the tapping with the envelope as a “negative physical contact”. To support that premise, it asks rhetorically if another employee had done the same type of tapping, would they be fired? The Union answers that rhetorical question in the negative, and avers that even if it is a disciplinable act, “it is difficult to imagine more than a verbal warning.”

In sum, it’s the Union’s view that the County did not prove that it had just cause to suspend and discharge the grievant. The Union therefore requests that both grievances be sustained and both disciplines overturned, that the grievant be reinstated, and a make-whole remedy issued.

### **Employer**

The Employer’s position is that it had just cause to suspend the grievant for ten days for his workplace behavior on November 1, 2007. According to the Employer, he engaged in misconduct that day when he yelled, swore at and pushed his supervisor backwards with his belly. The Employer contends that type of behavior cannot be tolerated in the workplace. It’s also the Employer’s position that it had just cause to terminate the grievant for his workplace behavior on January 3, 2008. According to the Employer, he engaged in misconduct that day when he threatened and was abusive to his co-workers. The Employer contends that this misconduct violated the grievant’s Performance Improvement Plan. As the Employer sees it, it provided sufficient evidence to satisfy its burden of proving that both these disciplinary actions were warranted under the circumstances. It makes the following arguments to support these contentions.

The Employer addresses the suspension case first. In its view, here’s what happened. On November 1, 2007, the grievant angrily yelled and swore at Supervisor Pich without any provocation. He called him a “prick”, a “fucking asshole” and said he wasn’t going to be pushed around by him or the “fucking union” anymore. At that point, he “invaded” Pich’s personal space “in an aggressive manner” and physically touched Pich by pushing him (Pich) with his (i.e. the grievant’s) stomach. The Employer avers that Pich never yelled back at the grievant or swore at him; instead, he twice told the grievant that he better stop because he was getting himself into trouble. The Employer notes that Pich’s testimony about the incident was supported by three bargaining unit employees who who all testified it was the grievant who yelled and swore at Pich, and that Pich did not yell or swear at all.

Having identified the conduct in question, it's the Employer's view that what the grievant did constituted misconduct for the following reasons. First, the Employer maintains it cannot have its employees yell at, swear at, threaten and physically touch a supervisor (as the grievant did here). According to the Employer, that was intolerable behavior which undercut the supervisor and was detrimental to the working environment. Second, the Employer cites several of its policies that address inappropriate and unacceptable workplace behavior and avers that the grievant's conduct toward Pich was certainly the type of conduct proscribed therein. It maintains that the grievant was well aware of those policies and expectations because the Human Resource Director had counseled him about inappropriate workplace language and behavior in 2006. Third, the Employer maintains that Pich was not the aggressor in this matter as the grievant claimed. To support that contention, it notes that the only person who testified that Pich was the aggressor was the grievant. According to the Employer, the grievant was not credible, and clearly had a reason to lie and deny any wrongdoing. Conversely, the Employer calls attention to the fact that the bargaining unit employees who testified about the incident all testified that the grievant was the aggressor – not Pich – and that Pich did not yell or swear at the grievant.

Next, the Employer argues that the discipline which it imposed on the grievant for his misconduct on November 1, 2007 (i.e. a ten-day suspension) was warranted under all the relevant facts and circumstances. First, it notes that the collective bargaining unit requires no specific sequence in imposing discipline. It acknowledges that Sec. 12.02 does reference "the principle of progressive discipline", but it maintains that that language does not require any specific (disciplinary) steps. Second, the Employer believes a mere reprimand would not have sufficed in this case given the seriousness of the situation. To support that premise, it notes that when the Employer was investigating the matter, the grievant lied to his supervisors about what he had done, showed no remorse and took no responsibility for his behavior. As the Employer sees it, it could have fired the grievant for his outburst, but it decided to give him one more chance (albeit with a significant suspension). Finally, it is the Employer's view that it satisfied the grievant's due process rights during its investigation, and that there is no evidence of disparate treatment in this case.

Next, the Employer addresses the discharge case. Before delving into what happened though, it first emphasizes the following for the purpose of putting what happened in an overall context. It believes that the events of January 3, 2008 cannot be viewed in a vacuum. It notes in that regard that the grievant's suspension letter detailed the County's expectations going forward that the grievant not engage in disrespectful, threatening or inappropriate work behavior towards other employees or his supervisor. That letter stated it was his "final reminder." It also calls attention to the fact that when the grievant returned to work following his suspension, he was placed on a Performance Improvement Plan which included the following specific expectations regarding workplace behavior: he was not to use profanity to others or direct threatening language to others; he was to control his anger and temper and keep it at an appropriate workplace level; and he was not to intimidate others or make negative physical contact with others.

