

BEFORE THE ARBITRATOR

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In the Matter of an Arbitration Between

**DANE COUNTY WISCONSIN MUNICIPAL EMPLOYEES  
LOCAL 60, AFSCME, AFL-CIO, FOOD SERVICE UNIT**

and

**OREGON SCHOOL DISTRICT**

Case No. 42

No. 68629

MA-14289

(P.F. Suspension)

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**Appearances:**

**Neil Rainford**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for the labor organization.

**Douglas Witte**, Melli Law, S.C., Attorneys at Law, P.O. Box 1664, Madison, Wisconsin 53701-1664, for the municipal employer.

**ARBITRATION AWARD**

The Dane County Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, Food Service Unit and the Oregon School District are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union filed a request, in which the district concurred, for the commission to appoint a member of its staff to hear and decide a grievance over the issuance of a one-day suspension to a member of its Food Service Unit, P.F. The commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Oregon, Wisconsin on June 4, 2009. A stenographic transcript was made available to the parties by June 15. The parties filed written briefs and replies, the last of which was received on August 13, 2009.

**ISSUE**

Did the employer violate the collective bargaining agreement when it imposed a one-day suspension on P.F. for the “popcorn chicken incident” of October 2, 2008? If so, what is the appropriate remedy?

**RELEVANT CONTRACTUAL LANGUAGE**

**4.0 Management Rights**

4.01 Except as otherwise specifically provided or limited by the express provisions of this Agreement, the Employer retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by law.

4.02 The foregoing reservations of rights includes, but is not limited to the right:

...

4.02.07 to suspend, discipline or discharge employees consistent with other provisions of this agreement;

...

**6.06 Evaluations**

6.06.01 The purpose of evaluations is to provide opportunities for employee improvement and for improvement of the work environment; to evaluate efficiency and appropriate job assignments and to allow for communication about the position, the work team and the performance expectations.

**9.0 Suspension, Discipline, Discharge**

9.01 Nothing in this Agreement shall preclude immediate suspension of an employee by the District Level Administrator deemed necessary in the best interest of the Employer. During the period of suspension, the employee shall receive regular pay.

9.02 The District Level Administrator or designee may discipline, suspend without pay, or discharge a non-probationary employee for just cause. Discipline, suspensions and discharges shall be subject to review under the grievance procedure.

## **BACKGROUND**

Among its several facilities, the Oregon School District operates the Rome Corners Intermediate School, where the grievant, P.F., has been a food service assistant since August, 2001, and in her current position with increased hours since February, 2007. The “essential job functions” for a food service assistant include the following:

1. Help prepare food working from planned menus, verbal and written job assignments so that menu items are available on time, at the proper temperature and in sufficient quantity. Examples of tasks include: prepare ingredients such as vegetables and fruit (wash, cut, measure, blend, open cans, etc.); defrost/heat/bake menu items that are not made from ingredients; place food in and remove from different types of ovens and steamers; help prepare and tray up entrees; help prepare food for transportation to other locations and/or transport food short distances; make and wrap sandwiches; move prepared food to serving line or storage area; prepare condiments and/or refill condiment holders such as ketchup.

For lunch, the Rome Corners school operates three service lines; one generally follows the K-4 menus, one is a self-serve menu plan, and one is a so-called “bar line,” (e.g., a potato bar, a pasta bar, soup and sandwich bar, etc.). Each line has two employees staffing it. The school serves sixth graders first, followed by fifth graders, for a total of between 320 and 360 meals daily. Each day, the kitchen is given a production sheet, showing what foods are on each line and an estimate of how much food should be prepared. Staff is then to fill in the amount prepared, the amount served, the amount remaining, and the disposition of the food prepared and not served. The general rule is for staff to prepare between one-half and two-thirds of the total estimated production for the first service.

Holly von Allmen is the District’s production manager for the K through 8 buildings, and as such is P.F.’s immediate supervisor. In the fall of 2007, she began having issues with P.F.’s job performance. von Allmen took notes on what she believed to be shortcomings in P.F.’s performance; she did not provide P.F. with copies of her notes, but did discuss the items with P.F., usually at about the time the situation occurred. P.F. was given an evaluation in December, 2007, which indicated a drop-off in some performance areas.

