

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**JEAN AEDER-GORT**

and

**CITY OF MANITOWOC (PUBLIC LIBRARY)**

Case 186  
No. 64601  
MA-12947

(Aeder-Gort Written Reprimand Grievance)

and

Case 187  
No. 64602  
MA-12948

(Aeder-Gort Suspension Grievance)

and

Case 188  
No. 64603  
MA-12949

(Aeder-Gort Discharge Grievance)

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**Appearances:**

**Douglas Carroll, Jr.**, Carroll & McDonald, Attorneys at Law, 2665 South Moorland Road, Suite 102, New Berlin, Wisconsin 53151, appearing on behalf of Jean Aeder-Gort.

**James Wyss** and **Juliana Ruenzel**, City Attorneys, City of Manitowoc, 900 Quay Street, Manitowoc, Wisconsin 54220-4543, appearing on behalf of the City of Manitowoc and the Manitowoc Public Library.

**ARBITRATION AWARD**

Wisconsin Council 40, AFSCME, AFL-CIO and the Manitowoc Public Library were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. In March of 2005, the Union appealed three grievances to arbitration involving discipline imposed on Jean Aeder-Gort (hereinafter Aeder-Gort). Case 186 involved a written reprimand, Case 187 involved her suspension and Case 188 involved her discharge. Raleigh Jones was subsequently appointed as arbitrator for all three cases. When the cases were appealed to arbitration, the Union's representative was AFSCME Council 40 Associate Director Jack Bernfeld and the City's representative was City Attorney James Wyss. Hearing on all three cases was originally scheduled for August 30 and 31, 2005, but those hearing dates were cancelled. The hearing was subsequently scheduled and postponed six more times between late 2005 and mid-2006. During that time period, the Union and Aeder-Gort agreed that Aeder-Gort would retain her own legal counsel, and would no longer be represented by AFSCME Council 40 Associate Director Jack Bernfeld. Given that agreement, Aeder-Gort is listed by name in the caption of this Award rather than the Union. Attorney Douglas Carroll, Jr. subsequently represented Aeder-Gort in these cases. The hearing convened on June 27, 2006, but no testimony was taken that day because the parties engaged in settlement discussions. Those efforts were ultimately unsuccessful. Hearing was rescheduled for September 6 and 7, 2006, but those dates were cancelled. Hearing commenced in December, 2006 and took place over the course of ten days in a one and one-half year time period. Hearing was held in Manitowoc, Wisconsin on December 5 and 6, 2006; February 13 and 14, March 20 and 21, and November 14 and 15, 2007; and June 30 and July 1, 2008. The hearing was transcribed. In April, 2008, City Attorney James Wyss died. Juliana Ruenzel subsequently became City Attorney. The parties filed their initial briefs by October 6, 2008 and their reply briefs by November 11, 2008. On January 15, 2009, the Employer filed an additional submission with the permission of Mr. Carroll, whereupon the record was closed. 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 did not stipulate to the issues to be decided herein. That being so, it is necessary for the arbitrator to decide what issues will be decided herein. Based on the entire record, I find that the issues which are going to be decided herein are as follows:

1. In Case 186, did the Employer have just cause to issue the October 4, 2004 letter of reprimand to the grievant? If not, what is the remedy?
2. In Case 187, did the Employer have just cause to suspend the grievant? If not, what is the remedy?
3. In Case 188, did the Employer have just cause to discharge the grievant? If not, what is the remedy?

**PERTINENT CONTRACT PROVISIONS**

The parties' 2002-2004 collective bargaining agreement contained the following pertinent provisions:

**ARTICLE 2**

**MANAGEMENT RIGHTS**

Except as otherwise provided in this Agreement, the Employer retains all management rights, including, but not limited to the following:

...

- (b) to establish reasonable work rules and enforce said work rules.

...

- (d) to suspend, demote, discharge or take other disciplinary action for just cause.

...

**ARTICLE 6**

**DISCIPLINE**

**Section A. Just Cause**

Employees may be disciplined for just cause.

Discipline shall include oral reprimand, written warning, suspensions with or without pay, demotion or discharge.

...

**Section C. Service of Notice.**

The Employer shall provide the employee and the Union with a letter setting forth the reason(s) for the disciplinary action (oral reprimands and written warnings excepted).

Discharge, demotion, or suspension of an employee shall be by proper written notice sent certified mail, return receipt requested, to the last known address of the employee with a copy to the Union by regular mail. Any appeal shall be subject to the grievance procedure.

...

### **BACKGROUND**

The City operates a public library. In 1992, Wisconsin Council 40, AFSCME became the certified exclusive collective bargaining representative for the library employees. Thereafter, the parties negotiated a succession of collective bargaining agreements. The collective bargaining agreement involved in this case was the parties' 2002-2004 collective bargaining agreement. In the decade from the mid-1990's to the time this matter arose, less than a half-dozen grievances were filed, and none of them went to arbitration.

While the lack of formal grievances over the years can be interpreted as meaning that the parties' labor relations history was relatively quiet, there had still been hot button issues in the department that generated controversy. One such issue was the matter of workplace dress (i.e. what employees wear to work). The record indicates that in 1999, the library director issued a directive dealing with the dress code. A grievance was filed concerning the directive. As a result of that grievance, the original directive was rescinded, and a second directive was issued. The dress code continued to be a contentious matter thereafter.

The Manitowoc Library Board adopted a Personnel Policy in 1992. This policy is also known as the Personnel Manual. One section in that policy is entitled "Proper Work Attire". It provides as follows:

#### A. Clothing Code

Staff members shall present a business-like appearance to the public. Dress must be neat and clean. Staff must be well-groomed and exercise good personal hygiene. Employees are expected to use discretion and be tasteful in their choice of clothing and footwear. Footwear that is comfortable may be worn seven days per week and causal dress will be allowed on Saturdays and Sundays. However, custodians and pages may wear blue jeans as long as they are not torn or have holes in them. Supervisors are responsible for encouraging their staff to dress appropriately.

Another section is entitled "Staff Complaint Procedure". This section provides as follows:

All Staff complaints must be addressed through the library channels established below.

A. The first step is that the employee should contact either in person or in writing his/her immediate supervisor for disposition;

B. If the complaint is not resolved, then the employee should contact either in person or in writing the next level of supervision for disposition. If the complaint is not resolved, the employee should continue this procedure until eventually his/her concern is submitted in writing to the library director for disposition;

C. If the complaint is not resolved, the employee should submit the concern in writing to the president of the library board for final decision by the library board. An employee's failure to follow this staff complaint procedure will nullify the employee's complaint. In the event of a staff complaint, the employee shall continue to perform the assigned task, or otherwise comply with the expected behavior, until the complaint is resolved.

At all times relevant herein, Alan Engelbert was the Library Director. The record indicates that he had an autocratic management style. He wanted all employees to utilize the chain of command, so he primarily dealt with the members of his management team. They (i.e. the members of his management team) considered him abusive, condescending and pompous. Engelbert reported to the library board. He acted as the gatekeeper for everything that went to the library board. Although Engelbert denied saying it, several employees testified that they heard him say that going to the library board "behind his back" was grounds for dismissal.

Underneath Engelbert in the department's organizational structure were the division coordinators. The two coordinators relevant to this matter were Hallie Yundt-Silver and Rachel Muchin-Young. Underneath them in the organizational structure were the department heads. The department head for the Information and Adult Services Department was Kathy Schmidt. Underneath Schmidt were the librarians. Aeder-Gort was one of the librarians. The librarians were in the bargaining unit. Those individuals who were above the librarian level were excluded from the bargaining unit and were part of the library's management team.

...

This Award involves discipline imposed on Jean Aeder-Gort. (Note: While her name was Jean Aeder for much of the time period applicable herein, her name became Jean Aeder-Gort following her marriage. In this decision, she is referred to throughout as Aeder-Gort). As noted in this decision's prefatory paragraph, Case 186 involves a written reprimand, Case 187 involves her suspension, and Case 188 involves her discharge.

Aeder-Gort was hired as a Librarian in the Information and Adult Services Department on February 12, 2001. She has a Master's Degree in Library Science. She worked in that capacity until she was discharged October 14, 2004. Thus, she worked for the Employer for about 3½ years. Prior to the incidents involved herein, she had a clear disciplinary history (meaning she had not been formally disciplined until she received the discipline involved here).

On Aeder-Gort's first day of work, she was given an orientation conducted by Gloria Wallace, the Business Office Manager at the Library. During that orientation, Aeder-Gort was supplied with various documents, including a copy of the collective bargaining agreement; she was not given a copy of the Library's Personnel Policy though. During this orientation, Wallace showed Aeder-Gort the Employer's table of organization and explained the chain of command to her as it relates to the organizational chart. During this orientation, Wallace did not tell Aeder-Gort that she would be subject to discipline if she didn't follow the chain of command.

During her employment with the Employer, Aeder-Gort's direct supervisor was Kathy Schmidt. Schmidt considered Aeder-Gort's work performance to be good. Schmidt described Aeder-Gort as someone who was not combative or hostile and was able to discuss disagreements with her without incident.

Aeder-Gort and Library Director Engelbert had limited daily interaction with each other. When they did have interaction with each other, it was Aeder-Gort who initiated it. One such interaction occurred when Aeder-Gort went into Engelbert's office and told him that the library was fortunate to have her, because once a director position opened up in Germany, she was going back to Germany. Another interaction occurred when Engelbert offered to move Aeder-Gort's cubicle because it was underneath a vent and she got cold. Another interaction occurred when Engelbert took a space heater from Aeder-Gort's cubicle. Although Supervisor Schmidt told Aeder-Gort that it was not right for Engelbert to have taken the space heater, Aeder-Gort defended Engelbert and contended he (Engelbert) did not steal her heater. Still another interaction occurred when Aeder-Gort went into Engelbert's office following a staff meeting and discussed something that had been addressed during the meeting. While the foregoing interactions were limited, it was Aeder-Gort's view that she had a good relationship with Engelbert until mid-2004.

At the end of June, 2004, Aeder-Gort received Kathy Schmidt's notes from a management team meeting. When Aeder-Gort reviewed the notes, she took issue with two of Engelbert's decisions which were referenced therein. One matter involved Engelbert's determination that Capri pants shorter than mid-calf length were shorts. Aeder-Gort felt that decision was stupid. Another matter referenced therein was Engelbert's determination that employees could not take breaks during the last half hour of their shift. Aeder-Gort felt that decision violated the collective bargaining agreement. She thought that the Union steward, David Ellison, would file a grievance about both those issues, but that did not happen and

Ellison did not file a grievance over either matter. That greatly irritated Aeder-Gort. She felt very strongly that Engelbert had overstepped his authority on these two matters. While she wanted to grieve these matters, she decided not to grieve them because she knew that the time limits for doing so had passed. She therefore decided to wait until next time. She thought that the Capri pants matter was not a one-time deal, and would come up as an issue again. She vowed that the next time that matter arose, she would use it, as she put it, as a vehicle to “voice her concerns” and challenge Engelbert.

That opportunity arose in late September, 2004 when the Capri pants matter came up again.

### FACTS

On September 27, 2004, an employee at the library, Amy Eisenschink, wore Capri pants. Eisenschink had worn the pants in question all summer and members of the management team had seen her wear them. No one from management had previously said anything to her about the pants. On that day, Library Director Engelbert told her that her Capri pants were “pushing it” (meaning that he did not consider her Capri pants to be appropriate workplace dress).

When Aeder-Gort arrived at work that day, she heard via the office grapevine that Engelbert had berated Eisenschink for her Capri pants. Upon hearing about the matter, Aeder-Gort spoke to Lisa Bruere, who was Eisenschink’s supervisor. Bruere told Aeder-Gort that there was a management team meeting coming up, that she discussed the matter with Hallie Yundt-Silver (her supervisor), and it was expected that the Capri pants matter would be addressed at the meeting.

The next day, there was a management team meeting. One of the items which Engelbert raised in that meeting was the wearing of Capri pants. Engelbert stated that some employees were “pushing it” by wearing Capri pants that were not mid-calf, and appeared to be shorts. According to some of those in attendance at this meeting, Engelbert yelled at them for not policing the dress code relative to Capri pants.

That evening (September 28, 2004), Aeder-Gort had dinner with Lisa Bruere and Dale Gort. Dale Gort was Aeder-Gort’s boyfriend at the time and subsequently became her husband. Both Dale Gort and Bruere were management employees at the library. Some of the discussion that occurred during that dinner is identified next because in Aeder-Gort’s view, it puts her subsequent conduct in an overall context. During dinner, Bruere talked about that day’s management team meeting, and specifically that Engelbert had accused the management staff of not policing the dress code. This upset her because she felt she had. Bruere also said that Engelbert yelled at them during the meeting. Aeder-Gort then asked Bruere if she considered Engelbert’s conduct harassment, to which Bruere replied that she did. Aeder-Gort

then asked Bruere why she did not file a harassment complaint against Engelbert, and Bruere responded that she would not file a harassment complaint because Engelbert once said that if an employee filed a harassment complaint, and the complaint was not substantiated, then the act of filing the complaint would be considered harassment and the person who filed the complaint would be subject to discharge. Dale Gort and Bruere also told Aeder-Gort that they could not discuss workplace issues with Engelbert because they never knew when a simple discussion would turn confrontational and Engelbert would belittle them. Both Dale Gort and Bruere also told Aeder-Gort that they felt intimidated, harassed and belittled by Engelbert. They also told her they would not take their complaints to the library board because Engelbert did not want employees going to the library board and had made it clear that if anyone went to the library board behind his back, it was grounds for immediate termination. According to Bruere, Aeder-Gort was “shocked” by these comments. Aeder-Gort implied in her testimony that she was so outraged by what she learned at the dinner party that she decided then and there to take on Engelbert.

The next day, September 29, 2004, Kathy Schmidt sent her notes from the prior day’s management team meeting to the employees she supervised. This was apparently her standard operating procedure. Aeder-Gort was one of the recipients of Schmidt’s notes. Schmidt’s notes of that meeting provided in pertinent part:

2. Dress Code Issues

We were told that some staff are pushing it with Capri pants. No names were mentioned. He said, “If there are any more problems with Capri pants no one will wear them at any time in this building any more.” He said that we were instructed to tell our staff.

I went back and looked at my prior notes and this is what I sent:

“Management Team Notes 6-29-04

3. Clothing Code Review

With the warmer weather it is time to review the Clothing Code Guidelines. The examples he gave were all pages. We have had some pages wearing both jeans and a t-shirt at the same time and it needs to be either one or the other. Also there have been some t-shirts with logos and some showing skin at the waist Flip-flops are out as they offer no protection and they are considered beachwear. Capri pants are OK but they must be at least mid-calf length. Someone has a pair that are at the knee and these are considered shorts.”

So the instructions are not just below the knee but they need to be mid-calf length.



Once Aeder-Gort got a copy of Schmidt's notes, she decided that the time was ripe for her to "weigh-in" on the Capri pants matter. She acknowledged that no one, including Amy Eisenschink, asked her to do so. She also acknowledged that she never wore Capri pants and in fact did not even own any. As she saw it though, that was irrelevant. She decided to inject herself into the matter and she did. She did this by writing an e-mail that subsequently became known as the "Authoritative Source" e-mail. The subject line in that e-mail contained the caption "Authoritative Source Question". Before she sent it, she showed it to co-worker Cathy Shallue. After Shallue read it, she told David Ellison about it (i.e. Aeder-Gort's e-mail). Ellison is a librarian and, as previously noted, is the local union steward. Shallue and Ellison discussed both the substance of Aeder-Gort's proposed e-mail and the fact that it (i.e. the e-mail) was going to be sent to "a lot of different people" (besides Schmidt). Ellison opined to Shallue that he thought it was problematic for an e-mail to be sent to people who were not part of the chain of command. He also speculated that it was not going to go over well with Engelbert. Besides showing her e-mail to Shallue, Aeder-Gort also showed it to Supervisor Schmidt before it was sent. After Schmidt read it, she told Aeder-Gort not to send it because it would just make Engelbert angry. Aeder-Gort ignored Schmidt's advice and sent the e-mail on September 29, 2004. When she did so, she did not send it to just Supervisor Schmidt. Instead, she sent it to Schmidt and eight other people in her department. Her e-mail provided thus:

Kathy,

Regarding the dress code mentioned at the two management team meetings, did Alan happen to mention his authoritative source on his definition of "shorts"? If Capri pants are longer than the knee, they don't fit any of the definitions that I've been able to find.