It's the Employer's position that less than a month after signing the Performance Improvement Plan, the grievant engaged in the type of behaviors proscribed therein when he did the following. After getting the written statements which Mazel and Paulson had filed about the incidents of November 1 and October 31, respectively, he went up to Mazel and said sarcastically "It's really nice that fellow union members are making out statements on me." The grievant then went up to Paulson and angrily said "I read your fucking statement. . ." and flicked him in the chest with an envelope.

Having identified the conduct in question, it's the Employer's view that what the grievant did on January 3, 2008 constituted misconduct for the following reasons. First, although he had been warned to not swear at co-workers, intimidate them, or make negative physical contact with them, that's exactly what he did. Second, the Employer notes that when it was investigating the matter, the grievant denied swearing at Paulson, showed no remorse and took no responsibility for his behavior.

Next, the Employer argues that the discipline which it imposed on the grievant for his misconduct on January 3, 2008 (i.e. discharge) was warranted for the following reasons. First, it emphasizes that just a few weeks earlier, the grievant was given written notice in two separate documents that further swearing, threatening behaviors toward co-workers and negative physical contact would result in further disciplinary action, up to and including termination, yet he inexplicably repeated such behaviors on January 3, 2008. As the County sees it, these explicit warnings, together with the length of his recent suspension, put the grievant on notice that he was on very thin ice in terms of his job, and if he engaged in any more "inappropriate conduct", he would be terminated. Thus, the Employer believes he was given fair notice to correct his behavior through progressive discipline. Second, the County maintains it can't have its employees swear at, threaten and intimidate other employees (as the grievant did here). According to the County, that was intolerable behavior which was detrimental to the workplace environment. It asks rhetorically if it failed to act herein, what message does that send to other employees? Third, the County avers that the grievant's suspension did not have the desired effect of rehabilitating the grievant because he engaged in the same type of misconduct on January 3, 2008 as he did on November 1, 2007 (i.e. two months before). Fourth, the Employer emphasizes that under traditional progressive discipline, the next step following a suspension is usually termination. The Employer argues that should be the case here as well, because the grievant's behavior on January 3, 2008 was similar to his misconduct on November 1, 2007. Finally, it's the Employer's view that it satisfied the grievant's due process rights during its investigation, and that there is no evidence of disparate treatment in this case.

Given all the above, the Employer submits it did not abuse its discretion in making the decision to terminate the grievant's employment, and its exercise of judgment should not be overturned. The Employer therefore asks that both grievances be denied and both the suspension and the discharge upheld.

## DISCUSSION

The parties stipulated that the issue in both Case 165 (the suspension) and Case 166 (the discharge) is whether the Employer had just cause for the discipline it imposed on the grievant. Since the stipulated issue deals with discipline, I'm first going to review the contract language which deals with same.

Both Sections 12.02 and 26.01 provide that the Employer will not suspend or discharge an employee without just cause. This language obviously subjects employee discipline to a just cause standard.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase "just cause" is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of "just cause", one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was commensurate with the offense given all the circumstances. That's the approach I'm going to apply here.

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

### The Suspension

On November 1, 2007, the grievant had an altercation with his supervisor at work. That incident resulted in the suspension which is being reviewed here.

At the hearing, the grievant admitted that he called Pich a "prick" and used other (unspecified) inappropriate language towards him (i.e. Pich). According to the grievant, that was the extent of what he did. He expressly denied yelling at Pich, using profanity (including the word "fuck") or bumping Pich with his belly.

The Union tries to minimize the seriousness of the incident by characterizing what happened that day as a heated workplace "discussion" between the grievant and his supervisor. While that characterization of the incident is quite sanitized, it nonetheless serves as a springboard for the following general comments about an employee's right to discuss workplace problems with their supervisor. Certainly, an employee has the right to discuss

workplace problems with their supervisor. It happens every day. When an employee does so though, they are not free to say whatever they want in whatever manner they want. Obviously, there are limits to what they can say and do. What I mean by that is that employees are subject, of course, to the normal rules of conduct and behavior in the workplace. As some examples, an employee can't blow up, go on a tirade, or let loose with a string of obscenities, and expect immunity from their bad conduct just because they were "discussing" a workplace problem with the supervisor. It just doesn't work that way. If an employee engages in the type of bad conduct just noted while "discussing" a workplace problem with the supervisor, their conduct is not protected and there can still be adverse employment consequences to the employee.