In January and February, 2008, von Allmen again documented incidents that she believed showed poor performance by P.F. von Allmen discussed the incidents with P.F., and had her initial the note, indicating she had been made aware of these matters:

- On January 22, P.F. ran out of taco meat because she had prepared a pan that was two inches deep rather than a four-inch pan. von Allmen explained the proper procedure to P.F. and “told her this is her line and it is up to her” to ask questions if she is not sure how to proceed. The district did not impose any discipline for P.F.’s poor performance;

- On January 25, P.F. prepared pizza wraps improperly, resulting in 29 items being wasted because she did not follow directions. von Allmen reminded P.F. of the proper method, and did not impose any discipline;
- On February 1, completed her production sheet improperly. von Allmen reminded P.F. of the proper method, and did not impose any discipline. P.F. wrote on von Allmen's notes, "will respond in writing when I have time."
- Follow-up conversations on February 7, February 27 and February 29;
- On May 30, von Allmen issued P.F. a verbal warning for handing out candy to children in her line.

The district provided another evaluation in June, 2008, which showed a further decline in some performance areas. von Allmen and District Food Service Director Robyn Wood met with P.F. and union steward Linda Glassmaker to discuss the evaluation, which P.F. did not believe accurately reflected her performance. Wood and von Allmen warned P.F. that her job was in jeopardy if her performance issues continued.

For the 2008-09 school year, the district moved P.F. from the bar line, where she had been the prior year, back to the second line, where she previously had shown acceptable performance. However, P.F. continued to have difficulties, including multiple days where her line ran out of prepared food, sometimes even on the first serving. von Allmen discussed these performance issues with P.F.

On October 3, 2008 Rome Corners prep cooks Charlene McCartney and Julie Vogel brought to von Allmen's attention an incident which they said happened the day prior, concerning the apparent misplacement of two pans of popcorn chicken. All parties met in a series of conversations that day. On October 7, 2008, Wood wrote P.F. as follows:

{P},

On the morning of Friday, October 3, 2008, you met with your supervisors, Holly von Allmen and Robyn Wood, and your Union Representative, Linda Glassmaker. This meeting was to discuss an incident in the Rome Corners kitchen which occurred on Thursday, October 2, 2008, in which you thought you would run out of popcorn chicken for lunch. This meeting was held to gather information for our investigation of the incident.

At the meeting you told us that you believed you did not have enough chicken for the second group, and you and another co-worker decided to put another product in the oven as you did not have enough popcorn chicken. You told us you did not know how much popcorn chicken you had used and did not know

how much you had started with. You told us that you did not discuss the amount of chicken with either prep-cook. You told us that your co-worker had put all the chicken in the oven, and did not tell you where it was. You also told us that the same co-worker found 2 pans of popcorn chicken after the other product was trayed up. You also told us the replacement product was not usable at the end of the meal and was thrown out.

We have spoken to you before, and discussed your job performance as related to being sure you have enough food, and knowing where all of your food is for your line. We have also discussed communicating with the prep-cooks regarding amounts of food and knowing where all your food is.

As this is an ongoing concern and shows poor job performance, disciplinary measures are considered appropriate. The disciplinary action will consist of 1 day of unpaid suspension, to be taken at the discretion of your supervisor. We expect that you will take this time to reflect on your job performance and if you truly feel you have the ability to continue in this job. Any further incidents of poor performance will be subject to disciplinary action up to and including dismissal. A copy of this letter will be placed in your personnel file.

A handwritten note from Glassmaker, dated October 8, indicates that P.F. received the note and "wishes to respond."

Also on October 7, 2008, Wood wrote another Food Service employee, J.H., as follows:

{J.,}

On the morning of October 3, 2008, you were interviewed by your supervisors regarding an incident that happened on October 2, 2008. At the start of the interview, you asked me if I wanted you to tell me the truth or lie. I told you I wanted you to tell me the truth.