Here's what I found:

American Heritage Dictionary: "short trousers extending to the knee or above"

New Oxford American Dictionary: "short pants that reach only to the knee or thighs"

Encarta World English Dictionary: "pants that end somewhere between the upper thigh and the knee"

Webster's Third New International Dictionary: "knee-length or less than knee-length trousers made in various styles for informal wear or sports-wear"

Thanks,  
Jean

Schmidt forwarded Aeder-Gort's e-mail to her supervisor, Hallie Yundt-Silver, who in turn forwarded it to Engelbert.

Aeder-Gort testified at the hearing that the reason she sent this e-mail was to "open up a discussion" with Engelbert. She thought that after she sent it, Engelbert would come back to her with an "authoritative source", would apologize, and then "the whole thing would be over."

That's not what happened.

Engelbert was upset about Aeder-Gort's e-mail for the following reasons. First, he did not consider it to be a joke or intended it to be lighthearted. Rather, he read it to question his authority to make a decision about what constitutes appropriate workplace dress, and asked him to supply a source out of a reference book to justify his decision. He felt that he's the one who decides what pants are appropriate under the dress code. Building on that premise, he felt he did not need to cite an "authoritative source" to justify his decision. Second, he felt that if Aeder-Gort wanted to question his decision on the matter, the proper way to do so was to speak/communicate with her supervisor (Kathy Schmidt) about it (either verbally or via e-mail). However, Aeder-Gort had not done that. Instead, she had communicated with a large audience (namely, everyone in her department). Third, Engelbert knew that Aeder-Gort did not wear Capri pants to work. That being so, it was Engelbert's view that Aeder-Gort was injecting herself into a hot button issue that did not affect her. Aside from the above, Engelbert was perplexed by Aeder-Gort's motives for sending her e-mail. Until this happened, Aeder-Gort had not been on his radar screen, so to speak.

The next day, September 30, 2004, Engelbert talked to Kathy Schmidt (Aeder-Gort's supervisor) about Aeder-Gort's e-mail of the previous day. During their discussion regarding same, Engelbert told Schmidt that he viewed the e-mail as disruptive because it was sent to so many people in the department, and he thought Aeder-Gort could be charged with "inciting a mutiny". (Note: The subtext for Engelbert's statement was that the dress code had long been a hot button issue among staff in the library). Schmidt replied to Engelbert's "mutiny" statement by saying that she thought Aeder-Gort was trying to help in some way, and was not "trying to start a mutiny."

Engelbert and Schmidt met later that day with Aeder-Gort to discuss her e-mail. The meeting started without any small talk and Engelbert got straight to the point. He asked Aeder-Gort several times what she was trying to accomplish by sending her e-mail. Aeder-Gort did not answer the question but instead said that she thought Engelbert did not have the right to decide what pants were appropriate, and that she, as a reference librarian, had the right to "demand" that Engelbert supply an "authoritative source" to justify his interpretation of the clothing policy. Engelbert then asked Aeder-Gort the same question noted above several more times. Each time, Aeder-Gort did not answer the question posed, but instead made the

statement noted above. Since Aeder-Gort refused to answer his question, Engelbert concluded that Aeder-Gort had sent her e-mail to challenge his authority to interpret and administer the Employer's dress code. He then told Aeder-Gort that she was on thin ice in doing so. He told her that if she questioned a decision by a supervisor, she could discuss it with them, but then the proper procedure was to follow the chain of command (and not to send out a memo challenging his authority to a large group of employees as she had done). Engelbert then explained what he meant by the chain of command (namely, that employees are to go through the proper channels). He said that Aeder-Gort was to deal with Schmidt, who in turn was to deal with her supervisor, etc. Engelbert told Aeder-Gort to follow the chain of command in the future. He also told her that if she disagreed with his interpretation of the dress code, she could file a grievance under the collective bargaining agreement or file a complaint under the Library's Personnel Policy. When Engelbert referred to the Library's Personnel Policy, Aeder-Gort said that she had not received a copy of that policy, and asked for one. Engelbert replied that he would provide her with one, whereupon the meeting ended.

After Aeder-Gort left the meeting, Schmidt and Engelbert discussed what had just occurred. It was Engelbert's view that Aeder-Gort had gotten the message he tried to impart to her during the meeting that what she had done was wrong and she was not to do it again. Schmidt disagreed, and felt that Aeder-Gort still did not get it (meaning understand that what she had done in sending the e-mail was wrong).

Following the meeting, Schmidt gave Aeder-Gort a document entitled "Questions and Answers on Librarian Speech in the Workplace". Schmidt gave Aeder-Gort this document because she wanted her to know that not all speech is protected, and that employees can't say whatever they want about their employer. Schmidt did not tell this to Aeder-Gort though, and she (Aeder-Gort) drew a different inference from the document than what Schmidt intended. Aeder-Gort felt that she had a free speech right to say whatever she wanted to say to Engelbert.

Later that day, Engelbert gave Aeder-Gort a copy of the Library's Personnel Policy.

The next day, October 1, 2004, Aeder-Gort sent a document entitled "Memorandum of Understanding" to Engelbert and Schmidt. In that document, Aeder-Gort memorialized what she thought occurred at the meeting the previous day. The document provided thus:

To: Alan Engelbert, Library Director, Manitowoc Public Library  
(MPL)  
To: Kathy Schmidt, Information and Adult Services (I&AS)  
Department Head, MPL  
From: Jean Aeder, Librarian, I&AS, MPL  
Date: October 1, 2004  
Subject: Memorandum of Understanding

The intention of this memorandum of understanding is to state in a written record, my understanding of the events and points discussed regarding yesterday's meeting between my library director, Alan Engelbert; my supervisor, Kathy Schmidt; and myself.

1. Alan asked if I could talk with him and Kathy in his office for a moment and after asking how we were, we started discussing an email I had sent.
2. In my email (attachment) I questioned Kathy about a point made in her management team notes for 9-28-04.
3. At the subject meeting, Alan asked me why I wrote that email, why I violated the chain of command and did I realize I was "adding fuel to the fire."
4. It is my understanding that as a librarian himself Alan knows that reference librarians are taught in library schools to question and use only authoritative sources; in the email I asked if a source had been mentioned.
5. I did address the email to my supervisor.
6. I copied in those who received my supervisor's original email.
7. It is my understanding that by "cc"ing the others in the email, I was not going behind my supervisor's back, but rather asking a question in the open and for the benefit of my fellow staff members - just the way I would have questioned those comments if they had been made at an I&AS staff meeting.
8. Alan informed me that acceptable dress falls under the supervisor's and the library director's discretion.
9. I stated that I did not have a copy of the clothing policy, but I would like a copy of it.
10. Alan mentioned that I should have been given a copy of this policy. I asked if I could get a copy of it because I didn't think I had been given one. Alan said I would get one. I asked if I could have it by the end of the day. Alan repeated I would get one. I

repeated my request to have it by the end of the day. Alan repeated once more that I would get one.

11. Alan again asked me why I had sent the email. (He was taking notes. Unfortunately I didn't come prepared for taking my own notes.) Then he stated I was "on thin ice."
12. I left his office after he said I could leave. He asked Kathy to remain.
13. I returned to my desk and asked someone else for a copy of the clothing policy and was given a copy of a memorandum from Alan dated December 28, 1999 addressed to all the staff, "Re: Clothing Code Guidelines" (adopted December 21, 1999, to be enforced effective January 2, 2000).
14. Shortly afterwards, Kathy called me and said that she was sure she had given me the clothing policy. I apologized and said I was just reading a copy of it. I also said she was correct because I remembered reading it and discussing a certain point with her shortly after I had been hired in March 2001.
15. I am assuming that the clothing policy mentioned in #13 is the most up-to-date. If it is not, I still wish to be supplied with the current policy.
16. I believe that I was not out of line with my question in my email, nor was I out of line by copying the recipients of the original email. On the contrary, I feel it was "above board."
17. I request that my union steward, David Ellison, be present if there are any further discussions with me on this matter. I am copying him on this memorandum so that he has a written record of my understanding of yesterday's event in case he is questioned on it. I also request that a copy be added by management to my personnel file.

The above is my understanding regarding yesterday's events. If there is a misunderstanding, please inform David Ellison, as well as myself.

Sincerely,

Jean M. Aeder  
Librarian, Information and Adult Services  
Manitowoc Public Library

Attachment (1)

CC: David Ellison, Librarian, I&AS, MPL and Union Steward, MPL,  
Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL

The attachment referenced at the end of this document was Aeder-Gort's "authoritative source" e-mail.

After getting Aeder-Gort's memorandum dated October 1, 2004, Engelbert decided to issue his own memo to Aeder-Gort. Accordingly, on October 4, 2004, he issued the following memorandum to Aeder-Gort:

MEMORANDUM

TO: Jean Aeder  
FROM: Alan Engelbert  
RE: Your Actions of September 29, 2004  
DATE: October 4, 2004

On September 29, 2004, you sent an email to the entire Information and Adult Services staff questioning the right of the Director of the Manitowoc Public Library to make a decision without providing what you consider to be an "authoritative source." The specific incident involves my decision on what constitutes appropriate dress at work.

Please be advised that the administration of the Library is not the same thing as answering a reference question. The idea that the proper solution for all administrative decisions can be found in a reference book is silly on its face. The job of the Director is to make judgements and exercise authority in the best interests of the Library. The Director is the "authoritative source" you seem to be looking for in the course of the administration of the Library.

When I met with you and Kathy Schmidt on October 1, 2004, I asked you several times what you were attempting to accomplish by sending the email. I was attempting to ascertain whether you were seeking to interfere with the decisions made and with the authority of the Director by sending out an email to all of the Information and Adult Services staff on this matter, or if you were simply lacking in good judgement by so doing. In this instance, I have concluded that your actions were driven by poor judgement. Therefore, while this memorandum and your "Memorandum of Understanding" will be retained in your personnel file, no disciplinary action will be undertaken at this time.

Please be advised that if you question any action taken by your superiors, you may discuss it with your immediate supervisor. Your supervisor will determine what course to pursue from that point forward. If you believe the action taken by your superiors is in violation of the Labor Agreement, you have recourse to the grievance procedure, which also requires that you discuss the matter with your immediate supervisor. You are not free to send out emails or other forms of communication to all or part of the staff if you question decisions made by your superiors. Doing so in the future will result in discipline up to and including termination.

This matter is concluded.

cc Kathy Schmidt  
Hallie Yundt Silver  
David Ellison  
File

By her own admission, this memorandum made Aeder-Gort furious. She viewed this directive as a gag order and a form of censorship. It was her view that what Engelbert did in this memo was to set things up so that she could file a grievance but not discuss it with the union steward because in explaining what the grievance was about, she would be questioning a decision of her superior and therefore, be in violation of the rule contained in the next to last sentence of the memorandum just noted. She further believed that the memorandum contained a work rule that only applied to her. She felt that Engelbert should be fired "for trying to prevent access to information."

The next day, October 5, 2004, Aeder-Gort sent the following e-mail to her supervisor, Kathy Schmidt:

Dear Kathy,

After work you must have seen my face after I had read Alan's email. I wasn't happy about it. I'm still not. However since I am to be given no disciplinary action, I guess that is something. I find it amazing what goes on in this library!

I am sorry that you and Hallie were put in the difficult situation of being between me and Alan and having to reason with him. I am grateful to you for presenting my case to Alan. Trying to get the powers-that-be to see reason sometimes can be extremely difficult. Since Hallie is not my direct supervisor I would be violating chain of command if I thanked her directly, however you can see that my thanks get to her. I would hate to have her job of trying to make Alan see reason. I always thought I would be able to, but after these last few days, I realize it is something I would not succeed at.

To put your mind at rest I DO want to keep my job, so rest assured that as of 5 P.M. yesterday, I will follow Alan's instruction to the letter of not communicating with anyone but you or the staff if I question my superior's decisions. This gag order is extremely infuriating and since I have never been a "yes man," instead of me just questioning you about I&AS matters, you'll now have to put up with me questioning everything else too. (My apologies in advance for future ear-bending.)

I had written one of my library science professors to get his opinion on the matter, the night after Alan called me into his office. I am attaching his response. Well, Alan wrote in his memo that this matter is concluded. I will not discuss with you or Hallie the specific events of 9/29 and 10/04 again.

Again, just to let you know that I do realize it, I am not to in any forms of communication disagree with any of my "superiors" decisions, except to you alone on the staff. As I said, infuriating. Also, poor Kathy.

Thanks for listening to me.

Jean

P.S. A general comment: I find it amazing for someone who puns the way he does, that Alan is unable to take a joke. Of course, perhaps I should give him the benefit of the doubt. Maybe he just doesn't recognize jokes.

P.P.S. I wouldn't want yours and especially not Hallie's job for the world!!!



P.P.P.S. If you hear of any non-supervisory library related jobs in the area where I don't have to be a "yes man," would you please let me know?

Attached to this e-mail was an e-mail from a professor at Clarion College, Professor James Maccaferri. He was one of Aeder-Gort's former college professors. Aeder-Gort had written him and asked him a question, but the record does not identify what question was asked.

After Schmidt got this e-mail from Aeder-Gort, Schmidt forwarded it to Engelbert.

After getting the October 4, 2004 memorandum from Engelbert, Aeder-Gort decided she wanted to file a grievance challenging same, so she discussed it with union steward Ellison. They subsequently had several discussions about it. In one of their discussions, Aeder-Gort told Ellison that she wanted to be the union steward so she could make life difficult for Engelbert. Ellison responded that he did not think that was a good idea because it was based on her anger toward Engelbert alone. In another discussion, Aeder-Gort asked Ellison for the names and addresses of employees who had been fired by Engelbert because she wanted to contact them. When Aeder-Gort asked Ellison for this information, Ellison already knew that Cathy Shallue had told him that Aeder-Gort was trying to get Engelbert fired. Ellison tried to get Aeder-Gort to drop her plan to go after Engelbert, telling her that if she pursued that course of action, she was going to get fired herself. Aeder-Gort responded by becoming very angry with Ellison for saying that. She told him that if the library board didn't fire Engelbert, then she would "go after them, too." As a result of their difference of opinion on strategy, Ellison decided to turn Aeder-Gort's representation over to AFSCME Council 40 Staff Representative Neil Rainford. Rainford subsequently served as her union representative.

On October 8, 2004, Aeder-Gort e-mailed a draft of a grievance she wanted to file to Ellison and Rainford. It is not reproduced here because of its length. In his response, Rainford counseled Aeder-Gort to not "send that e-mail or anything like it." Aeder-Gort did not file her proposed grievance. Rainford and Aeder-Gort subsequently had numerous discussions about issues involving Engelbert which Aeder-Gort wanted discussed.

On October 8, 2004, Aeder-Gort called Rachel Muchin-Young at her home. Muchin-Young is the head of Public Relations at the Library. Insofar as the record shows, Aeder-Gort had not called Muchin-Young at home before, so this call was unusual. After some small talk, Aeder-Gort told Muchin-Young: "Keep it under your hat, but I'm planning on filing a grievance" whereupon she abruptly hung up. Muchin-Young was perplexed by what had just happened, so she called Aeder-Gort back. They talked for awhile about why Muchin-Young had taken a job at the library. Muchin-Young asked Aeder-Gort about what her motive was in filing a grievance, and Aeder-Gort responded that, at the very least, she wanted "Alan (Engelbert) and Hallie (Yundt-Silver) to be walking on eggshells." Aeder-Gort also said that she had written a long memorandum which she wanted Engelbert to sign. Aeder-Gort also said

that she planned on working with Deb Geiger (the City's Personnel and Safety Coordinator) and that she (Aeder-Gort) thought Geiger would force Engelbert to make "changes" at the library that Aeder-Gort believed were warranted.

This phone call upset Muchin-Young; she considered it disturbing and inappropriate. Later that day, she called Engelbert and told him about Aeder-Gort's phone call.

That same day (October 8, 2004), Aeder-Gort sent an e-mail to Linda Bendix. Bendix was the Library Director at the Lake Geneva Public Library. Bendix used to work for the Manitowoc Public Library where she held a management position. Bendix had left the Manitowoc library before Aeder-Gort was hired, so Aeder-Gort and Bendix had never even met. The e-mail which Aeder-Gort sent to Bendix was as follows:

Subject: Grievance planned against AE at MPL  
From: Jean Aeder . . .  
Date: Fri, 08 Oct 2004 17:28:3 6-0700 (PDT)  
To: bendix@lakegeneva.lib.wi.us  
CC: cp <comeuppanceparty@yahoo com >

Hi Linda,

I work at the reference desk at MPL. I'm planning on filing a union grievance against Alan and would like to talk to any one who can add to the list of complaints against him. Would you be willing to talk with me?

I'm not on the management team and would like to get in as many complaints that may pertain to the general position they are stuck in, as well as specifics pertaining to your relationship with him.

Have just finished writing up a draft version of my grievance. The grievance itself is minimal, but it will stick. The request for Settlement is "Alan Engelbert, the Library Director, should acknowledge as true, sign, and hand-deliver the attached memorandum to both the recipient and to all the library employees (both union and non-union)."