The reason this basic principle of the workplace was noted was because the grievant failed to comply with it during his "discussion" with Pich. Here's why. First, both Pich and two other witnesses (Mazel and Kaiser) testified that the grievant yelled at Pich during the altercation. Second, both Pich and two other witnesses (Mazel and Kaiser) testified that the grievant used the word "fuck" numerous times during the altercation. Third, both Pich and two other witnesses (Mazel and Kaiser) testified that the grievant got into Pich's space and belly bumped him (meaning the grievant's belly made contact with Pich and pushed him). While the grievant denied that he yelled at Pich, or used the word "fuck", or belly bumped Pich, his denial was not corroborated by any other witnesses. In contrast, Pich's testimony that the grievant did all the foregoing was corroborated by bargaining unit employees Mazel and Kaiser. After weighing the grievant's flat assertion that he did not yell at Pich, or say the word "fuck", or belly bump Pich, against the contrary testimony of Pich, Mazel and Kaiser, I do not find the grievant's denials persuasive.

The grievant's words and conduct, particularly his conduct, crossed the proverbial line. At a minimum, he was disrespectful and intemperate to his supervisor in this incident. Employers have a legitimate and justifiable interest in maintaining order in the workplace and preventing employees from being disrespectful and intemperate towards supervisors. Such conduct is obviously detrimental to the workplace environment since it undercuts the authority of supervisors. No employer can be expected to tolerate it. The grievant's tirade that day was not a minor incident. It was very serious. The most troubling aspect of what the grievant did was to physically touch Pich by belly bumping him. Employees are not to physically touch their supervisors. That's a type of insubordination and is oftentimes considered a cardinal offense warranting summary discharge. Given its seriousness, employees who engage in such behavior do so at their own peril. Not surprisingly, Pich testified that he felt threatened and intimidated by the grievant's outburst and behavior. Given the overall tenor of the grievant's tirade, that reaction certainly seems understandable. It would be one thing if the record evidence showed that on that day Pich said or did something that intentionally provoked the grievant (i.e. that "jerked his chain" or "pushed his button"). If the evidence showed that, then some blame for the incident could be placed at Pich's feet. However, there is no evidence that anything like that occurred. Insofar as the record shows, the two men had no contact with each other that day before Pich walked up to the grievant to talk about a work-related matter.



The grievant responded with his tirade. During his tirade, it was he alone who raised his voice and swore. Pich did not yell back at the grievant or use profanity. Additionally, Pich unsuccessfully tried to defuse the situation by twice telling the grievant to calm down (and essentially get a hold of himself). That being so, there is nothing in Pich's conduct that day that indicated he provoked the grievant's tirade. At the hearing, the grievant implied that Pich was partially responsible for provoking his tirade because the day before, Pich had (supposedly) yelled that he (Pich) wanted him (the grievant) to retire and then slammed the door. While Pich denied saying and doing that, I find that even if it occurred as the grievant alleged, that verbal exchange would not give the grievant a legitimate excuse to have a tirade against Pich the next day. In my view, the two are not remotely comparable in terms of seriousness. I therefore find that Pich does not bear any responsibility for the grievant's tirade. Instead, it is the grievant who bears responsibility for his misconduct, and he alone. His hostile, intemperate and threatening behavior that day towards Pich constituted workplace misconduct.

Having concluded that the grievant engaged in misconduct on November 1, 2007 by his threatening behavior toward his supervisor, the next question is whether that conduct warranted discipline. I find that it did. As previously noted, the Employer has a legitimate and justifiable interest in ensuring that employees don't threaten supervisors. However, on November 1, 2007, that's exactly what the grievant did. Aside from that, the Employer has policies that prohibit employees from engaging in threatening and abusive behavior. The grievant violated those policies. That, in turn, warranted discipline.