When you were asked who put 2 pans of (missing) popcorn chicken in the over, you told me {P} did. When you were asked who found the 2 pans of chicken you told me {P} did.

A while later you came into the breakroom, where I was sitting with Holly, Charlene, and Julie, and told me that you wanted to set the record straight. You stated that {P} did put the chicken in the oven, and found it later. You and I left the room and I had you repeat what you said. You also added that you told {P} to tell me that you had put the chicken in the oven, and that you had found the chicken. I asked you why you would tell her to lie to me. You replied that you did it to keep her from getting into trouble.

At the time I told you that lying to your supervisor was not acceptable and you told me to write you up.

This is a written warning. Telling co-workers to lie to their supervisor is not acceptable behavior. Further incidents of this type of behavior will result in disciplinary action up to and including termination.

On October 22, 2008, the union grieved the suspension, along with another one-day suspension the District imposed for lying during the investigation. Wood, who had imposed the suspensions, denied the grievance on October 28. After the union appealed, District Business Manager Andrew Weiland wrote P.F. on November 20, 2008, as follows:

The Step 2 grievance received by P.F. on November 10, 2008 has been denied.

According to the Collective Bargaining Agreement, **9.0 Suspension, Disciplines, Discharge** – 9.02 “The District Level Administrator of designee may discipline, suspend without pay, or discharge a non-probationary employee for just cause.” Ms. F. has had repeated verbal discussions with her supervisor regarding performance issues. The current issue was putting food in the oven and then forgetting it. The entire kitchen staff tried to make a replacement and then found the items in the oven.

On October 7<sup>th</sup>, 2008 P.F. was given written warning and a 2 day unpaid suspension – one day for lying and one day for poor performance.

After the union appealed, District Board President Doug Kornetzke wrote P.F. on January 13<sup>th</sup>, 2009, as follows:

The Board has had an opportunity to review the appeal of your grievance dated December 9, 2008, and has voted to deny your grievance.

The Board did not see any basis for changing the discipline imposed. Nothing in the materials you submitted during the grievance process supported a change in discipline and the Union has submitted nothing on your behalf or presented any reasons which would warrant a modification of the discipline.

The Board supports the Administration’s efforts to use progressive discipline to correct problems and believes the Administration’s actions in your case are more than warranted. Just cause exists for the discipline imposed. There is no contractual violation.

The union submitted a timely request that the WERC appoint a member of its staff to hear and decide the grievance over P.F.’s one-day suspension for the performance issue. The union did not advance to arbitration P.F.’s one-day suspension for lying during the investigation.

As noted above, the District conducts performance appraisals of its food service employees. It uses the following four-point rating:

- 1 Exceeds expectations
- 2 Meets expectations
- 3 Needs improvement (basically satisfactory, improvement desirable. Written comments as to the basis of this evaluation will be included).
- 4 Does not meet expectations (corrective action necessary. Written plan for improvement will be developed. Specific written comments as to the basis of this evaluation will be included).

The district offered into evidence three performance evaluations of P.F. The evaluation of May 18, 2007, is noted below in normal font; the evaluation of December 17, 2007, is noted in *italics*; the evaluation of June 8, 2009, is noted in ***bold-faced italics***. The latter two evaluations also indicated they were “Special (probationary) – or staff to develop skills. Comments should include goals or areas to address. Two-way communication about staff goals, objectives and other performance related concerns.” For the first evaluation, the district used a (-) mark to indicate the employee was “close to meeting expectations.”

I. Communications Skills

- A. Communicates effectively with students, staff, co-workers and supervisor -2/3/4
- B. Cooperates in planning and evaluating goals and objectives 3/3/3
- C. Handles problems in a constructive manner 3/3/4
- D. Accepts and utilizes supervisory suggestions for improvement - 2/3/4

Comments: {P} understood when this position was created that it was a test to see if it would work with the current kitchen schedule.