He'll be damned if he does and damned if he doesn't since it will bring up as many of the complaints I've heard against him. Once the grievance process is initiated, and therefore public, I'll go to Deb Geiger and let her work on the legal aspect. If nothing else I will embarrass him out of town.

I especially hate the way he treats my supervisor, who has no recourse. I'm sorry to put her through the stress I'm going to, but am sure she will thank me later.

Any advice greatly appreciated.

. . .

Thanks, Linda!  
Jean Aeder

Aeder-Gort testified at the hearing that she sent this e-mail to Bendix to "gather information" and "do research" (about Engelbert). She thought that any "information request" she made of Bendix would remain "confidential".

That did not turn out to be the case.

On Saturday, October 9, 2004, Aeder-Gort sent an e-mail to five management employees plus her supervisor. The e-mail stated thus:

Subject: A Humble Request

Dear Lisa, Kathy, Dale, Gloria & Connie,

I am planning on taking serious action on a matter of extreme importance.

I highly value Rachel's opinion of me.

When everything settles, I humbly request that you PLEASE do your utmost to individually plead my case to Rachel that what I have done is righteous wrath -- not vindictiveness.

You need not reply.

Most sincerely,  
Jean  
cc: Rachel

Aeder-Gort testified at the hearing that she sent this e-mail to her supervisors "to let them know that something was going to be done" about Engelbert intimidating them. She also testified that when she used the phrase "righteous wrath" in this e-mail, she was referring to the fact that she was "justifiably angry" at Engelbert's "censorship".

That same day (Saturday, October 9, 2004) Aeder-Gort called her supervisor, Kathy Schmidt, at her home. Insofar as the record shows, Aeder-Gort had not called Schmidt at home before, so this phone call was unusual. After making some small talk, Aeder-Gort told Schmidt that she was going to get Alan Engelbert to either resign or have to be very careful from now on around the management team members. Schmidt responded that she (Aeder-Gort) was “imagining a fantasy”, that this would not happen and that “she would get herself fired.” During the course of the phone call, Aeder-Gort said that she had drunk some wine so “at the moment she might be a little drunk.” Aeder-Gort then told Schmidt she was worried about her, and didn’t want her to resign. Aeder-Gort said she would “protect” Schmidt and “everyone else on staff.” Aeder-Gort then told Schmidt that she had drawn up a list of people who should be the next library director (after Engelbert was gone), and that Schmidt was third on the list. Schmidt responded that Aeder-Gort could not decide who would be the (next) library director. Aeder-Gort responded to that statement by saying “she could make a recommendation, couldn’t she?” Aeder-Gort then said that if she got fired, then Dale (her husband) would be able to say whatever he wanted to Engelbert and he would be protected.

Early the following Monday (October 11, 2004), Schmidt got a call from Deb Geiger, the City’s Personnel and Safety Coordinator. Geiger told Schmidt that she (Geiger) had gotten a phone message from Aeder-Gort saying that she wanted to meet with Geiger as soon as possible about a confidential matter. Geiger said that the phone message specified that Geiger was to call Schmidt to set up the appointment (instead of calling Aeder-Gort to set up the appointment). Geiger then scheduled the appointment for the next day, Tuesday, October 12, at 1:00 p.m.

After receiving this phone call from Geiger, Schmidt told Aeder-Gort about it and the appointment set for October 12. Aeder-Gort asked Schmidt to put the appointment on the Library’s in-house schedule. Schmidt complied with this request, and put Aeder-Gort’s appointment on the in-house schedule. By doing that, it became public knowledge within the library that Aeder-Gort had a meeting scheduled with Geiger for October 12 at 1:00 p.m.

Later that morning, Schmidt told Engelbert about Aeder-Gort’s phone call to her over the weekend. When Engelbert heard about the phone call to Schmidt, he also knew about Aeder-Gort’s recent phone call to Muchin-Young and Aeder-Gort’s cryptic e-mail to members of the management team over the weekend. In his view, Aeder-Gort’s behavior was strange, and he felt she was “spiraling out of control.”

At 11:00 a.m., Engelbert convened a meeting with union steward Ellison and Schmidt concerning Aeder-Gort’s recent actions. Geiger joined the meeting while it was in progress via speakerphone. At the start of that meeting, Engelbert reviewed what he knew of Aeder-Gort’s conduct over the past few days and asked those present if they knew what her motivation was for her unusual conduct. Ellison responded that the second-hand information he had received was that Aeder-Gort’s motivation/objective was to get Engelbert removed

from his job (i.e. fired). Ellison then stated that Aeder-Gort had contacted or was contacting former library employees who had resigned or been fired by Engelbert. Ellison indicated that Aeder-Gort's stated purpose in contacting these former employees was to "gather as much dirt as possible" and then "take it" to the library board; if the library board didn't agree with her, then Aeder-Gort would go after them (i.e. the library board). Ellison specifically identified three former employees who Aeder-Gort had contacted or was contacting for that stated purpose. Ellison said that he had pleaded with Aeder-Gort to not do this, but she had gotten furious at him for opposing her so he could no longer reason with her. Ellison then described Aeder-Gort as a "zombie" and said "this case is beyond me". Finally, Ellison said that given the behavior Aeder-Gort was exhibiting, he did not see how she could continue to work at the library.

Following this meeting, Engelbert conferred with Geiger about Aeder-Gort's actions. They mutually decided that Aeder-Gort was engaging in conduct that she had been told not to engage in. Additionally, although they did not understand what Aeder-Gort's goal and purpose was, they nonetheless considered her conduct to be a threat directed at Engelbert. Consequently, they mutually decided that formal disciplinary action needed to be imposed on Aeder-Gort.

Later that afternoon, Engelbert met briefly with Aeder-Gort and told her to appear at a meeting at 3:00 p.m. Aeder-Gort asked Engelbert if the meeting involved discipline, and Engelbert replied in the affirmative. Aeder-Gort then asked if fellow employee Ann Herrmann could be present at the meeting, and Engelbert agreed that she could be. Engelbert subsequently asked Ann Herrmann to be present at the 3:00 p.m. meeting.

Just before that meeting was to convene, specifically at 2:54 p.m., Aeder-Gort sent an e-mail to 16 staff members. The recipients of this e-mail were both management and bargaining unit members. The subject line of this e-mail indicated that the topic was "Jean Requests to Meet with Board President, Tom Klein." (Klein was the President of the Library Board). The e-mail provided thus:

Please see the attached memo. For some this is a second copy. For others, union members, it is a copy of the one that will be placed on the Union Bulletin Board, located in the Staff Room, as per the latest Union contract.

PLEASE MAKE SURE THAT IT DOES GET PUT ON THAT ONE, since it is the only one in the room. Currently the Union Bulletin Board has Hearts and Hands stuff on it. That should go elsewhere, since it IS the Union Board. Perhaps out in the hallway?

I'll need anything that needs discussion with Tom Klein. (This request is to you as employees of the Manitowoc Public Library, NOT as Union members.)

Please email them to . . . My home phone number is: . . . . Wish me luck! It would be great to see overall conditions improve in the Library. No more intimidation. No retaliations. Just good, hard, fun work.

Jean

Engelbert was not copied on this e-mail and did not learn of its existence until later.

About the same time that the above-noted e-mail was sent, Engelbert got a voice mail message from Linda Bendix. As noted earlier, Bendix used to be a management employee with the Manitowoc Public Library who had left to become the director at the Lake Geneva Public Library. In her voice mail, Bendix indicated that she had gotten a disturbing e-mail from an employee at the Manitowoc Library, and wanted to speak to Engelbert about it. Although Bendix did not identify the employee by name, Engelbert surmised that the employee Bendix was referring to was Aeder-Gort.

After he got the voice mail message just referenced, Engelbert called Geiger to apprise her of Aeder-Gort's recent actions. After hearing the details, it was Geiger's view that Aeder-Gort's actions were "snowballing" and "getting out of control", so she recommended that Aeder-Gort be suspended. Engelbert concurred with that recommendation.

The 3:00 p.m. meeting convened as scheduled and was attended by Engelbert, Aeder-Gort, Ann Herrmann, David Ellison and Kathy Schmidt. As several members of that group were walking into the meeting room, Aeder-Gort handed Engelbert a memorandum that she wanted delivered to Library Board President Tom Klein. The memorandum was addressed to Board President Klein, and was entitled "Request for Meeting". It provided as follows:

Because I do not want you to be caught unaware, I am planning on bringing some important matters to your attention and would like to request meeting with you first, in order to give you a "heads up" so that you have the chance to discuss them with the Library Director.

By addressing this request to you, via Alan Engelbert, I am following proper procedures.

Point of contact is Jean Aeder, \* \* \*

This memorandum was copied to nine library management employees, Personnel and Safety Coordinator Geiger and the Union bulletin board. Aeder-Gort handed the memorandum to Engelbert and ordered him to deliver it to Klein. Engelbert refused to accept the memorandum, saying that he did not take orders from her. In response, Aeder-Gort shouted, "Did you all hear that! He told me no!"

Once the meeting started, Engelbert reviewed what he had written in his October 4, 2004 memo to Aeder-Gort. He then indicated that he was aware of the phone calls Aeder-Gort had made to Muchin-Young and Schmidt, and Aeder-Gort's cryptic e-mail to the members of the management team. Engelbert also indicated that he had received a voice mail from Linda Bendix regarding an e-mail Aeder-Gort had sent her. Engelbert indicated that he had originally intended on giving Aeder-Gort another warning letter at this meeting, but because events were still unfolding, he had changed his mind. Engelbert said that he thought Aeder-Gort was attempting to undermine his authority and effectiveness, and he considered her conduct to be insubordination. He then told Aeder-Gort she was suspended indefinitely pending further investigation. Aeder-Gort was then asked if she had any questions or anything to say and she responded that she did not, except that she did say "I wasn't expecting this right away." Aeder-Gort then asked if her "termination" was effective immediately, and Engelbert responded that she was not terminated but rather was being suspended. Aeder-Gort then asked if the suspension was with or without pay, and Engelbert responded that at that point, he did not know. Engelbert then told Aeder-Gort that while she was on suspension, she could not be in the library as a patron. This directive infuriated her and she stated several times: "I'm giving you the opportunity to take that back." Engelbert declined to do so. At the end of the meeting, Aeder-Gort pushed a document across the table to Engelbert. The document was the memorandum she had tried to get Engelbert to take at the start of the meeting, but he had refused. This time, Engelbert accepted the document. He subsequently delivered it to Klein.

Following the meeting, Engelbert learned of the e-mail that Aeder-Gort had sent at 2:54 p.m. that day to 16 staff members requesting information for her "discussion with [Library Board President] Tom Klein." After he reviewed it, he thought that by sending that e-mail just six minutes before their planned disciplinary meeting, Aeder-Gort was essentially saying to him "in your face".

That same afternoon, Engelbert returned Linda Bendix's phone call. During their phone call, Bendix told Engelbert that she had received an e-mail from Aeder-Gort that she (Bendix) considered "very disturbing". Bendix told Engelbert that she "did not want to get into this kind of thing", but that she wanted Engelbert to know about Aeder-Gort's e-mail. Bendix indicated she was shocked to have received Aeder-Gort's e-mail because she did not even know her (i.e. Aeder-Gort). Bendix subsequently sent a copy of Aeder-Gort's e-mail to Engelbert.

That same afternoon, Aeder-Gort called Patrick Young at his workplace. Patrick Young is the husband of Rachel Muchin-Young; he is not a library employee. Insofar as the record shows, Aeder-Gort and Patrick Young were not close friends, so it was not usual for Aeder-Gort to call Patrick Young at his workplace. Insofar as the record shows, it was apparently the first time Aeder-Gort had called Patrick Young. During their short phone call, the following occurred: Aeder-Gort told Patrick to tell Rachel that she (Aeder-Gort) respects Rachel, likes Rachel and hopes Rachel will understand why she is doing this. Then Aeder-

Gort said goodbye. Patrick was surprised by these comments and asked Aeder-Gort what was going on. Aeder-Gort responded that she had just been suspended. Patrick said something to the effect of "You sound happy?", to which Aeder-Gort replied, "Oh, I'm very happy." Aeder-Gort said she had looked in the labor contract and found that she could not be suspended without a certified letter, so Alan had broken the contract. Aeder-Gort ended the phone call by saying "I have him right where I want him" (referring to Engelbert).

Over the course of the next several days, Engelbert met and conferred with Klein, Geiger and City Attorney Wyss about what disciplinary action to take against Aeder-Gort. They mutually decided that discharge was warranted.

On October 14, 2004, Aeder-Gort was summoned to another disciplinary meeting. Before going into that meeting, Aeder-Gort went to City Hall and dropped off an envelope for Deb Geiger. The envelope contained four memorandums. Those memorandums will be identified in detail below.

When the meeting convened at noon, the following people were present: Aeder-Gort, Schmidt, Ellison and Engelbert. The first thing that happened was that Aeder-Gort asked for Ann Herrmann to be present at the meeting. Engelbert responded to her request by saying that Ellison was the Union's designated steward and he would be present at the meeting as her union representative. The practical effect of Engelbert's statement was that he implicitly denied Aeder-Gort's request to have Herrmann present at the meeting. The next thing that happened was that Engelbert told Aeder-Gort she was discharged effective immediately. He then handed her a discharge letter which provided thus:

On October 11, 2004 you were suspended from your position at the Manitowoc Public Library. Further investigation and your actions have resulted in the decision to terminate your employment with the Library, effective immediately.

The reasons for termination are:

1. Insubordination.
2. Your actions undermining the authority and effectiveness of the Library Director.
3. Causing the reputation and esteem in which the Manitowoc Public Library is held in the community to diminish.
4. Making verbal and written threats to publicly damage the reputation and livelihood of the Library Director.

Signed,

Alan Engelbert /s/  
Alan Engelbert, Director



Engelbert read the letter out loud, but did not expound on it. Engelbert then handed Aeder-Gort a letter which dealt with her suspension. That letter provided thus:

On Monday, October 11, 2004 you were suspended from employment at the Manitowoc Public Library. The reasons for the suspension are insubordination and undermining the authority and effectiveness of the Library Director. You were informed that the duration of the suspension and the terms would be communicated to you in the near future. The suspension is now ended, due to your being terminated from employment at the Manitowoc Public Library effective October 14, 2004. In light of your termination, the decision has been made to have the suspension be with pay.

After Aeder-Gort read the letters, Engelbert asked her if she had anything to say, to which she responded in the negative. Aeder-Gort then indicated that she had three memorandums she wanted posted on the Union bulletin board. All three memorandums were dated that day (i.e. October 14, 2004). The first memorandum was addressed to City Attorney Jim Wyss and was entitled "Request for an Investigation". It provided as follows:

1. In your capacity as the Personnel Officer for the City of Manitowoc, I respectfully request that you investigate an event that happened at a Library Management Team meeting last year following CVMIC harassment training for supervisory staff.
2. The question pertained directly to the Library Director and involved harassment.
3. By addressing this request to you, I am following proper procedures.
4. Point of contact Jean Aeder \* \* \*, home phone \* \* \* (I am currently unavailable to answer my home phone right now, but if you leave a message I will get back to you.)

This memo was copied to nine library management employees, Personnel and Safety Coordinator Geiger, Library Board President Klein and the Union bulletin board. The second memorandum was also addressed to City Attorney Jim Wyss and was entitled "Request for an Enforcement of Law." It provided as follows:

1. In your capacity as the Personnel Officer for the City of Manitowoc, I respectfully request that you enforce responsibilities of the Library Director.
2. While it is up to the President of the Library Board, Tom Klein, if he wants to take action on my request, it is the Library Director's responsibility to

carry out Manitowoc Public Library's policy that the President of the Library Board can only be properly contacted via the Library Director.

3. I would quote the exact Library regulation, but as of 6AM today, the Library's main Web page, [www.manitowoc.lib.wi.us](http://www.manitowoc.lib.wi.us), was down.

4. It is also in violation of the Library/Union Contract: Article 2, Management Rights: "the Employer agrees that it will not use these management rights to interfere with rights established under this Agreement or for the purpose of...discriminating against any of its members."

5. On October 11, 2004 at 3PM, I handed Alan Engelbert, Manitowoc Public Library Director, a copy of the attached memorandum with a slightly different signature (since in the course of distributing them, I believe I accidentally gave the original one out as one of the distributed copies and had to reprint the document so that the original designee would have an original signature), according to proper procedures.

This event took place immediately before a disciplinary interview with the following attendees: Alan Engelbert, Kathy Schmidt, Ann Herrmann, David Ellison, and myself.