The final question is whether the penalty which the Employer imposed for this misconduct (i.e. a ten-day suspension) was appropriate under the circumstances. I find that it was. Here's why. First, it is noted that nothing in the parties' collective bargaining agreement requires that a lesser form of discipline had to be issued in this particular case. Some labor agreements specify a particular sequence that must be followed by the employer when it imposes discipline (for example, a written warning must be imposed before a suspension). This collective bargaining agreement does not contain such language. Second, I conclude that the grievant was not subjected to disparate treatment in terms of the punishment imposed. While the Union's brief alleged that other employees have used the same "type of language" as the grievant did, my hearing notes do not contain testimony which supports that factual assertion. What my notes reflect is that one witness testified that employees commonly use "shop talk", but what the grievant said to Pich was not normal "shop talk". Even if employees do use "shop talk" though, (which I assume means they swear and use profanity), that testimony proves little in and of itself. Here's why. It is implicit from the Union's disparate treatment argument that the Union is saying that the grievant was suspended for using "shop talk". That is not accurate. While the grievant used profanity on the day in question in that he used the words "prick" and "fuck", that is not all he did. He was also insubordinate towards his supervisor, used abusive language to his supervisor and threatened his supervisor by physically touching him. Insofar as the record shows, no similar conduct has ever occurred in the workplace, much less been condoned by the Employer. In order to prove disparate

treatment, it is necessary to show that other similar factual situations occurred where the Employer imposed either lesser or no punishment. That was not shown. Since that type of proof is lacking here, the Union has not shown that the grievant was subjected to disparate treatment in terms of the punishment imposed. Given the foregoing, I find that the grievant's ten-day suspension was not excessive, disproportionate to the offense, or an abuse of management's discretion, but rather was reasonably related to his proven misconduct. The County therefore had just cause to suspend him for ten days.

### **The Discharge**

At a January 3, 2008 grievance meeting involving his suspension, the grievant was given copies of the written statements that Mazel, Kaiser and Paulson had made. The written statements made the grievant angry. He subsequently confronted Mazel and Paulson about what they had written. Those confrontations resulted in his discharge which is being reviewed here.

For the most part, the facts are undisputed. The grievant first confronted Mazel. He walked up to him and calmly but sarcastically said "It's real nice that fellow union members are making out statements on me." Then the grievant walked away. Next, he confronted Paulson. He went up to Paulson and angrily said: "I read your fucking statement but you left out the administrator and Jerry." As the grievant said this, he took an envelope (that apparently contained one or more of the written statements) and "flicked" Paulson in the chest with it. Then the grievant walked away.

The Union characterizes the grievant's confrontations with Mazel and Paulson as no big deal. As the Union sees it, neither Mazel nor Paulson was scared or intimidated by their "conversations" with the grievant, so the Employer overreacted to what happened.

I've decided to begin my discussion about the grievant's conduct on January 3, 2008 by making the following preliminary comments. If someone was to pick up this Award, and skip over everything that has been written thus far, and just read the paragraph above that identifies the grievant's conduct on January 3, 2008, I surmise they would probably say something to the effect of: That's it? He was fired for that? The short answer to those questions is that while the grievant's conduct of January 3, 2008 doesn't seem of sufficient magnitude to warrant discharge, the grievant's conduct of that date does not stand alone. It must be considered in an overall context.

To do that (i.e. to consider the grievant's conduct of January 3, 2008 in an overall context), it is necessary to go back and review the suspension letter which was issued following the grievant's November 1, 2007 misconduct. That letter detailed the County's expectations going forward that the grievant was not to engage in disrespectful, threatening or inappropriate work behavior towards other employees or his supervisor. That letter also stated it was his "final reminder". When the grievant returned to work following his suspension, he

was placed on a Performance Improvement Plan which included the following specific expectations regarding workplace behavior: he was not to use profanity to others or direct threatening language to others; he was to control his anger and temper and keep it at an appropriate workplace level; and he was not to intimidate others or make negative physical contact with others.

Less than a month after signing the Performance Improvement Plan though, the grievant engaged in the very behaviors proscribed therein. Although he had been warned to not swear at co-workers, intimidate or threaten them, or make negative physical contact with them, that's exactly what he did.

Of the two confrontations that the grievant had, I consider the one with Paulson more serious than the one with Mazel. Here's why. In his confrontation with Paulson, the grievant used the word "fuck". He did not use that word or any profanity with Mazel. Also, in his confrontation with Paulson, the grievant physically touched Paulson when he "flicked" an envelope on his (Paulson's) chest. In contrast, the grievant did not touch Mazel.