*The kitchen is still in a state of change due to the uncertainty of what items we can serve for ala carte. The prep cooks are able to get a lot of work done in the morning before {P} arrives.*

***The kitchen is still in a changing process and therefore {P}'s job duties have changed as well. {P} has not made any comments or mentioned concerns to her supervisor regarding setting up ala carte and the different job duties that she is now doing. {P} was out sick in March and when she returned to work her work quality and speed showed some improvement.***

{P} has gone to her union rep with concerns about her schedule but has not come to her supervisor with these concerns.

*{P} does not communicate concerns to her supervisor regarding her schedule. Does this mean the schedule is working for {P}? She did talk to her supervisor about the floor scrubber. They will look at it this week Thursday (12/20/07). {P} needs to bring other concerns she has to her supervisor.*

*At a later date the repair man came to work on the floor scrubber and talked to {P}, but {P} did not tell anyone she had talked to him. He was ordering parts for it and when we got the bill we did not know he had been there. When asked about it {P} told me that he needed to order a part and she did not know when it would be in or when he would be back.*

*{P} is very good at communicating with the students and other staff in the building. {P} did a good job helping a staff member who was having a medical issue. {P} tends to show negative emotions when things are not going right or when she has been spoken to about production of quality of food.*

*{P} still needs to work on communicating with her supervisor and co-workers without feeling that she is being singled out. {P} stated in her self-evaluation that a co-worker is very negative toward her. {P} needs to address this with the co-worker. Her supervisors can assist her if she wishes.*

*{P} has made no attempt to talk to the person she stated (above) was being negative toward her. This person has gone to {P} and told {P} that she is doing a much better job (since she came back from being sick in March). {P} has still made no attempt to talk to this person about her concerns.*

*{P} needs to communicate with her supervisor when she wants to do something different than what is on the production sheets. Example: {P} handed out candy on the lunch line. If {P} wants to hand out something to the students and it is not on the production sheet {P} will talk to her supervisor prior to doing so and get approval from her supervisor. {P} will also not pick and choose who she will hand out extra items to. {P} does not always handle problems in a constructive manner. Example: When {P} runs out of food and has to cook more while the students wait, she sometimes gets angry and slams things. We have seen some improvement since March, but expect consistent improvement. When {P}'s supervisor talks to her she rolls her eyes and sighs. This relates to items A, C and D (above). When {P} is given instructions on specific job duties she does not always follow through with all of the instructions. Example: when cooking food for the wrap bar and boating a new product (curly fries). {P} was given instructions with the curly fries to weigh one boat for 4 ounces, and then use a spoodle and measure the next boat. Then she was to sue the one that most looks like the serving that is usually given out. {P} only did the weight measurement and did not do the spoodle measurement. When I came back through the kitchen to see the new*



*and how it went {P} said that they get a lot more with the weight measurement. I asked if she did the spoodle measurement and she said no.*

*{P} had a question on her schedule for the last days of work, but instead of asking her supervisor when the schedule came out on a Thursday (for a Monday), she questioned/talked to her co-workers. She called her supervisor at 6:30 Monday morning to check on the schedule.*

Goals: {P} will talk to her supervisor when she has concerns about her schedule.

*{P}'s supervisor has not heard any concerns from {P} regarding her schedule. Does this mean there are no concerns with the schedule?*

***Goal not met June 2008.  
Still have no feed back.***

{P} will be confident when making decisions on quality of foods, and will talk to other staff when she doesn't think a product is acceptable. We will see an improvement by June 1, 2007.

*{P} needs to be able to determine for herself when food is or is not of acceptable quality. Instead of just asking if food is acceptable, she needs to pose a question that shows us she understands the difference between having and not having an opinion and expecting someone else to give her the answer. For example: lettuce doesn't look great. Instead of asking another person what to do, say, "I don't think this lettuce looks good. What do you think?"*