Three times the Library Director refused to follow this proper procedure. Kathy Schmidt, Ann Herrmann, and David Ellison witnessed this.

6. A copy of the correspondence that I gave the Library Director to deliver to the Library Board President is attached.

7. The Library Board President may be under the mistaken belief that I wish to discuss with him events subsequent to September 28, 2004. This is not the case.

8. By addressing this request to you, I am following proper procedures.

9. Point of contact, Jean Aeder,\* \* \*; home phone \* \* \* (I am currently unavailable to answer my home phone right now, but if you leave a message I will get back to you.)

This memorandum, like the first one, was copied to nine management employees, Personnel and Safety Coordinator Geiger, Library Board President Klein and the Union bulletin board. The third memorandum was also addressed to City Attorney Jim Wyss and was entitled "Request for an Investigation". It provided as follows:

1. In your capacity as the Personnel Officer for the City of Manitowoc, I respectfully request that you investigate the following event.
2. On October 11, 2004, shortly after 3PM, I handed David Ellison, Union Steward, a copy of the attached memorandum. The copy was intended for the Union bulletin board.
3. I told Ellison that, as per the Union contract, I wanted the copy of that letter designated for the Union Board to be placed on the Union Board in the staff room - the only board - that is currently being used for Hearts & Hands in compliance with the Library/Union contract: Article 4, Section E, Union Activity: "The Employer agrees to provide the Union with space on a bulletin board in the staff room or to provide a separate bulletin board within the staff room to post notices regarding Union: ... any other materials of a non-political nature related to ... contract administration".
4. Alan Engelbert, Kathy Schmidt, and Ann Herrmann witnessed this.
5. As of 9AM on the morning of October 14, 2004, it had not been done.
6. I mistakenly believed that it was the Union Steward's responsibility according to the Library/Union contract: Article 4, Union Activity, Section E. Bulletin Board" All materials and notices posted shall be signed and dated by a Union representative and contain a date when the material can be removed. Any material removed by the Employer, except for expiration of the specified removal date, shall be returned to the Union with a written statement of why the Employer removed the material."
7. Since I was suspended because I asked the Library Director to give a copy of that memorandum for the Library Board President **to** the Library Board President, I believe that the memorandum may not have been posted because Ellison felt **intimated**. (sic)
8. I could not post it myself on October 11th, because I was immediately banned from the library by the Library Director - including that portion of the Library open to the general public -- and was ordered to leave the building immediately after picking up blank grievance forms from the Union Steward.
9. I, as a Union representative, will post the three memorandums that I have written to you today on the Union bulletin board in the Staff Room, immediately following my noon scheduled interview with the Library Director, the I&AS Department Head (Kathy Schmidt) and the Union Steward,

10. If they are taken down, I will request that you, in your capacity as the Personnel Officer for the City of Manitowoc, investigate.

11. By addressing this request to you, I am following proper procedures.

12. Point of contact, Jean Aeder, \* \* \*, home phone \* \* \*. (I am currently unavailable to answer my home phone right now, but if you leave a message I will get back to you.)

This memorandum, like the other two, was copied to nine library employees, Ellison, Herrmann, Personnel and Safety Director Geiger, Library Board President Klein and the Union bulletin board. When Aeder-Gort told Engelbert that she was going to post her three memorandums on the bulletin board in the staff break room, Engelbert responded that she could not do so because she no longer worked at the library. Engelbert also said that the union bulletin board was the bulletin board hanging in the staff hallway – not the one hanging in the staff break room. He indicated that there had been a grievance filed about the placement of the union bulletin board when the library moved to its new building. Aeder-Gort then repeated that she was going to hang up the documents on the bulletin board in the staff break room. Aeder-Gort and Engelbert then engaged in a verbal bout of “yes, I am – no, you’re not” concerning the placement of the memorandums on the bulletin board. The verbal bout ended when Engelbert said Aeder-Gort could place the memorandums on the bulletin board in the staff break room, but that he would remove them.

Aeder-Gort, Ellison and Schmidt then left the conference room and walked to the staff break room. As they walked into that room, Aeder-Gort told the person who was in the room – Gloria Wallace – that she (Aeder-Gort) was going to rearrange the union bulletin board to post some memos on it. Wallace replied that the official union bulletin board was the one in the hallway – not the one in the break room. Ignoring what Wallace had just said, Aeder-Gort then proceeded to hang up the memos on the bulletin board in the break room, saying out loud as she did: “Memo #1, Memo #2, Memo #3.” Aeder-Gort then walked out of the room. As she walked out, Engelbert walked in. He went over to the bulletin board in the break room and took down the three memos which Aeder-Gort had just posted. Engelbert subsequently gave the three memos to David Ellison, along with the following note:

The attached material was removed by me on 10/14/04 from the Hearts and Hands Bulletin Board. The material does not belong on that bulletin board at all, and is not appropriate for the Union bulletin board under Article 4, Section E, of the labor agreement. It also was posted by a person no longer employed by the Library who is not a union representative.

Schmidt then escorted Aeder-Gort back to her cubicle to clean out her personal belongings. As they walked Aeder-Gort danced and skipped, as if she was very happy. While

cleaning out her cubicle, Aeder-Gort told Schmidt that she was leaving all her work-related papers there because “she would be back soon” and Engelbert “would be gone soon.” She also told Schmidt that she was very happy about getting fired. As she left the building, she waved goodbye to people in a happy way.

That same day (October 14, 2004), the City mailed two letters to Aeder-Gort in one envelope. The letter was sent via certified mail. One letter enclosed therein was the discharge letter and the other letter enclosed therein was the suspension letter. These were the same two letters that Engelbert had handed to Aeder-Gort at that day’s meeting.

Sometime after Aeder-Gort was fired (the record does not identify when), Engelbert told Aeder-Gort to disable her e-mail account at the library. This directive made her furious.

Aeder-Gort subsequently filed five grievances: the first (which came to be known as the workrule grievance) challenged a single sentence contained in the October 4, 2004 letter of reprimand; the second challenged her suspension; the third challenged her discharge; the fourth dealt with the bulletin board dispute; and the fifth dealt with the directive to disable her e-mail account at the library. The first three grievances were processed through the contractual grievance procedure. It is unclear from the record if the fourth and fifth grievances were processed through the contractual grievance procedure. When the first three grievances were being processed, a dispute arose concerning Aeder-Gort’s right to designate herself as the union representative for her grievances. The Union subsequently designated Aeder-Gort as the union representative for her grievances. A dispute also arose concerning Aeder-Gort’s right to speak to the library board about her grievances. This dispute was subsequently resolved and Aeder-Gort spoke to the library board about her grievances in January, 2005. By her own admission, she “blew a gasket” at that meeting. She testified at the hearing that one of the library board members thought she was “nuts” and said he was very concerned for her. The library board subsequently denied all three grievances, whereupon they were appealed to arbitration.

...

Following Aeder-Gort’s discharge, Geiger investigated all of the charges contained in the three memorandums which Aeder-Gort gave to Engelbert on the day she was discharged. While Aeder-Gort had asked City Attorney Wyss to conduct the investigations, the record indicates that Geiger conducts City investigations – no matter who the letter is addressed to. Geiger found that none of the charges contained therein had merit.

...

Aeder-Gort testified at the hearing that the reason she did everything that she did was because “the library board needed to find out what was going on” with Engelbert. She thought

that after the library board learned that Engelbert was bullying and intimidating his supervisors, the library board would discharge him.

...

Aeder-Gort admitted at the hearing that she contacted other former supervisors besides Linda Bendix. She did not identify them, though. Her stated reason for contacting them was the same as her stated reason for contacting Bendix (i.e. to gather “information”/complaints about Engelbert from them). She thought she could contact these former employees because her October 4, 2004 directive from Engelbert did not explicitly say “don’t contact former employees.”

### POSITIONS OF THE PARTIES

#### Aeder-Gort’s Initial Brief

Aeder-Gort’s position is that the Employer did not have just cause to impose any of the discipline it imposed herein. As she sees it, all the discipline imposed was unjust. She makes the following arguments to support those contentions.

She opines at the outset that it is “ironic that this case originates from a library setting because, at its core, this case is about freedom of information and freedom of speech, principles which libraries and librarians are supposed to champion.” According to Aeder-Gort, when she was engaged in the conduct at issue here, she was attempting to exercise her First Amendment rights to freedom of speech and freedom of information as a public employee. Building on that premise, she argues that “no employment decision in violation of the Constitution of the United States of America can be with ‘just cause’.”

Next with regard to the standard which the arbitrator is going to use to analyze whether just cause exists, Aeder-Gort asks the arbitrator to use the DAUGHERTY standard in his analysis. According to Aeder-Gort, when the City presented its case, it elicited testimony and other evidence concerning each of the seven elements considered under the DAUGHERTY standard. Building on that premise, Aeder-Gort believes that binds the Employer to an application of the DAUGHERTY standard herein.

Next, before Aeder-Gort addresses the discipline which was imposed, she asks the arbitrator to consider her motivation for her “complicated actions” and “cryptic conduct.” She summarizes her motivation as follows. She implies that prior to the September 28, 2004 dinner party, she was essentially unaware of how Engelbert ran the library. She avers that changed when she learned (at the dinner party) that management employees felt bullied, harassed and intimidated by Engelbert and felt they had no recourse to report it. She also avers that she learned (at that dinner party) that Engelbert had created a situation where he was

over the library board because he controlled the information that went to the board. Finally, she avers that she learned (at that dinner party) that Engelbert interpreted the collective bargaining agreement's grievance procedure and the Harassment Policy in such a way to make it impossible for employees to get to the library board to tell them what's going on. Aeder-Gort submits that once she learned the foregoing, all of her subsequent actions were "directed at getting herself before the library board to express her concerns with Engelbert's management style and its effect on the library without violating the rules as she understood them." According to Aeder-Gort, her actions were primarily taken outside work and did not "interfere with discipline, harmony or her ability to perform her job."

Having given that context for her actions/conduct, Aeder-Gort next addresses each of the disciplinary actions imposed on her.

She makes the following arguments concerning the October 4, 2004 memorandum. First, she argues that Engelbert's October 4, 2004 memorandum contained a work rule which applied only to her. The portion of the memorandum she is referring to is the next to the last sentence of the memorandum, which provided thus: "You are not free to send out emails or other forms of communication to all or part of the staff if you question decisions made by your superiors." According to Aeder-Gort, this directive was not merely a restatement of the complaint procedure contained in the Library Personnel Policy and the chain of command as argued by the City. Aeder-Gort argues that the City's position (i.e. that this directive was not a new rule) is devoid of merit. To support that contention, she notes that there is no written rule or policy in the library entitled "chain of command", and the memorandum does not even contain the words "chain of command." She also notes that the memorandum does not mention the Complaint Procedure in the Personnel Policy. She also notes that when she was hired, she was told that the rules she was to follow were in the collective bargaining agreement. Nothing was said at the time about the Library's Personnel Policy. Building on the foregoing, it's Aeder-Gort's view that the work rule contained in the next to the last sentence of the October 4, 2004 memorandum must be seen as a new work rule. Next, building on the premise that the next to the last sentence of the October 4, 2004 memorandum contained a work rule, it's her position that that work rule was unreasonable for the following reasons. First, Aeder-Gort contends it applied only to her. Here's why. She interpreted it to completely prevent her from discussing the subject of a grievance with her union steward. While the memorandum initially stated that she could resort to the grievance procedure if she believed a violation of the collective bargaining agreement had occurred, the letter concluded with a broad ban on any communication that questioned a decision made by her superiors. As Aeder-Gort read it, that meant she could file a grievance, but could not tell the steward the substance of the grievance because if she did, that would be questioning her superior's decision. Second, Aeder-Gort maintains that the work rule was vague, at least as interpreted by Engelbert. To support that premise, she opines that Engelbert essentially said that the only acceptable way to "question" a decision by a superior is through the complaint procedure, but then he failed to advise her that she would be subject to discipline if she did not follow the

complaint policy. Third, Aeder-Gort argues that Engelbert interpreted his work rule in an arbitrary and capricious way because he testified “that not every situation where an employee expresses a complaint without following the policy is a violation.” Fourth, she asserts that the City is asking the arbitrator to decide that the complaint procedure in the personnel policy and the grievance procedure “are the only ways employees can express any concerns about the operation of the library even though there is no written rule expressing same.” Finally, Aeder-Gort maintains that the work rule was a clear-cut violation of the U.S. Constitution. In support thereof, it cites various U.S. Supreme Court cases which have dealt with the First Amendment. She avers that those cases stand for the proposition that public employees – such as herself – have a constitutional right to comment on matters of public interest in connection with the operation of the government agencies for which they work. She implies that when she sent her “authoritative source” e-mail, she was exercising her First Amendment right to freedom of speech as a public employee. Building on all the foregoing, it’s her view that there was not just cause for the Employer’s October 4, 2004 memorandum (which was the Employer’s response to her exercise of her First Amendment rights).

Next, Aeder-Gort makes the following arguments concerning her suspension. First, she contends she complied to the letter with the Employer’s October 4, 2004 memorandum because she did not explicitly question any decision made by her superiors. Building on that premise, it’s her view that she did not violate “any of the rules of which she was aware at the time they were expressed to her.” Second, she asserts that unbeknownst to her at the time, she was not getting assistance from union steward Ellison because he had told both management and the union that he wanted nothing to do with her and had become an “informant” to Engelbert. Aeder-Gort maintains that as a result, she was left on her own to investigate and formulate her grievance “without being able to actually explain to any current employee what the grievance was about.” She believes it was “patently clear” that all her communications/conduct were in relation to a grievance. Third, she asserts that when she engaged in her conduct, she did not know that the City was interpreting the October 4, 2004 memorandum to be a restatement of the complaint procedure in the personnel policy. She argues that interpretation is not set forth in the plain language of that memorandum and the City failed to communicate its interpretation of the memorandum to her. Building on that premise, she maintains she “could not adjust her conduct to comply with that interpretation before she was disciplined.” Fourth, she contends that before she was disciplined, the City failed to conduct an investigation which included the opportunity for her to defend herself. She also maintains that her constitutional right to due process was violated because when she met with Engelbert on October 11, 2004, he had already conducted his investigation and made his decision to suspend her. She emphasizes that prior to that meeting, Engelbert had not asked her to explain why she was doing what she was doing, or asked her why she believed her conduct was allowed. Fifth, she asserts that the investigation which Engelbert conducted was not fair and impartial because Engelbert was deeply involved in every aspect of the investigation. She notes in this regard that just as he controlled all of the information that went to the Board, Engelbert also filtered the information he gave to Geiger. Sixth, she maintains



that Engelbert's own testimony indicated that the rule at issue was not applied evenhandedly. Finally, she believes that under the circumstances, a suspension was too harsh a penalty and, as a result, does not fit the crime. Based on all the foregoing, it's her position that the Employer did not have just cause to suspend her.

Next, Aeder-Gort makes the following arguments concerning her discharge. First, she argues that she complied to the letter with "her understanding" of the Employer's October 4, 2004 memorandum because in her actions, she did not explicitly question any decision made by her superiors. With regard to contacting Linda Bendix, Aeder-Gort avers that she could contact Bendix (as she did) because Engelbert's October 4, 2004 directive did not explicitly say "don't contact former employees." She argues "she could not have known she was prohibited from communicating with employees outside of work to gather information about the director's conduct to present to the body which is statutorily responsible for the operation of the library." That being so, it's her position that her conduct (i.e. contacting Bendix) did not violate any of the rules in place at the time she undertook that conduct. Second, she contends that to the extent that she did engage in bad behavior, she was not given the opportunity to correct it (i.e. her bad behavior). She maintains that should have happened. Third, she asserts that her due process rights were violated because when she went into the disciplinary meeting on October 14, 2004, Engelbert and Geiger had already decided to discharge her and had already drafted the discharge letter. She also believes it is significant that at that meeting, no one asked her to explain why she was doing what she was doing. Fourth, she contends that Engelbert violated her WEINGARTEN rights when he would not allow Ann Herrmann to be present at her discharge meeting. She notes in this regard that the union representative who Engelbert had picked to be present was Ellison, who she describes as Engelbert's "confidential informant." Finally, she argues that the Employer's conduct in discharging her violated the First Amendment of the U.S. Constitution. To support that premise, she again cites various U.S. Supreme Court cases which have dealt with the First Amendment. She avers that those cases stand for the proposition that public employees – such as herself – have a constitutional right to comment on matters of public interest in connection with the operation of the government agencies for which they work. Based on all the foregoing, it's her position that the Employer did not have just cause to discharge her.

In sum then, Aeder-Gort requests that all three grievances be sustained and her discipline overturned. She asks to be reinstated to her former position and be made whole. She also asks that her attorney's fees be awarded as part of the make-whole remedy.