What I find ironic about the grievant's confrontation with Paulson that day is this: Paulson's written statement (i.e. the one that the grievant complained to Paulson about) did not even deal with the conduct involved in the grievant's suspension. As noted above, the grievant was suspended for his altercation with Pich on November 1, 2007. While the grievant also had a "discussion" with Paulson the day before (October 31, 2007), that "discussion" was not cited as a reason for the suspension. Thus, it was essentially a separate matter, and most importantly, not a disciplinable matter. As just noted, the written statement that Paulson made dealt only with the verbal exchange (i.e. the "discussion") he and the grievant had on October 31, 2007. Paulson's written statement said nothing about the grievant's altercation with Pich (which, of course, occurred the next day). That means that Paulson's written statement about what happened October 31, 2007 played no role whatsoever in the grievant's suspension. That being so, it's a mystery to me why the grievant chose to confront Paulson and say what he did. One would think that if the grievant was going to run the risk of confronting anyone, it would have been the two employees whose statements dealt with the incident involved in the suspension. That was Kaiser and Mazel. However, the grievant did not confront Kaiser at all, and his confrontation with Mazel was not as serious as his confrontation with Paulson. When looked at that way, the grievant's confrontation with Paulson doesn't make sense.

The Union offers several defenses for the grievant's conduct which, in its view, should reduce the seriousness of what happened. First, the Union contends that the grievant's statements to Mazel and Paulson were not intended to be threats. I find otherwise for the following reasons. When the grievant made the statements in question, he obviously wasn't trying to initiate idle conversation. He made a single statement to each man and then walked away. He did not elaborate on what his statements meant, so they were left to decipher its meaning (as is the arbitrator). Although the two men did not feel physically threatened or

scared by what the grievant said to them, I'm convinced that the reason the grievant made his statements was to threaten and intimidate them. A factor that supports that interpretation was the grievant's demeanor at the time. By his own admission, he was angry when he spoke to Mazel and Paulson. His anger was readily apparent to them. Just because the grievant did not go on a tirade with Mazel and Paulson the way he did with Pich does not mean he controlled his anger. This time, his anger was the seething type. Second, the Union avers that when the grievant "flicked" Paulson in the chest with the envelope, he did it merely to get Paulson's attention so that he (the grievant) could speak to him. While that interpretation is plausible, another interpretation is that the grievant used the envelope as a substitute for a finger, as if he was jabbing a finger into Paulson's chest. Based on reasons that will be expounded on later in this discussion, I find the latter interpretation more probable than the former. Consequently, the defenses proffered by the Union for the grievant's conduct on January 3, 2008 are not persuasive.

Having concluded that the grievant engaged in misconduct on January 3, 2008, the next question is whether that conduct warranted discipline. I find that it did. As previously noted, the Employer has a legitimate and justifiable interest in ensuring that employees don't threaten or intimidate co-workers. Obviously, that's intolerable behavior which is detrimental to the workplace environment. No employer can be expected to tolerate it. That's why this Employer, like many employers, has written policies that prohibit employees from engaging in threatening and abusive behavior. While these rules apply to everyone in the bargaining unit, the Employer had also given the grievant what amounted to personalized instructions via his Performance Improvement Plan. While these work instructions were created exclusively for the grievant, there is nothing that precluded the Employer from doing so. Employers are empowered to create individualized improvement plans for employees to improve work performance. As already noted, that plan included the following specific expectations regarding workplace behavior: 1) he was not to use profanity to others or direct threatening language to others; 2) he was to control his anger and temper and keep it at an appropriate workplace level; and 3) he was not to intimidate others or make negative physical contact with others. Nothing in the record establishes that these work instructions were unreasonable, unattainable or unrealistic. To the contrary, the instructions follow commonly-accepted personnel practices and procedures. That being so, it is held that the work instructions which the Employer set for the grievant were reasonable, objective, achievable and within his control. The grievant's conduct on January 3, 2008 violated all three of the work instructions noted above. As a result, his conduct on January 3, 2008 warranted discipline.

In so finding, I want to expound on one aspect of the grievant's behavior on January 3, 2008 because its resemblance to what happened November 1, 2007 is uncanny. What I'm referring to is this: when the grievant confronted Pich on November 1, 2007, he not only threatened Pich verbally but also physically touched him by belly bumping him. As I noted earlier, that's where the grievant's conduct really crossed the proverbial line. That's also true of the grievant's confrontation with Paulson. On January 3, 2008, the grievant crossed the proverbial line when he "flicked" Paulson in the chest with an envelope. I'm convinced that when the grievant did that, he was using the envelope as a substitute for a finger, as if he was

jabbing a finger into Paulson's chest. Thus, as I see it, the grievant physically touched Paulson even though it was actually the envelope that touched him. That physical contact, which essentially amounted to a type of battery, should not have occurred. In reaching this conclusion, it is noted that usually when employees touch each other in the workplace, it is lighthearted and no big deal. Here, though, the instant situation was far different. There was nothing lighthearted about the touching that occurred here. This touching was part and parcel of the grievant's attempt to threaten and intimidate Paulson. Another reason why the grievant's touching of Paulson was such a big deal was because the grievant was supposed to be following a Performance Improvement Plan following his altercation with Pich. That plan specified in Section D that he was not to "make negative physical contact" with co-workers. His contact with Paulson on January 3, 2008 falls into that category of proscribed behavior.