*Goal not met.*

***{P} and I have spoken on many different occasions about the wrap bar and the amounts to cook and how to cook the different wraps. She is still struggling with this. Specifically, directions given on amounts to be cooked and time to cook products are not being followed. The last wrap bar of the school year {P} did cook it according to directions. Directions were given every single time she ran that bar line. {P} does not always have back-up product ready on the taco line. {P} has been instructed multiple times to bring out two pans of taco meat for the first serve. One pan should go in the well and the "use-first" pan should be on top of the pan in the well. When {P} does not do this the line has to stop and wait while she gets the rest of the product from the kitchen. This relates to (D) in communication skills. {P} feels she has improved on this as she has had her back-up taco meat on the line. (handwritten addition)***

*New Goals:*

*{P} will follow directions as given for preparation, production and line service, including portion control.*

*{P} will contact her supervisor if she adds or takes anything away from the line that is on the production sheet or not on the production sheet.*

*If {P} has questions on her schedule she will contact her supervisor and not just her co-workers. She will contact her supervisor before the date she has in question.*

*{P} will show improvement on communicating.*

*Continue to work on all other goals stated above.*

II. Responsibility and Reliability

- A. Shows responsibility for performance of assigned duties. -2/3/4
- B. Effectively uses resources and materials to reduce waste.  
2/2/2
- C. Is aware of budget planning and operating within established parameters. 2/2/2
- D. Consistently complies with and enforces district policies and school rules and regulations. 2/2/4
- E. Reports to work on time and follows procedure for excused absences 2/3/2
- E. Follows and completes production sheets in a timely and accurate manner. 2/2/2

**[On second appraisal, this was revised to read, “Reports to work on time and follows procedures for excused absences].**

Comments: {P} is a very reliable person, coming to work and following District policy for calling in or having to take time off.

{P} needs to be more careful with the production sheets and aware of what is on them.

She needs to make sure she reads them from top to bottom so as not to miss something.

She also needs to watch her end of day recording and make sure she finishes recording all products at the end of the day and completes her production sheet.

{P} also needs to make sure she is getting everything done that is on her schedule.

*{P} needs to have milk and fruit done early enough so that everyone knows those items are ready. All milk coolers should be loaded, and fruit washed and panned before checking with prep cooks to see what else needs to be done. If nothing else has to be done, cleaning should be started and checked off and initialed.*

*{P} needs to let the supervisor know when she has to leave the floor/building.*

*Leaving is not the issue, communicating to her supervisor that she left is the issue.*

*{P} was struggling to get all job duties done efficiently on a daily basis. She has improved on her job duties since coming back to work at the end of March after being out sick.*

*{P} is following procedures for taking time off.*

*She needs to know the history of the food she is working with. There are times when she is asked questions about food on her line and she does not know the answer. Example: Taco meat on the line tasted funny one day, and when {P} was asked about it she did not know if the different pans were from the same batch or if they were cooked before. {P} needs to taste the products on her line to make sure that they taste good. {P} will be confident when making decisions on quality of foods, and will talk to other staff when she doesn't think a product is acceptable. See above. {P} is responsible for rotating milk and filling the milk coolers on the lines. Milk has not been rotated. Five cases of chocolate milk were found in the large cooler with a "use-by date" of June 9 (on June 9). Milk with this date was delivered at least 2 deliveries ago.*

Goals: {P} will make sure her production sheet has all foods recorded.

*{P} has shown improvement in filling out her production sheet. Keep up the good work.*

She will make sure that everything on her work schedule is done without the need for everything to be listed in detail for her. For example, {P} will be able to follow the menu and production sheets and determine what needs to be done without specific instruction and detail. If she can't get something done she will communicate this with co-workers (if she needs help) and her supervisor.

*We are no longer detailing {P}'s job duties. The prep cooks have been able to do a majority of the production in the morning. {P} is responsible for filling all milk coolers, washing fresh fruit for all lines, and opening canned fruit for all lines. At 10:30 she is responsible for setting up her line completely. This needs to be done by 10:55. {P} still needs to communicate with the prep cooks daily to find out what needs to be done.*

*New goals: {P} will be confident knowing when to pull products from the freezer so they are thawed and ready for use. (Example: meat for sub bar sandwiches, dinner rolls. A full pan of sliced meat will take 3-4 days to thaw, while a pan of 20 slices will take 1 day to thaw. Dinner rolls need to be panned and in the cooler [today] for the next day, before meal service starts [today]).*