### **Aeder-Gort's Reply Brief**

Aeder-Gort begins by addressing what she believes are errors/omissions in the Employer's statement of the facts.

First, Aeder-Gort avers that there's a distinction between the discharge letter and the record testimony concerning why she was discharged. She submits that while her discharge letter stated four reasons for her discharge, the lengthy testimony at the hearing "revealed that all of the charges contained in the discharge letter boil down to [her] violation of the library director's interpretation of the Staff Complaint Procedure contained in the Personnel Policy of the Library." She argues that "at times, it is appropriate for an employee to try and 'go over the boss' head'". According to Aeder-Gort, that's what she tried to do here.

Second, Aeder-Gort contends that in the City's recitation of the facts, it stated that at the September 30, 2004 meeting, Engelbert referred to the complaint procedure in the Library's Personnel Policy. Aeder-Gort maintains that assertion was incorrect, because Engelbert did not, in fact, refer to the complaint procedure in the Library's Personnel Policy at that meeting. Building on that point, she argues that since she was not told at that meeting that the complaint procedure in the Library's Personnel Policy applied to her, she did not know until after she was discharged that it (i.e. the complaint procedure in the Library's Personnel Policy) applied to her.

Third, Aeder-Gort submits that the City essentially asserts that the reason it imposed discipline on Aeder-Gort was because "we told her over and over what not to do but she just kept doing it." She maintains that the record facts don't support that assertion. As she sees it, "there is a stark difference between what the City claims was conveyed to Aeder-Gort regarding her conduct and what was actually conveyed." She notes that Engelbert's October 4, 2004 memorandum stated that she was henceforth not to send out e-mails to all or part of the staff "if you question decisions made by your superiors." Aeder-Gort stresses that she followed those instructions to the letter because none of the e-mails she sent, the memorandums she drafted, or the telephone calls she made technically "questioned" any decisions made by her superiors; instead, she "simply informed the recipients that she was filing a grievance and requested any information those individuals may wish to provide." Thus, it's Aeder-Gort's view that the real reason she was suspended and discharged was because she indicated in her e-mails, memorandums and phone calls that she "was going to file a grievance and request an investigation into harassment." She submits that conduct was not prohibited conduct.

Fourth, Aeder-Gort avers that in the City's recitation of the facts, it ignores that there were serious problems at the library with respect to Engelbert's management style. To support that premise, it cites Employee Exhibit 27 which is the confidential affidavit of employees taken during the summer of 2006. According to Aeder-Gort, that affidavit "establishes that employees of the Manitowoc Public Library felt harassed, bullied and intimidated by the Director and that his treatment of employees ultimately affects the services provided to the public."

Fifth, Aeder-Gort maintains that in the City's recitation of the facts, it ignores that her "objective was to bring what she learned at the September 27, 2004, dinner party to the Board's attention and that her conduct was an effort to allow employees to contribute information regarding what she presented to the Board." As she put it in her brief, she wanted to get "the truth" about Engelbert's "wrongdoing" and "illegal conduct" to the library board's attention, so that they (i.e. the library board) could "address" those issues.

Next, Aeder-Gort makes the following arguments about an employee's pre-termination rights to procedural due process.

First, she notes that in the City's initial brief, the City cites *HANSON V. MADISON SERVICE CORP.*, 150 Wis. 2d 828, 443 N.W. 2d 315 (Ct. App. 1989) for the proposition that "grievance arbitration provisions under a collective bargaining agreement is adequate to satisfy due process requirements." Aeder-Gort argues that "the City supplies this statement with the implication that the Court was holding that the post-termination arbitration process would somehow negate the United States Supreme Court's holding in *LOUDERMILL* that regardless of post-termination remedies, due process requires a pre-termination hearing." Building on that premise, Aeder-Gort asserts that in *HANSON*, the Court of Appeals held nothing of the sort and specifically stated the exact opposite: "As we have said, in addition to adequate post-termination process, Hanson had the right to a 'hearing' prior to his discharge." The Court in *HANSON* then went on to find that Hanson's pre-termination due process rights were violated. Aeder-Gort submits that she "was afforded less pre-termination rights than Mr. Hanson was and Mr. Hanson's rights were violated." She emphasizes that although Engelbert and Geiger interviewed and questioned a number of individuals and had many lengthy meetings to try and figure out what Aeder-Gort was trying to accomplish, they never questioned Aeder-Gort about her conduct. Instead, they formed the belief that Aeder-Gort was trying to get Engelbert fired "without ever once asking her if that was what she was trying to do and if so, why."

Second, she emphasizes that before her suspension and discharge "hearings", the decision had already been made to impose the discipline of suspension and discharge, respectively. She argues that what happened at those meetings (where she was asked if she "had anything to say") was not a "pre-termination opportunity to be heard, it is a post-suspension and a post-termination opportunity to be heard." Thus, Aeder-Gort stresses that she was not given any opportunity to provide her side of the story **before** the adverse employment actions were taken against her.

Third, building on the premise that her due process rights were violated, Aeder-Gort next addresses what the remedy should be for this due process violation. She contends that the appropriate remedy is reinstatement with back pay. She avers that if at some point Engelbert or Geiger had simply asked her why she was doing what she was doing, she would have explained it to them. She asserts that what she would have explained is this: "that she wanted to present information about Engelbert's treatment of employees, its illegal retaliatory nature,

its stifling effect on the flow of information and ideas and its ultimate harm to the public.” Building on the foregoing, Aeder-Gort avers that had that happened, the City then could have said “Jean, you are going about this in the wrong way. The complaint procedure in the personnel policy applies to you. If you follow that you can ultimately present your concerns to the board.” Aeder-Gort opines that if the City had done that, and given her a chance to explain herself and her concerns to the Board, then perhaps “none of this would have occurred.”

Next, Aeder-Gort makes the following comments about her “reasonable work rule” grievance. She reiterates her view that the portion of the October 4, 2004 memorandum which said “you are not free to send out e-mails or other forms of communication to all or part of the staff if you question decisions made by your superiors” was a rule made specifically for her. Building on that premise, she reiterates her contention that that rule was unreasonable regardless of whether it was a separate rule or a restatement of the Complaint Procedure in the Personnel Policy. She also asserts that Engelbert interpreted that rule in an arbitrary and capricious way.

Next, Aeder-Gort makes the following comments about her suspension and discharge. Assuming for the sake of discussion that the arbitrator does not apply the DAUGHERTY standard, but rather the traditional two-element test, Aeder-Gort asserts that her conduct does not qualify as “misconduct” under that test. In making this argument, she disputes the City’s characterization of her as being on a “crusade” against Engelbert. She acknowledges that she was angry at him over his censorship, harassment and intimidation of the staff, but she maintains she was not trying to get him fired. Instead, she emphasizes that what she wanted to do was to present information to the library board. She argues that regardless of her intent, her actions did not constitute a “substantial disregard of the Library’s interest.” She opines in this regard “that the manner in which she went about bringing these matters to the Board’s attention was the direct result of her understanding of the ‘rule’ conveyed to her by Engelbert.” Building on that premise, she reasons that her “actions were the result of a good faith error in judgment.” She maintains that a “good faith error in judgment” is not misconduct and not just cause for suspension and discharge.

Finally, Aeder-Gort repeats her contention that when she took all her actions herein, she was attempting to exercise her First Amendment right to freedom of speech as a public employee. She avers that the City’s contention that “the employee is not an honorable employee attempting to make things right in the office, but rather a disgruntled employee who is challenging the authority of Engelbert because of her dislike for him and wanting to see him resign or be fired” is not supported by the evidence. She maintains that all her conduct implicated matters of public concern (which she describes as Engelbert’s “censorship, illegal harassment, illegal labor practices and intimidation”).

Given all the above, Aeder-Gort requests that the arbitrator find there was not just cause for her suspension and discharge, and reinstate her with full back pay.

### **City's Initial Brief**

The City's position is that it had just cause to impose all the discipline at issue herein. It elaborates on that contention as follows.

Before it delves into the facts, the City first addresses the standard which the arbitrator should use to review this discipline. It contends that the arbitrator should use the generally accepted two-part analysis for determining just cause (i.e. (1) did the employer establish that the employee engaged in the misconduct for which he/she was disciplined; and if so, (2) was the level of discipline imposed appropriate under the present circumstances.") The Employer answers both those questions in the affirmative.

Next, the City makes the following arguments concerning the October 4, 2004 memorandum which Engelbert gave to Aeder-Gort.

It begins by reviewing what happened prior to the issuance of that memorandum. It notes that at the hearing, Aeder-Gort admitted that she knew that the Capri pants issue – which had arisen in June, 2004 – would come up as an issue again, and she vowed that she would use that issue to challenge Engelbert. The Employer puts it this way in its brief: "By her very own words she was just waiting for an opportunity to bring an action." That opportunity arose in late September, 2004 when Engelbert discussed the Capri pants matter with his management team and told them to police the dress code. It was at that point that Aeder-Gort decided to weigh in on the matter via her "Authoritative Source" e-mail.

The Employer contends there were several problems with her e-mail. First, the e-mail had a sarcastic tone that clearly challenged the authority of the Library Director on setting the dress code. It notes in this regard that the dress code was a "hot button" issue in the department. Second, rather than sending the e-mail to just her supervisor (Schmidt) as she was supposed to do, she also sent it to eight other people in her department. Engelbert thought that by copying those bargaining unit members on her e-mail, Aeder-Gort was intentionally trying to disrupt the workplace atmosphere and cause dissention by stirring the pot on a contentious issue. Engelbert felt this negatively impacted the operations of the library.

After Engelbert got the e-mail, he met with Aeder-Gort to discuss her motivation/intent for sending it. In that meeting, he specifically asked her what she was trying to accomplish by sending her e-mail. Aeder-Gort did not answer that question but instead argued that she had the right to demand an "authoritative source" for Engelbert's authority to define the clothing policy. Engelbert concluded from their verbal exchange that Aeder-Gort had sent her e-mail to challenge his authority to interpret and administer the Employer's dress code. He told her that

if she questioned a decision by a supervisor, the proper procedure for her to follow henceforth when questioning a supervisor's directive was to address her concern to just her immediate supervisor (and not to other employees as she had done in her e-mail). He also told her she could be disciplined for not following this procedure. Following that meeting, Engelbert issued a written memorandum which memorialized what happened at the September 30, 2004 meeting and also specified the procedure she was to follow in the future. With regard to the latter (i.e. the procedure she was to follow in the future), the next to the last sentence in the last full paragraph provided thus: "You are not free to send out emails or other forms of communication to all or part of the staff if you question decisions made by your superiors." As the Employer understands it, that one sentence is the focus of Aeder-Gort's first grievance (i.e. the so-called work rule grievance).

It's the Employer's position that to the extent that this one sentence was a work rule for Aeder-Gort because it directed her to communicate questions about superiors' directives to her (Aeder-Gort's) immediate supervisor, it was a reasonable rule. Here's why. First, the Employer maintains that requiring employees who question their superiors to follow the chain of command establishes an orderly and efficient means of resolving workplace complaints. Said another way, following the chain of command avoids confusion and misunderstandings along the way. The Employer maintains that when employees follow the chain of command, the Library can continue to run smoothly and efficiently while the underlying issue is being addressed and resolved. The City opines that it's important for employees to follow this procedure so that the operation runs smoothly and disputes are resolved without interruption or disruption. Second, the Employer claims that requiring employees to communicate questions about superiors' directives to their immediate supervisor has long been the rule at the library. To support that contention, the Employer notes that in 1992, the Library Board adopted a Personnel Policy which contained a Staff Complaint Procedure. The City notes that the first step in that complaint procedure is for the employee to contact their immediate supervisor either in writing or in person when they have a complaint. Third, the City points out that when AFSCME Council 40 and the Employer negotiated their first collective bargaining agreement in 1993, they included a similar rule in their contractual grievance procedure. What the Employer is referring to is the requirement in the first step of the grievance procedure that says that when the employee has a dispute, they are to first discuss it with their immediate supervisor. The City avers that the fact that both the Union as well as the Library Board adopted a similar rule which requires an employee having a disagreement or dispute with their superior to address the complaint to their immediate supervisor is evidence that the rule is seen as reasonable both by the Union and Management. It asks rhetorically why else would it have been adopted? Finally, the Employer argues that "There was no testimony given at the arbitration hearing indicating that the rule was not reasonable."

The Employer disputes Aeder-Gort's contention that this rule/procedure was created exclusively for her. According to the Employer, this rule/procedure applied to all employees, union and non-union alike; everyone is to follow the chain of command.

Building on the foregoing (i.e. that the “rule” contained in Engelbert’s October 4, 2004 memorandum was reasonable and that the “rule” was not created exclusively for Aeder-Gort), the Employer contends that Aeder-Gort knew, following her receipt of Engelbert’s October 4, 2004 memorandum, that in the future when she questioned a superiors’ decision, she was to communicate only with her supervisor and not anyone/everyone else in the department about it (as she had done in her “Authoritative Source” e-mail). To support that contention, the Employer cites Aeder-Gort’s own words which she used in an e-mail to Schmidt the day after she got Engelbert’s memorandum. In that e-mail, she said that although she regarded Engelbert’s memo with disdain, “I will follow Alan’s instruction to the letter of not communicating with anyone but you on the staff if I question my superior’s decision.” The Employer avers that the plain meaning of her statement is that Aeder-Gort acknowledged to Schmidt that she understood that the rule/procedure was that she was to communicate only through her supervisor if she questioned her superior’s decision, and that she would abide by it (i.e. the rule/procedure) in the future.

The Employer submits that unfortunately, though, Aeder-Gort did not do what she said she was going to do (i.e. abide by that procedure).

Next, the City reviews Aeder-Gort’s behavior after she got Engelbert’s memorandum. First, on October 8, 2004, she sent an e-mail to Linda Bendix who works at the Lake Geneva Library wherein Aeder-Gort solicited “complaints” about Engelbert from Bendix. The Employer emphasizes that in her e-mail to Bendix, Aeder-Gort said therein that Engelbert will “be damned if he does and damned if he doesn’t since it will bring up as many of the complaints I’ve heard against him. . . .If nothing else I will embarrass him out of town.” Second, that same day, Aeder-Gort called supervisor Muchin-Young at her home and told her she was filing a grievance to change things at the Library. During the course of that call, Aeder-Gort said that at the very least, she wanted “Alan and Hallie to be walking on eggshells.” She also stated that she had written a long memo which she wanted Engelbert to sign which she (Aeder-Gort) thought would change things at the Library. Muchin-Young was disturbed by this phone call. Third, the next day (October 9, 2004) Aeder-Gort sent an e-mail to five management employees plus her supervisor wherein she stated: “I am planning on taking serious action on a matter of extreme importance” which would culminate in what she called “righteous wrath – not vindictiveness” (against Engelbert). Fourth, that same day, Aeder-Gort called supervisor Schmidt at her home. In that phone call Aeder-Gort said, among other things, that she (Aeder-Gort) was going to get Engelbert to resign or have to be very careful around the management team. She also stated that if she got fired, then Dale (her husband) would be able to say whatever he wanted to Engelbert and he would be protected. Fifth, about this same time, Aeder-Gort sent an e-mail to Professor James Maccaferri at Clarion College asking his advice on the issue of the policy of the Library. Sixth, on October 11, 2004, Engelbert convened a meeting concerning Aeder-Gort’s recent actions. In that meeting, he asked those present if they knew what Aeder-Gort’s motivation was for her unusual conduct. Ellison responded that Aeder-Gort’s objective was to have Engelbert

removed from his job. Ellison also said that Aeder-Gort was contacting former employees who had resigned or who had been fired by Engelbert to gather as much dirt as possible on him. He also stated that Aeder-Gort had told him that she was going to the Library Board with the information, and if the Board did not agree with her, she was going after the Board. Ellison indicated he was disturbed by Aeder-Gort's statements and actions. Seventh, just six minutes before her disciplinary meeting was to convene that same day, Aeder-Gort sent an e-mail to 16 staff members at the library. The subject line of this e-mail indicated that the topic was "Jean Requests to Meet with Board President, Tom Klein." This e-mail provided in pertinent part: "I'll need anything that needs discussion with Tom Klein." Eighth, about the same time that the above-noted e-mail was sent, Engelbert got a voice mail message from former employee Linda Bendix. In her voice mail, Bendix indicated that she had gotten a disturbing e-mail from an employee at the Manitowoc Library, and wanted to speak to Engelbert about it. Engelbert subsequently returned Bendix's call, and Bendix identified Aeder-Gort as the employee who had sent her the e-mail. Bendix told Engelbert she was shocked to have received the e-mail because she did not even know Aeder-Gort.