The second part of the just cause analysis being used here requires that the Employer establish that the penalty imposed for the employee's misconduct was appropriate under all the relevant facts and circumstances. In reviewing the appropriateness of discipline under this standard, arbitrators generally consider the notions of progressive discipline, procedural due process and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. discharge). These matters will be addressed in the order just listed.

With regard to the first matter (i.e. progressive discipline), it is noted at the outset that the grievant was a long-term employee (i.e. 25 years) who had not been formally disciplined prior to November, 2007. His altercation with Pich changed that though, and his clean disciplinary history went out the proverbial window. As was noted above, that offense was so serious that he could have been discharged for it. That did not happen though and the Employer instead gave him a 10-day suspension. The suspension letter said in pertinent part that it was his "final reminder". There was nothing obtuse about what the phrase "final reminder" meant. It was a last chance warning. It warned him that any similar behavior could result in his termination. The Employer had the right to make that statement in the suspension letter as part of its power to discipline employees. This warning, together with the length of the suspension, plus the Performance Improvement Plan, put the grievant on notice that he was on very thin ice, job wise, and if he engaged in any more of the proscribed conduct, he could be discharged. It is set against this backdrop that less than a month after signing the Performance Improvement Plan, the grievant engaged in essentially the same type of proscribed behavior with co-workers as he had done with a supervisor. To quote Yogi Berra, "This was like déjà vu all over again." One purpose of progressive discipline is to get employees to change or modify bad behavior. The theory is that after an employee is disciplined for proscribed behavior, they will change. Here, though, the grievant's suspension did not rehabilitate the grievant or correct his behavior because his misconduct on January 3, 2008 was similar to what he did on November 1, 2007. Since the grievant repeated the same type of misconduct, he rightly exposed himself to more severe discipline. Under traditional progressive discipline, the next step following suspension is usually discharge. The Employer concluded that no discipline short of discharge would correct the grievant's behavior. The

record provides no objective basis for the arbitrator to find otherwise and overturn that decision.

With regard to the second matter (i.e. due process), there is no evidence that the grievant was denied procedural due process before he was fired. Here's why. During the course of the Employer's investigation, the grievant was given an opportunity to tell his side of the story. In that meeting, the grievant denied swearing at Paulson, showed no remorse over what he had done, and took no responsibility for his behavior. Following that meeting, management representatives were not persuaded that the grievant would not repeat the same type of proscribed behavior again, so they decided to discharge him. In my view, there is nothing in the foregoing facts that raise any so-called red flags regarding procedural due process problems. Accordingly, I find that the County gave the grievant due process before it fired him.

Finally, with regard to the third matter referenced above (i.e. disparate treatment), I find that the grievant was not subjected to disparate treatment in terms of the punishment imposed. As was noted in the discussion concerning the suspension, in order to prove disparate treatment, it is necessary to show that other similar factual situations occurred where the Employer imposed either lesser or no punishment. That was not shown here because no specifics were provided about any other instances of similar conflicts between co-workers. As a result, it was not shown that the grievant was subjected to disparate treatment in terms of the punishment imposed.

Given all the circumstances then, it is held that the severity of the discipline imposed here (i.e. discharge) was neither disproportionate to the offense, nor an abuse of management discretion, but rather was commensurate with the grievant's proven misconduct. The grievant's lengthy employment with the County is not a sufficient reason to alter this conclusion. The County therefore had just cause to discharge the grievant.

In light of the above, it is my

**AWARD**

1. That the County had just cause to suspend the grievant. Therefore, that grievance is denied.

2. That the County had just cause to terminate the grievant. Therefore, that grievance is also denied.

Dated at Madison, Wisconsin, this 15th day of January, 2009.

Raleigh Jones /s/

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Raleigh Jones, Arbitrator

REJ/gjc

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