*{P} will follow HACCP procedures, including assuring oldest dated items are used first and kept separate from newest dated items that are the same. (Example: ham dated 12/5 must be gone before ham dated 12/7 is offered).*

*{P} will know how much to pull for use without taking too much, or too little. (Example: if a full pan of chopped, bagged meat is not needed, only the amount needed with padding, should be pulled).*

*{P} will correctly date all items she puts in the cooler and/or freezer without reminding. The issue here is not so much incorrectly dating product (1992). The issue is that the date was not fixed before putting product back into the freezer or cooler.*

***New Goals:***

***{P} will not add anything to the lines or give out candy on the lunch line.***

***{P} will know the history of the food she is serving.***

***{P} will taste foods to make sure that the quality is acceptable, and will do what is necessary to fix by bringing it to a prep cook's attention. {P} will follow production sheets and will not add or take away anything unless it has been approved by her supervisor.***

***{P} will rotate and use all products according to HACCP guidelines.***

***Continue to work on all goals stated above.***

***{P} will show consistency with responsibilities.***

***{P} will follow school policies.***

**III. Job Performance**

**A. Displays knowledge of the following areas:**

Meal prep (follows recipes if required, safe food temperatures, work schedules, production sheets) - 2/2/2

Meal service (portion control, set-up) 2/2/3

Reimbursable meals (understands requirements) 2/2/4

Sanitation 2/2/2

Equipment (knowledge and care) 2/2/2

HACCP knowledge and implementation 2-/3/3

**B. Works well with peers and supervisors to promote problem solving as a team effort. 3/3/4**

**C. Implements the Food Service Mission Statement through effective completion of tasks and assignments. -2/3/3**

Comments: {P} has served food of questionable quality (non-safety issues) to the line and served it without communicating to prep cooks so they could evaluate and fix it.

*This is an ongoing concern. Example: chicken gravy was too thin again on December 10 (see attached note), {P} did not ask for help. After her supervisor asked it that was all she had or if was there (sic) new product made today, {P} checked the production sheet and told her supervisor that was 1 pan of new product. The old product was on the line [good] but it was too thin and should have been checked and corrected before service.*

{P} needs to make sure she is completing everything on her daily work schedule and pulling the foods that are written down. *Work schedule is completed. See above for pulling items.*

***{P} has shown improvement in getting her work done since coming back from being sick in March.***

{P} needs to be comfortable with food temperatures and knowing what acceptable temperatures are for the product she is using. *Doing well, keep up the good work. Doing well, Keep it up!*

{P} needs to let whoever is ordering food know that she is getting low on her products so she doesn't run out when the item is on the menu again. *Doing better, keep up the good work.*

***{P} needs to apply this to everything that she is using. Example: {P} ran out of ala-carte sheets for lunch. {P} used the last sheet and did not tell anyone. The next day she used a breakfast ala-carte sheet to record the lunch ala-carte item-counts (the items are different). Then when the day was over and I was leaving the building she told me that she has been out of ala-carte sheets for lunch for 2 days now. {P} is not giving notice when ala carte items are running low and need to be made. The other cooks took on keeping track so they would have enough time to prepare more items.***

{P} often allows her emotions to take over. *Anything {P}'s supervisor says or does is taken as a negative, instead of as a way to improve.*

Goals: {P} will come to her supervisor with concerns or questions about her schedule. *At this point, {P} has not mentioned schedule concerns to her supervisors.*

***{P} will discuss questions on her schedule with her supervisor prior to the day***

{P} will communicate with the prep cooks when she doesn't think something is of good quality. *Continue to work on this. Continue to work on.*

{P} will increase her speed during the morning prep time so she is able to complete all job duties, including cleaning, and help others. *{P} is able to do some cleaning. Continue to work on.*

***{P} needs to be more efficient when cupping or bagging products. Example: When bagging the carrots {P} put all the carrots into a bag and then set the bag down onto a cart. When all of the carrots were in bags, then {P} goes back and starts wrapping up the bags and then putting the bags of carrots into the pan. Instead of bagging them, wrap them and then put them into the pan only handling each bag one time. Handle the carrots and bags one time instead of 2 times.***