The Employer avers that after Engelbert learned of the foregoing, he interviewed Schmidt and Ellison and had discussions with Klein, Geiger and Wyss about Aeder-Gort's actions. After doing so, he concluded that Aeder-Gort had indeed sent the e-mails, made the phone calls and made the statements referenced above. With regard to what Ellison had told him, Engelbert concluded that Ellison's information had been substantiated by Aeder-Gort's e-mails to Bendix.

The Employer concluded that by her conduct, e-mails and statements, Aeder-Gort had not complied with the directive which Engelbert had (verbally) discussed with her on September 30, 2004, and given her in writing on October 4, 2004. The Employer further concluded that the foregoing conduct, e-mails and statements establish that Aeder-Gort "did not have honorable intentions here, but rather a substantial disregard for what was right and for any interest that was contrary to her own." The Employer believes it is axiomatic that employees are supposed "to know the difference between right and wrong and therefore even in the absence of a work rule spelling out what they can and can not do, they are held to a standard of conduct requiring the appropriate behavior." The Employer further concluded that by her conduct, e-mails and statements, Aeder-Gort showed a "blatant disregard of the Employer's interest" and did not comport with "any appropriate standard." Finally, the Employer concluded that the various statements Aeder-Gort made referenced above were vindictive statements meant to damage Engelbert's reputation, embarrass him and possibly get him fired. According to the Employer, when considered together, Aeder-Gort's actions show that she was on a crusade to destroy Engelbert. The Employer also emphasizes that Aeder-Gort said that she wouldn't stop at the library director either; if the library board didn't fire Engelbert, she would go after them as well. The Employer argues that it can't have its employees publicly threaten its supervisors and board members as Aeder-Gort did here. In the Employer's opinion, Aeder-Gort's actions were not the actions of someone who wanted to stay



employed. The Employer contends that Aeder-Gort's "egregious" behavior constituted misconduct and warranted severe discipline. It's the Employer's view that the discipline which it imposed (suspension and discharge) was totally justified and not excessive under the circumstances.

Next, the Employer avers that Aeder-Gort was afforded due process prior to being disciplined. The Employer contends that in the context of this case, due process required (1) the opportunity to be heard prior to her discharge and (2) the right to challenge her discharge via the grievance arbitration procedure. As the Employer sees it, both those due process elements were satisfied here. With regard to item (1), the Employer emphasizes that at all three meetings that Engelbert had with Aeder-Gort, Engelbert gave Aeder-Gort the opportunity to state her case and explain her actions. According to the Employer, she refused to do so at all three meetings. With regard to item (2), the Employer points out that all three of Aeder-Gort's disciplinary grievances were appealed to arbitration as allowed under the parties' collective bargaining agreement. The Employer opines that this means element (2) of due process was satisfied here.

Finally, the Employer disputes Aeder-Gort's contention that this case is a First Amendment freedom of speech case. The Employer cites various First Amendment cases for the proposition that only matters of public concern have protections under the First Amendment. Building on that premise, it's the Employer's view that when Aeder-Gort took all the actions referenced above, "she was not expressing any public concern but rather she was expressing her personal interest and dislike of the Library Director and his management style." According to the Employer, "this predominant motivation so dominates the substance of her speech that it becomes a personal concern, not a public concern." The Employer avers that matters of personal interest in an employment setting do not invoke protected First Amendment free speech rights.

In sum then, it's the Employer's position that there was just cause for all of the discipline imposed on Aeder-Gort, so none of it should be overturned. The Employer therefore asks that all three grievances be denied.

### **City's Reply Brief**

The City begins its reply with the following overview of what this case is, and is not, about. As the Employer sees it, this is not a freedom of speech case as Aeder-Gort tries to make the arbitrator believe. The Employer opines that "There is no evidence of any Speech issue, except the weak and twisted claims of Ms. Aeder-Gort in her attempt to destroy the good name and sabotage the career" of Engelbert. The Employer avers that "rather, this case is about a violation of an established work rule, set out in the procedural policies in the Manitowoc Library, and the willful, wrongful tactics employed by one employee on a crusade to get Mr. Engelbert fired." The rule the Employer references is the one requiring employees

to follow procedure (the so-called “chain of command.”) The Employer argues that Aeder-Gort not only failed to follow procedure, “but her actions were so egregious, so malicious in her intended quest to destroy a man and his career that her actions rise, not only to the level of insubordination, but to a level of destruction, creating an atmosphere of distrust and disharmony amongst the staff at the Library.”

Next, it addresses the standard which the arbitrator should use to review this discipline. It repeats the contention it made in its initial brief that the arbitrator should use the generally accepted two-part analysis for determining just cause. It disputes Aeder-Gort’s assertion “that the DAUGHERTY test is appropriate given the testimony of the Personnel Director, Deb Geiger.” The Employer avers that statement is wrong on two counts. First, it notes that the Personnel Director for the City at the time of the hearing was Attorney James Wyss, not Deb Geiger; Geiger was the assistant to Wyss, with the title of Personnel and Safety Coordinator, not Director. She answered to Wyss. Second, the Employer asserts that nowhere in Geiger’s testimony did she ever testify that the City was agreeing to use the DAUGHERTY analysis to determine just cause. The City surmises that Aeder-Gort’s argument in this regard was based on the fact that Geiger answered various questions about just cause put to her by Aeder-Gort’s attorney. The City argues that “the mere fact that Ms. Geiger answered the questions put to her without any affirmative acknowledgement of approval of one test over the other is clearly stretching the facts in evidence.” Thus, the Employer claims there is no agreement to use the DAUGHERTY test in this case.

The Employer argues in the alternative that if the arbitrator does use the DAUGHERTY standard for determining just cause, it still met its burden of proof under the seven elements in that standard. Here’s why. With regard to the first element (i.e. whether the employee knew the rule and had foreknowledge of the possible or probable consequences of her conduct), the Employer answers that question in the affirmative. In support thereof, it notes that after she sent her “Authoritative Source” e-mail, Engelbert told her about the rule at their September 30, 2004 meeting (namely, that when she questioned a superior’s directive, she was to address her concern to just her immediate supervisor, and not to other employees as she had done in her “Authoritative Source” e-mail). The Employer also notes that Engelbert told Aeder-Gort that she could be discharged for not following this procedure. Thus, she had both notice of the work rule and the consequences for not following it. It is in that context (where Aeder-Gort knew of the rule), that Aeder-Gort violated that rule when she did the following: 1) called Muchin-Young at home on October 8, 2004; 2) sent her October 9, 2004 “righteous wrath” e-mail to various library employees; 3) called Schmidt at home on October 9, 2004; 4) sent her e-mail to Professor Maccaferri questioning Engelbert’s policy; 5) sent her October 8, 2004 e-mail to Bendix; 6) sent her October 11, 2004 memo to the library board president which copied various staff members; 7) sent her October 11, 2004 e-mail to library employees which attempted to gather dirt on Engelbert; and 8) sent her October 14, 2004 memos which copied a large number of library employees. With regard to the second element (whether the work rule was reasonably related to the orderly and efficient operation of the Library), the

Employer answers that question in the affirmative. In support thereof, it avers that the rule is reasonable “as it insures an orderly and efficient means of resolving complaints and problems within the organization with little or no disruption.” It cites Muchin-Young’s testimony that Aeder-Gort’s actions “caused an atmosphere of distrust and discomfort among the staff” and “had a negative impact at the Library, which carried over to the staff.” The Employer opines that if Aeder-Gort had followed the work rule and directed her complaints to just her supervisor, and not to other past and present staff members “the staff would not have exhibited distrust or discomfort in the workplace, as they would not have been aware of the grievant’s actions and opinions. The situation would have been isolated, only known to a few.” With regard to the third element (whether the Employer conducted an investigation to determine if the employee violated the work rule), the Employer answers that question in the affirmative. According to the Employer, Engelbert conducted a thorough investigation wherein he obtained “unbiased information” from various people that Aeder-Gort violated the rule numerous times via her phone calls, e-mails and actions. It also notes that Engelbert asked Aeder-Gort to state her case and defend herself at three separate meetings, but each time she failed to do so. With regard to the fourth element (whether the investigation conducted was fair and objective), the Employer answers that question in the affirmative. It avers that from the very beginning, Engelbert made an effort to discover what Aeder-Gort’s motives were for her actions, but as just noted, she refused to tell him at their meetings. It emphasizes that much of the information which Engelbert compiled in his investigation came to him without solicitation from Muchin-Young, Schmidt, Bendix, Ellison and Aeder-Gort herself. It also points out that Engelbert consulted with Geiger on how to handle Aeder-Gort’s situation. As the Employer sees it, Engelbert’s investigation was fair, unbiased and objective. With regard to the fifth element (whether the City discovered substantial evidence that the employee violated the rule), the Employer answers that question in the affirmative. The Employer notes that in its discussion on the first element, it identified numerous instances wherein Aeder-Gort violated the work rule. It repeats those instances here and argues that those instances also substantiate this element. With regard to the sixth element (whether the work rule is applied evenhandedly), the Employer answers that question in the affirmative. According to the Employer, this work rule (that she was to contact only her supervisor if she had a disagreement with a supervisor) was incorporated into both the Library’s Personnel Policy (via the Staff Complaint Procedure) and the collective bargaining agreement (via the contractual grievance procedure). The Employer argues that Aeder-Gort’s contention that Engelbert admitted to applying this rule arbitrarily and capriciously mischaracterizes his testimony. The Employer asserts that in his testimony, Engelbert “understood there is a difference between comments that are mere opinions, and comments and actions attempting to change the system, which should follow grievance or complaint procedure.” The Employer maintains that Aeder-Gort mischaracterized Engelbert’s testimony regarding the hypothetical situation where an employee goes to the Library Board to express an opinion regarding the collection of books at the Library as a violation of the policy. The Employer asserts that in his testimony, Engelbert “was explaining that if an employee was challenging a decision of the Library Director that this should follow the complaint procedure and not be immediately brought to the Library

Board. He wasn't attempting to interpret the policy in an arbitrary fashion as the employee contends." Given the foregoing, it's the Employer's position that there is no concrete evidence in the record that this rule was applied arbitrarily and capriciously; instead, it was applied evenhandedly. With regard to the seventh element (whether the discipline imposed relates to the seriousness of the alleged violation in light of the employee's discipline record), the Employer answers that question in the affirmative. It argues that termination was warranted because Aeder-Gort actively sought out dirt on the Library Director from other individuals in an effort to undermine his authority, ruin his reputation, smear his name, and possibly get him fired. It's the Employer's view that Aeder-Gort acted willfully, intentionally and with substantial disregard for the employer's interest, so all the discipline it imposed was warranted.

Next, the Employer makes the following arguments about the so-called work rule grievance. First, the Employer argues that Aeder-Gort misstated what the work rule was. According to the Employer, the work rule was this: if she had a problem and disagreed with her superior, then she was to follow the complaint procedure (which is found in the Personnel Policy), or she could follow the contractual grievance procedure (if she believed that there was a violation of the collective bargaining agreement). In other words, employees are supposed to take their workplace issues to their supervisor and follow the chain of command; they are not supposed to communicate on these matters with all or part of the staff. The Employer contends that the one sentence which Aeder-Gort focuses on (i.e. the sentence which stated: "You are not free to send out emails or other forms of communication to all or part of the staff if you question decisions made by your superiors") is not the rule, "but rather an extension or clarification on the work rule of what not to be doing." The Employer avers that by relying on just that one sentence, and characterizing it as the work rule, "she chose a very selective portion of the information at hand to twist the Library Director's intent to make her case against Mr. Engelbert, as she had been doing since September 30, 2004." Second, the City responds as follows to Aeder-Gort's contention that the sentence just noted "prevented her from discussing the subject with the Union steward." The City contends that doesn't make sense, as Engelbert encouraged her to file a grievance if she felt the collective bargaining agreement was violated. The Employer also avers that Aeder-Gort's claim that she thought that Engelbert was tricking her "is just paranoia" because there is no evidence that Engelbert was attempting to trick her. The Employer alleges that Aeder-Gort's contention that "she could not tell the Union Steward anything" is not true because she told Ellison that she wanted to get rid of Engelbert, and wanted him fired, and that she was contacting other past employees for information to use against Engelbert in an attempt to gather as much dirt on Engelbert as she could get. Then she planned on taking that information to the Board. She further told Ellison that if the Board didn't agree with her that she would go after the Board. As the Employer sees it, these are not the words of someone who is afraid to talk to the union steward, but rather are the "fighting words of an employee on a crusade to damage the career of her employer." Third, the Employer disputes Aeder-Gort's contention that Engelbert never explained the "chain of command" to her. It points out that in Aeder-Gort's notes from her first meeting with Engelbert, she wrote that Engelbert said she did not follow the "chain of

command.” The Employer opines that if Aeder-Gort did not understand what that was, she could have questioned Engelbert about it, but she failed to do so. As the Employer sees it, it is hard to believe that she would not have questioned him if she didn’t understand what the “chain of command” was.

Next, the Employer addresses several of the claims which Aeder-Gort made in her initial brief about Engelbert. According to the Employer, Aeder-Gort did not substantiate the following claims. First, it notes that while Aeder-Gort described Engelbert as abusive and bullying, it maintains that a review of the record shows that the only people who called him that were Attorney Carroll and Dale Gort (the grievant’s husband). Second, the Employer notes that while Aeder-Gort claimed that Engelbert’s management style “adversely affected the services provided to the public”, the Employer asserts there is no evidence in the record to substantiate that claim. The Employer makes the same contention about Aeder-Gort’s assertions that Engelbert “abused his authority” and “accused anyone who challenged his conduct of undermining his authority.”

Next, the Employer addresses Aeder-Gort’s contention that Engelbert violated her WEINGARTEN rights when he refused to allow her request that Ann Herrmann be present at the termination hearing. The Employer disputes that assertion. It notes that when Aeder-Gort was summoned to the discharge meeting on December 14, 2004, she could have arranged on her own to have Herrmann come with her to the termination hearing. That did not happen. Instead, Aeder-Gort came to the termination meeting alone and then made a request for Herrmann to be there. Engelbert already arranged for union steward David Ellison to be at the meeting so that Aeder-Gort had union representation. Thus, when Aeder-Gort asked to have Ann Herrmann present at the meeting, Engelbert responded that a union representative was already present. The Employer avers that if Aeder-Gort had asked Herrmann to be at the discharge meeting, Engelbert would have allowed Herrmann to be present because he had allowed her to be present at the suspension meeting. Thus, the Employer submits that “there would be no reason to not allow Ms. Herrmann.” Aside from that, the Employer also points out that Aeder-Gort knew that Herrmann was at lunch at the time this meeting was held (and was therefore unavailable). To support that contention, it cites Engelbert’s notes of that meeting which say that Herrmann was at lunch. The Employer believes that Aeder-Gort purposely waited until she arrived at the meeting at noon to request Herrmann, even though she could have arranged this on her own prior to the meeting. It’s the Employer’s view that it should not be faulted for Aeder-Gort’s last-minute request for Herrmann’s presence.

Finally, the Employer reiterates its contention that Aeder-Gort was on a “crusade” to “dig up dirt” on Engelbert and get him fired. The Employer describes her actions as “irrational and disturbing.” It avers that when her actions are reviewed in the aggregate, they show “an employee on a mission, with no intent on stopping any of her behaviors until she reached her ultimate goal of having the Library Director terminated.” The Employer submits that Aeder-Gort’s conduct created an intolerable situation which it could not allow to continue.

It argues that it had just cause to suspend and ultimately terminate Aeder-Gort for (1) “insubordination”; (2) “her actions undermining the authority and effectiveness of the Library Director”; (3) “causing the reputation . . . [of the library]. . . to diminish”; and (4) “making verbal and written threats to publicly damage the reputation and livelihood of the Library Director.” It asks that all three grievances be denied.

### DISCUSSION

In all three cases herein, the Employer imposed a type of discipline on the grievant. That being so, I’m first going to review the contract language which deals with employee discipline.

Both Articles 2 and 6A subject employee discipline to a just cause standard. That means that the Employer retains the right to discipline employees, so long as it has just cause for doing so. In Case 186, the Employer gave the grievant a written reprimand; in Case 187, it suspended her; and in Case 188, it discharged her. The obvious question to be answered in all three cases is whether the Employer had just cause for taking that disciplinary action.

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. Many arbitrators apply a standard which consists of a two-prong analysis: the first element is whether the employer proved the employee’s misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was commensurate with the offense given all the circumstances. Other arbitrators apply what has come to be known as the DAUGHERTY standard, named after Arbitrator Carroll Daugherty. In an arbitration in 1964, Daugherty tried to crystalize the definition of just cause into seven independent questions. (Note: The seven questions are not repeated here, but were referenced earlier in this Award in the “City’s Reply Brief” section). As Daugherty saw it, if the answer to any of his seven questions was “no”, there was not just cause for discipline. Of these two approaches, the former (i.e. the two-prong analysis) is more common. Aeder-Gort asks me to apply the (less-common) DAUGHERTY standard here. I decline to do so for the following reasons. First, notwithstanding Aeder-Gort’s contention to the contrary, the City never agreed at the hearing to use the DAUGHERTY standard to review this discipline. Aeder-Gort’s contention that the City did agree to use the DAUGHERTY standard is based on the fact that during the hearing, Geiger answered various questions about just cause which were put to her by Aeder-Gort’s attorney. I find that just because Geiger answered those questions does not mean that she bound the City to a DAUGHERTY analysis. It would be one thing if Geiger had plainly said in her testimony that the City agreed to use the DAUGHERTY standard. However, she did not say that. That being so, it clearly stretches the record facts to say that Geiger’s testimony bound the City to a DAUGHERTY analysis. Second, while the City did address all

seven DAUGHERTY questions in their reply brief, that is not a sufficient basis to find that the City subsequently “agreed” to use the DAUGHERTY standard. In their reply brief, the Employer made it crystal clear that it was not agreeing to a DAUGHERTY analysis; all it was doing in addressing the seven DAUGHERTY questions was essentially “covering the bases”, so to speak, in the event the arbitrator applied DAUGHERTY. I therefore find that since the parties did not agree to have the arbitrator apply the DAUGHERTY standard, I’m not going to apply it. Instead, I’m going to apply the two-prong analysis noted above.

...

Before I apply that analysis to the discipline involved herein, I’ve decided to note at the outset that Aeder-Gort sees all of her cases as First Amendment freedom of speech cases. She essentially argues that the Employer violated her First Amendment freedom of speech when it imposed the disciplinary actions involved herein. There’s a fundamental problem though with my deciding these cases on constitutional grounds. It’s this: I’m not empowered to interpret and apply the United States Constitution. In the context of this case, my jurisdiction is limited to interpreting and applying the collective bargaining agreement, and specifically Articles 2 and 6A. It would be one thing if there was language in those provisions which gave the arbitrator authority to interpret and apply the United States Constitution in making a just cause determination. However, there is no language in those contract provisions or elsewhere in the collective bargaining agreement which does that. Additionally, the parties did not give me the authority to make that call via a stipulation. That being so, the arbitrator has no jurisdiction to rule on the claimed constitutional violations. Simply put, that’s not my call to make. My jurisdiction is limited to deciding whether just cause existed for the discipline imposed herein. I can make that determination without invoking the First Amendment to the United States Constitution. Consequently, I make no ruling on the claimed constitutional violations herein.

...

Next, before I review Aeder-Gort’s actions and conduct, I’m going to comment on the following matters for the purpose of context.

First, these disciplinary cases all grow out of a series of events that occurred in a two-week time period between late September to early October, 2004. The Employer considered those events to be disciplinary events and imposed discipline for them on the grievant.

When employees are disciplined, one common reason is job performance problems. That was not the situation here. The grievant had no history of job performance problems. Another common reason that employees receive discipline is because they have an extensive disciplinary history with an employer. That is not the case here either. The grievant had a clean work record (meaning no prior discipline) until the events involved here unfolded. When

those events unfolded though, the grievant's relationship with the Employer changed dramatically for the worse in short order.

Second, as will be expounded on in more detail below, Aeder-Gort decided to take on Engelbert. One thing that is surprising about that is that oftentimes in such situations, there's a history of conflict between the parties. Here, though, there was no history of conflict between Aeder-Gort and Engelbert.

Third, as a pre-emptive measure, the grievant tries to put her actions and conduct in perspective by emphasizing her motivation. According to Aeder-Gort, her motivation was as follows. She implies that prior to the September 28, 2004 dinner party, she was essentially unaware of how Engelbert ran the library. She avers that changed when she learned (at the dinner party) that management employees felt bullied, harassed and intimidated by Engelbert and felt they had no recourse to report it. She also avers that at that dinner party she learned that Engelbert controlled the information that went to the board. Finally, she avers that at that dinner party she learned that Engelbert made it impossible for employees to get to the library board to tell them what's going on. Aeder-Gort maintains that this information "opened her eyes", so to speak, to the way Engelbert ran the library. She implies that she was so outraged by what she learned at the dinner party that she decided then and there to take on Engelbert.

I'm going to expound on the last sentence just made by dividing it into two parts: the latter deals with her decision to take on Engelbert and the former deals with the timing of her decision to do that.

While the timing of Aeder-Gort's decision to take on Engelbert is, in the great scheme of things, not that important, I'm persuaded that the dinner party was not the seminal event that Aeder-Gort made it out to be. In my view, what happened there can fairly be summarized thus: some co-workers got together in a social setting and did what co-workers do – talk shop. In the course of doing so, they did what workers do – gripe out the boss. As previously noted, Aeder-Gort implies that what she learned that night at the dinner party about Engelbert and how he ran the library prompted her decision to take on Engelbert. However, the record evidence shows that she had decided to do that months before the September 28, 2004 dinner party. Here's why. Aeder-Gort acknowledged at the hearing that she thought that Engelbert had overstepped his authority on two matters in June, 2004. One of those matters involved the dress code and, in particular, Capri pants. While she initially wanted to fight him over the matter then and there (i.e. June, 2004), she decided to bide her time, so to speak, because she thought that the Capri pants matter would come up again. She vowed that the next time the matter arose, she would use it, as she put it in her testimony, as a vehicle to "voice her concerns" and take on Engelbert. That opportunity came along in September, 2004 when Engelbert admonished an employee about her Capri pants and told the management team to police the dress code relative to Capri pants.



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### **The “Authoritative Source” E-mail**

After Aeder-Gort heard about Engelbert’s actions in late September, 2004 regarding the Capri pants, she decided to make it (i.e. Capri pants) her own personal issue. This was surprising for several reasons. First, Aeder-Gort did not wear Capri pants to work. She did not even own any. That being so, it is not readily apparent why Aeder-Gort wanted to make this her personal issue. Second, the employee who was admonished by Engelbert about her Capri pants did not ask Aeder-Gort to be her representative and “fight this fight” for her. Instead, Aeder-Gort just injected herself into this matter on her own volition.

She did that by sending the e-mail that subsequently became known as the “Authoritative Source” e-mail. Aeder-Gort testified that she thought that after she sent it, Engelbert would come back to her with an “authoritative source”, would apologize, and then “the whole thing would be over.” It is an understatement to say she was wrong. None of Aeder-Gort’s expectations played out as she thought they would.

Her e-mail was problematic for the following reasons. First, Engelbert did not consider the e-mail to be lighthearted or a joke. He read it to challenge his authority to make a decision about what constitutes appropriate workplace dress, and asked him to supply a source out of a reference book to justify his decision. As he saw it, he’s the one who decides what pants are appropriate under the dress code, and he did not need to cite an “authoritative source” to justify his decision. Second, Engelbert thought that Aeder-Gort had not followed the chain of command. While Aeder-Gort had sent her e-mail to her supervisor, she had also sent it to everyone in the department. Engelbert thought that Aeder-Gort did that just to rile up, agitate and disrupt the staff. Third, Engelbert knew that Aeder-Gort did not wear Capri pants to work. Knowing that, Engelbert thought that Aeder-Gort was “stirring the pot” and injecting herself into a hot button issue that did not affect her.

When Engelbert met with Aeder-Gort to discuss her e-mail, it became apparent to him that he had not misinterpreted the e-mail. He asked Aeder-Gort at the outset what she was trying to accomplish by sending her e-mail. Aeder-Gort did not answer the question but instead replied that she thought Engelbert did not have the right to decide what pants were appropriate, and that she, as a reference librarian, had the right to “demand” that Engelbert supply an “authoritative source” to justify his interpretation of the clothing policy. Engelbert then repeated his question several more times, and each time, Aeder-Gort did not answer the question posed, but instead made the statement just noted. Not surprisingly, Engelbert concluded from this verbal exchange that Aeder-Gort had sent her e-mail to challenge his authority to interpret and administer the Employer’s dress code. He then told Aeder-Gort that she was on thin ice in doing so. He told her that if she questioned a decision by a supervisor, she could discuss it with them, but then the proper procedure was to follow the “chain of

command” (and not to send out a memo to everyone in the department as she had done). Engelbert then explained what he meant by the chain of command (namely, that employees are to go through the proper channels). Engelbert told Aeder-Gort to follow the chain of command in the future.

### **The Letter of Reprimand**

Following their meeting, Engelbert gave Aeder-Gort a letter of reprimand for sending her “Authoritative Source” e-mail to everyone in the department. Here’s a recap of that letter. The first paragraph identified what the memo was about – it said that on September 29, 2004, she sent an e-mail to the entire department that questioned his right “to make a decision without providing what you consider to be an ‘authoritative source’.” In the second paragraph, Engelbert said that if she wanted him to name an “authoritative source”, then it was him. In the third paragraph, Engelbert said that when he met with her, he asked her several times what she was trying to accomplish by sending the email. He then opined: “I was attempting to ascertain whether you were seeking to interfere with the decisions made and with the authority of the Director by sending out an email to all of the Information and Adult Services staff on this matter, or if you were simply lacking in good judgement by so doing. In this instance, I have concluded that your actions were driven by poor judgement.” In the fourth paragraph, Engelbert identified the procedure Aeder-Gort was to follow in the future if she questioned any action taken by her superiors. He told her to discuss it with her supervisor; if she wanted to challenge it, she had recourse to the grievance procedure. Engelbert then said: “You are not free to send out emails or other forms of communication to all or part of the staff if you question decisions made by your superiors.” The final paragraph, which was one sentence long, said “This matter is concluded.”

Based on the following rationale, I conclude that the Employer had a justifiable basis for issuing the letter of reprimand. The Employer has a legitimate interest in operating an orderly and efficient workplace. Said another way, the Employer has a legitimate interest in avoiding workplace disruptions and distractions because they interfere with the work that is supposed to be getting done. When conflict arises in the workplace, there is a commonly-accepted way of dealing with it. It’s this: the employee talks to their immediate supervisor about the underlying problem. If the problem is not resolved, then the supervisor, in turn, talks to their superior about the matter. This process is sometimes called going through the proper channels. Other times, it is referred to as following the “chain of command”. Whatever the process is called, the point is that not everyone in the workplace needs to be involved in these discussions. That’s true even if the topic being discussed is one that affects all the employees. Aeder-Gort followed this process correctly when she sent her “Authoritative Source” e-mail to her supervisor (Schmidt). However, she deviated from this process when she copied everyone else in the department on her e-mail. She should not have done that. None of the employees copied on the e-mail were in a position to do anything about the Employer’s dress code policy. Aeder-Gort knew that, of course, but she copied her co-

workers anyway, so they could see her ridicule her boss and vicariously share whatever enjoyment comes from that. However, the Employer does not have to put up with that. Aeder-Gort's action of copying all the employees in the department caused a disruption in the workplace which the Employer could address. Engelbert decided to do that by telling Aeder-Gort in clear, plain terms that she was not to do that again.

Normally, when the undersigned reviews a written reprimand that is being challenged, the entire written reprimand is at issue. In this case though, that does not appear to be the situation. Here's why. When Aeder-Gort filed her grievance concerning Engelbert's October 4, 2004 memorandum, she did not challenge the written reprimand as a whole. Instead, she singled out just a single sentence from that document and challenged it. The sentence she expressly challenged is the next to the last sentence of the memorandum, which provided thus: "You are not free to send out emails or other forms of communication to all or part of the staff if you question decisions made by your superiors." According to Aeder-Gort, this directive was a workrule made specifically for her. That's why this grievance came to be identified as the workrule grievance.

What Aeder-Gort asks me to do here is look at just one sentence from the written warning, find it unreasonable, and use that conclusion as a basis to overrule the entire written warning. I decline to do so for the following reasons. First, the directive that Engelbert gave Aeder-Gort in their meeting on September 30, 2004 was that in the future when she challenged a decision by a supervisor, she was to follow the "chain of command" (and not send her communications on the matter to everyone in the department as she had done with her "Authoritative Source" e-mail). There's no question that Engelbert used the phrase "chain of command" during the meeting because in the memo that Aeder-Gort wrote afterwards, she wrote that Engelbert told her she did not follow the "chain of command" when she sent her e-mail to everyone in the department. To the extent that Engelbert's directive to Aeder-Gort to follow the chain of command in the future was a work rule, it was not created exclusively for Aeder-Gort. It applied to everyone in the department; everyone is supposed to follow the chain of command. That's the way things get done. Even if the directive is considered as something created exclusively for the grievant, there is nothing that precluded Engelbert from doing that. Employers are empowered to create work directives for employees that are tailored to specific situations. In this situation, it was apparent that Aeder-Gort thought that she did not need to follow the chain of command. Engelbert instructed her otherwise. Second, this directive followed commonly-accepted personnel policies and procedures. That being so, it is held that the work instruction to follow the chain of command was reasonable, objective, achievable and within Aeder-Gort's control. Put conversely, nothing in the record establishes that this work instruction was unreasonable, unattainable or unrealistic. Third, the one sentence which Aeder-Gort focuses on in the written reprimand is not the directive/rule per se; instead, it's an elaboration on what she was to do in the future that was stated in the negative (i.e. that in the future, when she questioned a supervisor's decision, she was to communicate only with her supervisor and not everyone else in the department about it as she had done in her

“Authoritative Source” e-mail). Fourth, Aeder-Gort’s own words establish that she understood that this was the procedure/rule she was to follow in the future. In making this statement, I’m referring to the fact that the day after Aeder-Gort got the written warning, she sent an e-mail to Schmidt wherein she stated that although she regarded Engelbert’s memo with disdain, “I will follow Alan’s instruction to the letter of not communicating with anyone but you on the staff if I question my supervisor’s decision.” Her statement to Schmidt demonstrated that she knew what was expected of her going forward (i.e. that she was to communicate only through her supervisor if she questioned her superior’s decision), and that she would comply with it in the future. Fifth, although Aeder-Gort contends that this one sentence “prevented her from discussing the subject with the union steward”, the record facts show that it did not, in fact, prevent her from doing that (i.e. talking to Ellison about the matter).

Based on the above, I find that when Aeder-Gort copied everyone in her department on her “Authoritative Source” e-mail, that constituted misconduct. The Employer had the right to impose discipline on her for that misconduct.

With regard to the level of discipline which was imposed (i.e. a letter of reprimand), it is noted that that discipline is one of the mildest forms of formal discipline possible. I find that given the circumstances present here, a letter of reprimand was not excessive, disproportionate to the offense, or an abuse of management’s discretion, but rather was commensurate with her misconduct. The Employer therefore had just cause within the meaning of Articles 2 and 6A to impose the letter of reprimand.

### **The Suspension and Discharge**

I’ve decided to address the suspension and discharge together rather than addressing them separately. Here’s why. The suspension and discharge occurred in close proximity to one another. Aeder-Gort was suspended on Monday, October 11, 2004 and discharged on Thursday, October 14, 2004. In addition to their close proximity in time, there’s also an overlap in terms of the stated reasons for each. The following shows this. The grievant’s suspension letter stated that she was suspended for two reasons: (1) “insubordination” and (2) “undermining the authority and effectiveness of the Library Director.” The grievant’s discharge letter stated that she was discharged for four reasons. Reasons (1) and (2) were the same reasons that were listed in the suspension letter (i.e. (1) “insubordination”, and (2) “undermining the authority and effectiveness of the Library Director”). Reasons (3) and (4) were as follows: (3) “causing the reputation and esteem . . . [of the library]. . .to diminish”; and (4) “making verbal and written threats to publicly damage the reputation and livelihood of the Library Director.” Reason (1) is conclusory in nature. That doesn’t make the charge invalid though. It simply means that it is necessary for the arbitrator to determine if that conclusory assertion is supported by the record evidence. Reason (3) is subjective in that there’s no way for the arbitrator to objectively determine whether Aeder-Gort’s actions

“caused the reputation and esteem” of the library “to diminish”. In contrast, Reasons (2) and (4) are charges that are capable of being objectively proven or disproven by the record evidence.

Before I review the record evidence relative to those charges though, I’ve decided to make the following comments about Aeder-Gort’s motive for her actions.

By her own admission, the written warning made Aeder-Gort furious. She viewed it as a gag order and a form of censorship. While Engelbert had disciplined her with a written warning, Aeder-Gort thought that it was Engelbert who should be disciplined – not her. Building on that premise, she decided that the discipline Engelbert deserved for what she called “preventing access to information” was discharge. In other words, she wanted to turn the table on Engelbert, so to speak, and get him fired. She knew that she was not empowered to do that on her own, and that only the library board could fire Engelbert. To effectuate that end, she embarked on a quest to solicit complaints about Engelbert from former employees. Her plan was to take the information she compiled to the library board. She thought that the library board was unaware of how Engelbert treated his supervisors, and the board needed to find out what was going on. She thought that after the board learned that Engelbert was bullying and intimidating his supervisors, the board would fire him.

That’s the context for the following events which occurred shortly after Aeder-Gort received her written warning. First, she had a conversation with Ellison wherein she asked him for the names and addresses of employees who had been fired by Engelbert because she wanted to contact them. When Aeder-Gort asked Ellison for this information, Ellison knew that Cathy Shallue had told him that Aeder-Gort was trying to get Engelbert fired. Ellison tried to get Aeder-Gort to drop her plan to get Engelbert fired, telling her that if she pursued that course of action, she was going to get fired herself. Aeder-Gort got angry with Ellison for saying that, and told him that if the library board didn’t fire Engelbert, then she would “go after them, too.” Second, on October 8, 2004, Aeder-Gort sent an e-mail to Linda Bendix who was the director of the Lake Geneva library. Bendix used to be a supervisor at the Manitowoc library and in that capacity, she worked with Engelbert. In her e-mail, Aeder-Gort indicated she was planning on filing a grievance against Engelbert and was looking for “anyone” who could “add to the list of complaints against him.” Aeder-Gort said she was looking for as “many complaints” against Engelbert as possible. In her e-mail, Aeder-Gort also said that Engelbert will “be damned if he does and damned if he doesn’t since it will bring up as many of the complaints I’ve heard against him. . . .If nothing else I will embarrass him out of town.” This e-mail was copied to the “comeuppanceparty”. After receiving Aeder-Gort’s e-mail, Bendix called Engelbert and told him about it. She characterized Aeder-Gort’s e-mail as “disturbing” and indicated she was shocked to have received it because she did not even know Aeder-Gort. Third, Aeder-Gort contacted an unknown number of other former supervisors besides Bendix. Her stated reason for contacting them was the same as her stated reason for contacting Bendix (i.e. to solicit complaints about Engelbert from them). Fourth,

on October 8, 2004, Aeder-Gort called Muchin-Young at her home. This call was unusual because Aeder-Gort had not called Muchin-Young at home before. In this phone call, Aeder-Gort told Muchin-Young she was going to file a grievance which she thought would change things at the library. Aeder-Gort indicated that she wanted Engelbert to “be walking on eggshells”. She also stated that she had written a long memo which she wanted Engelbert to sign. Muchin-Young found this phone call disturbing. Fifth, the next day (October 9, 2004) Aeder-Gort sent an e-mail to five management employees plus her supervisor wherein she stated: “I am planning on taking serious action on a matter of extreme importance” which would culminate in what she called “righteous wrath – not vindictiveness” (against Engelbert). The recipients of this e-mail did not understand its cryptic meaning. Sixth, that same day, Aeder-Gort called Schmidt at her home. This phone call was unusual because Aeder-Gort had not called Schmidt at home before. In that phone call Aeder-Gort said, among other things, that she was going to get Engelbert to either resign or have to be very careful from now on around the management team members. Schmidt responded that she (Aeder-Gort) was “imagining a fantasy”, that this would not happen and that “she would get herself fired.” Aeder-Gort then said she would “protect” Schmidt and “everyone else on staff.” Aeder-Gort also said that if she got fired, then her husband would be able to say whatever he wanted to Engelbert and he would be protected. Seventh, on October 11, 2004, just a few minutes before Aeder-Gort was to go into the disciplinary meeting wherein she was notified of her suspension, she sent an e-mail to 16 staff members (who were both management and bargaining unit members). The subject line of this e-mail indicated that the topic was “Jean Requests to Meet with Board President, Tom Klein.” This e-mail provided in pertinent part: “I’ll need anything that needs discussion with Tom Klein.”

In some disciplinary cases, the employee denies the factual allegations made against them by the Employer. That didn’t happen here. For the most part, Aeder-Gort admitted that she sent the e-mails, made the phone calls and made the statements referenced above.

In this case, the real fight is over whether that conduct constituted acceptable workplace conduct (as Aeder-Gort alleged) or misconduct (as the Employer alleged).

I find it unnecessary to go through each and every one of the previously-identified incidents and determine whether that conduct was misconduct. Instead, I’m going to focus on a handful of incidents which I consider dispositive of the outcome herein.

The incidents I’m going to focus on are the following: (1) Aeder-Gort’s comment to Ellison that if the library board didn’t fire Engelbert, then she would “go after them, too”; (2) her e-mail to Linda Bendix seeking complaints against Engelbert; (3) her contacting other former supervisors besides Bendix for the same purpose; and (4) her statement to Schmidt that she was going to get Engelbert to “resign”.

The first incident is important because Aeder-Gort's statement to Ellison undercuts her contention that she was not trying to get Engelbert fired. Her statement to Ellison that if the library board didn't fire Engelbert, then she would "go after them, too" conclusively establishes that she was trying, as she put it, to "go after" Engelbert and get him fired. The second incident (i.e. her e-mail to Bendix) is important because it establishes that her statement to Ellison was not just talk – she was actively trying to implement her stated goal of getting Engelbert fired by soliciting complaints about him that she planned to take to the library board. The third incident is important because it establishes that Aeder-Gort also sought out complaints about Engelbert from other former supervisors besides Bendix for the same stated reason (i.e. to take them to the board to get Engelbert fired). The fourth incident is important because what happened there was that Aeder-Gort told her supervisor (Schmidt) that she was trying to get Engelbert to "resign". Given the context in which it was used, the term "resign" meant a forced resignation (i.e. "fired").

With regard to the second incident just referenced (i.e. Aeder-Gort's e-mail to Bendix seeking complaints about Engelbert), Aeder-Gort contends that she did not know her e-mail to Bendix was impermissible because the written warning didn't expressly say "don't contact former employees." That's true; the written warning did not say that. Be that as it may, there are some types of workplace offenses that are considered to be so basic that an employee is simply expected to know that that conduct is improper and readily punishable, even if it's not covered by a workplace rule. A commonly-cited example of this type of misconduct is theft from the employer. That misconduct requires no explicit communication to the employee. In my view, that same principle applies to employees contacting former employees seeking complaints about the boss for the express purpose of getting the boss fired. That conduct is so obviously wrong that employees are simply expected to know that they will be disciplined for doing that.

There were many ways and approaches that Aeder-Gort could have chosen to "go after" Engelbert (to use her own words). However, I need not identify what Aeder-Gort could have done. Instead, my task herein is to review what she did. Here's what she did. First, she made verbal and written statements to her co-workers, her supervisor, and other members of management, that she was trying to get Engelbert fired. These statements can fairly be characterized as threats. By the time she was discharged, it can be surmised that most of the department must have known what Aeder-Gort was trying to do. That action on her part obviously undermined Engelbert's authority and effectiveness. Additionally, it was no doubt disruptive to the operation of the department. Second, there was her threat to the library board members that if they didn't fire Engelbert, then she would "go after them, too." Obviously, a public employer can't tolerate an employee threatening its public officials any more than it can tolerate an employee threatening their supervisor. Third, there were cryptic statements she made in her e-mails such as "righteous wrath – not vindictiveness", "walking on eggshells" and "comeuppanceparty". Although the Employer representatives couldn't decipher the meaning of all those statements at the time, they nonetheless considered them to be threats directed to Engelbert. That assumption was certainly reasonable under the circumstances.

All these actions by Aeder-Gort crossed the proverbial line that separates acceptable workplace conduct from unacceptable workplace conduct. Employers have a legitimate and justifiable interest in maintaining the authority of their supervisors and preventing employees from threatening them. This proscription against threatening supervisors includes threatening their job by actively trying to get them fired. It does not matter that Aeder-Gort was not successful in getting Engelbert fired. Instead, what's important is that she attempted to do it. That was misconduct warranting discipline.

One of the charges which the Employer made against Aeder-Gort in the discharge letter was that she "made verbal and written threats to publicly damage the reputation and livelihood of the Library Director." I find that charge was substantiated. Another charge which the Employer made against Aeder-Gort was that by trying to get Engelbert fired, she "undermined [his] authority and effectiveness." I find that charge was also substantiated. In my view, these two charges fairly and accurately describe Aeder-Gort's misconduct. Those two charges alone warrant severe discipline. In light of that finding, I need not decide whether Aeder-Gort's misconduct can also be characterized as "insubordination". Thus, no other comment is made about charge (1). That conclusion also applies to charge (3). Thus, no comment is made about charge (3) either.

...

Before I turn to the next part of the just cause analysis, I've decided to make the following comments.

First, the focus of my discussion is admittedly much narrower than what Aeder-Gort wanted it to be. What I'm referring to is this. At the hearing, Aeder-Gort testified that she believed her case involved censorship and intellectual freedom, and she implicitly invited me to address those topics in my discussion. I decline to do so. In my view, I do not need to address those topics as part of a just cause analysis. Consequently, no further comment will be made about those topics.

Second, Aeder-Gort's attempt to shift the focus from her own conduct onto Engelbert's conduct is not persuasive. While there are disciplinary cases where an employee's conduct can be overlooked and/or immunized because of their supervisor's bad conduct, that is not the case here. This case ultimately involves Aeder-Gort's conduct - not Engelbert's conduct. Given that finding, a lot of good lawyering on Aeder-Gort's behalf ultimately went for naught.

Third, at the hearing, Aeder-Gort testified that she did what she did (i.e. referring to all her conduct at issue here) because she "wanted to get to the library board." She thought that if she could simply "get to the library board" and tell them "the truth" about Engelbert's "wrongdoing" and management style, then the library board, as an impartial and unbiased body, would surely see things her way and fire Engelbert. What's ironic about this is that



Aeder-Gort ultimately did get her chance to go before the library board and tell them the foregoing, albeit after her discharge. When that happened though, her experience was different from what she expected. What I'm referring to is that by her own admission, she "blew a gasket" at that meeting and she testified that one of the board members thought she was "nuts". Following her experience before the board, Aeder-Gort essentially changed her tune, so to speak, and decided she could not get justice from the library board because they were partial and biased against her.

Fourth, this case does not stand for the proposition that employees cannot take on the boss, so to speak. In point of fact, they can. It happens all the time in the workplace. When an employee decides to do that though (i.e. take on the boss), it certainly helps if they've got the proverbial "goods" on the boss. That was not the case here because when Geiger investigated all of the charges which Aeder-Gort made against Engelbert in her various memorandums, Geiger found that none of the charges contained therein had merit. Thus, Aeder-Gort did not have the proverbial "goods" on the boss as she thought she did. In her testimony, Geiger emphasized that Aeder-Gort lacked objective evidence to substantiate her complaints against Engelbert. Instead, all Aeder-Gort had was her subjective opinion that Engelbert was bullying and intimidating his supervisors and had abused his authority. That was not substantive enough; she needed more than that to make her case against Engelbert. Additionally, when an employee decides to take on the boss, they make themselves a target, so they had better be careful that they don't give the employer any ammunition to use against them, so to speak. In this case though, Aeder-Gort gave the employer plenty of ammunition to use against her. I'm referring, of course, to the fact that she made verbal and written threats that she was trying to get Engelbert fired. Not surprisingly, Engelbert took umbrage with that.

...

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 due process, progressive discipline and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. suspension and discharge). These matters will be addressed in the order just listed.

I begin my discussion on due process with the following general comments. As noted above, due process is a part of just cause. It essentially requires employers to treat employees fairly during the disciplinary process. Unfair treatment of an employee during the disciplinary process undermines the process and may lead an arbitrator to reverse the discipline imposed by the employer. While the term "due process" is borrowed from constitutional law, the complexities and formality required in criminal and judicial proceedings have not traditionally been adopted in labor arbitration.

The collective bargaining agreement involved here contains two express due process protections. The first is contained in the first paragraph of Article 6, Section C. It provides that when the Employer imposes a suspension, demotion or discharge, it will give the employee "a letter setting forth the reason(s) for the disciplinary action." That happened here, so the Employer satisfied that express due process protection. The second protection is contained in the next paragraph of that same article. It provides that when the Employer imposes the disciplinary action just noted, it will send the written notice to the employee via certified mail. That happened here too, so the Employer also satisfied that express due process protection.

Aside from the express due process protections just referenced, the implicit due process protections sometimes addressed in arbitration awards are: (1) timely action by the employer; (2) a fair investigation; (3) a chance for the employee to explain before the imposition of discipline; and (4) the right to have a union representative present at an investigative interview (the WEINGARTEN right).

Aeder-Gort made no argument concerning number (1) above, but did raise arguments concerning numbers (2), (3) and (4).

Aeder-Gort contends that the Employer's investigation was flawed and unfair because Engelbert was involved in it. There's no question that Engelbert had a personal stake in the matter. Be that as it may, that does not mean that he could not conduct the Employer's investigation. With regard to the investigation which he conducted, here's what he did. First, he interviewed Ellison, Bendix, Schmidt and Muchin-Young relative to Aeder-Gort's actions. Second, he reviewed the written statements which Schmidt and Muchin-Young supplied. Following those interviews, Engelbert concluded that he had the essential facts about what Aeder-Gort had done. Third, Engelbert consulted with Geiger, Wyss and Klein about the matter. Fourth, at both the suspension and discharge meetings, Aeder-Gort was given the opportunity to tell her side of the story. She essentially declined to do so. In my view, nothing in the foregoing facts establishes that the Employer's investigation herein was so botched or flawed that it denied Aeder-Gort basic due process. Using that criteria, I find the Employer's investigation was sufficient to pass muster.

Next, Aeder-Gort contends that the Employer violated her WEINGARTEN rights when Engelbert denied her request for Ann Herrmann to be present at the discharge meeting. Under WEINGARTEN, a represented employee is entitled, on request, to have a union representative present at meetings or interviews with the employer whenever the meeting or interview is one that the employee reasonably believes may lead to discipline or discharge. When Aeder-Gort walked into the discharge meeting, she asked if Ann Herrmann could be there. Engelbert implicitly responded in the negative because he said that Ellison was going to be present at the meeting as a union representative. As previously noted, Ellison was the union steward. Herrmann, in contrast, was not a union steward or officer. As Aeder-Gort sees it, she had the

right to select who her union representative would be. The problem with this contention is that an employee has no inherent right to the presence of a specific union representative or person. All that is required is that a union representative be present, and that occurred here because union steward Ellison was present. Aside from that, I'm persuaded that the reason Engelbert denied Aeder-Gort's request for Herrmann to be present was because he considered it a last-minute request. For the purpose of context, it's noted that Engelbert had allowed Herrmann to be present at the suspension meeting after Aeder-Gort gave him some advance notice of her request. Here, though, Aeder-Gort gave Engelbert no advance notice that she wanted Herrmann to be present. She simply walked into the meeting when it was ready to start and said she wanted Herrmann to be present. Since Engelbert had previously granted Aeder-Gort's request for Herrmann to be present at the suspension meeting, it can reasonably be surmised that he would have granted the same request if he had been given some advance notice. I therefore find that Engelbert did not violate Aeder-Gort's due process rights under WEINGARTEN when he refused to grant her request that Herrmann be present at the termination meeting.

Having found no due process violation, the focus now turns to progressive discipline. It is noted at the outset that the normal progressive disciplinary sequence is for employees to receive a written warning and a suspension prior to discharge. That happened here. Assuming for the sake of discussion that the Employer essentially skipped the suspension step and proceeded directly to discharge, it could still do that. Here's why. Some misconduct is considered so serious that an employer does not have to follow all the steps just noted. The grievant's conduct fell into that category. Aside from that, 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.

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. 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. No one else has ever engaged in the same type of misconduct that Aeder-Gort did (i.e. actively try to get the boss fired). Since no similar misconduct has ever occurred in the workplace, it was not shown that Aeder-Gort was subjected to disparate treatment in terms of the punishment imposed.

Based on all the circumstances then, it is held that the severity of the discipline imposed here (i.e. suspension and discharge) was not excessive, disproportionate to the offenses, or an abuse of management discretion, but rather was commensurate with the grievant's proven misconduct. The Employer therefore had just cause within the meaning of Articles 2 and 6A to suspend and discharge Aeder-Gort.

Given that finding, I have denied Aeder-Gort's request for attorney fees.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

**AWARD**

1. That in Case 186, the Employer had just cause to issue the October 4, 2004 letter of reprimand to the grievant. Therefore, that grievance is denied.

2. That in Case 187, the Employer had just cause to suspend the grievant. Therefore, that grievance is denied.

3. That in Case 188, the Employer had just cause to discharge the grievant. Therefore, that grievance is denied.

Dated at Madison, Wisconsin, this 17th day of April, 2009.

Raleigh Jones /s/

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Raleigh Jones, Arbitrator