{P} will make sure she reads the production sheets in full so she does not miss a change or a food item. *Doing well, keep up the good work. Doing well, keep up the good work.*

{P} will be flexible with change in the kitchen and communicate to co-workers and supervisor in a calm and professional manner when she sees or feels there is something to address. *Continue to work on. Continue to work on.*

We will re-evaluate in the fall of 2007. *On {P}'s self-evaluation she stated she did not feel a second review was needed. Any time goals are set, a follow-up review is required to see if goals have been met. {P} also states that she felt something was added to her May evaluation after she had signed it. The evaluation was signed in front of both supervisors, and returned to {P} immediately without any alteration of any kind. We will re-evaluate again in spring 2008.*

***{P} will be more efficient when doing prep work (example, not limited to: cupping or bagging products).***

***Continue to work on all goals, and meet them consistently. We need to see improvement in the scores. Some scores have gone down (communicating with supervisor, complies with and enforces district policies). {P} needs to take this seriously, and consistently meet set goals without falling behind in other areas so new goals have to be set. {P} needs to be consistent with her performance or her job may be in jeopardy. {P}'s job performance is sporadic, and we need to see scores consistently at a level "2." {P} needs to show consistent improvement.***

In October 2006, the District had posted a vacancy in the position of Cook (Prep-Baker-A la carte). P.F. applied for the position, but did not get it. She grieved, leading to this response from Food Service Director Wood on November 3, 2006:

One of the essential job functions in the job description is preparing and mixing ingredients, including measuring. The Union contract, section 8.03.05 B, states that the most qualified person will fill the vacancy. {P} did not meet the qualifications as stated in the job description, and there were no other internal applicants. Therefore, the position was filled by a qualified outside applicant, section 8.03.05 D.

After completing a second round interview, it was determined that {P} is not ready for a cook (prep/baker/ala carte) position. {P} did not demonstrate the confidence needed for this position, nor the motivation to improve her confidence or skills. It was suggested to {P} to use a cook book and follow some recipes to improve her skills over the summer, but she told us in the interview that she did not do that, she never uses recipes. When {P} filled in for a full time employee last year she did not show an ability to confidently read and follow recipes and instructions. When told how to fix a mistake made when following a recipe, she did not do it without direct supervision. When asked to change recipe amounts to meet production, either on the interview questions or at work, {P} was not able to do it by herself with confidence. A co-worker went over recipes with {P} the first time she had to follow a recipe. The next time the recipe had to be followed, a co-worker had to go over the recipes again, {P} was not able to follow recipes by herself. {P} was not sure how to cook and check pasta products. {P} was asked during the first round interview what she would do if she did not have the correct amount of food for a days production. She was unable to answer the question satisfactorily, showing us that she did not yet have the knowledge needed for the position. {P} still questions what proper temperatures are for serving. {P} has trouble converting number of servings of a product into pounds, and trouble with correct pan sizes.

When {P} was given the opportunity to fill in for 2 months at the end of last school (2005-06) year due to an employee illness, she was told specifically that this did not mean she would move into the position if and when it opened up if she did not show she had the necessary qualifications. The ability to independently read and follow recipes is essential to this position. {P} has now asked if she could have copies of recipes to take home and study.

Based on the above, the grievance is denied.

On or about November 8, 2006, P.F. filed the following response:

In response to Robyn's denial of my grievance, I file this appeal.

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Robyn said I do not meet the qualifications for the position which are:

Read + follow recipes – I can

Work without direct supervision – I can

Set up, serve, tear down – I can

Get items ready for lunch + ala carte – I can

Serving + batch cooking for lunch – I can

Run computer – I can

Prior food service exp. + computer exp. preferred – I have

I have also used the slicer + chopper once or twice.

It had been suggested for me to do some recipes out of cookbooks over the summer – I didn't. I have asked since last year if I could photo copy the kitchens recipes so I could familiarize myself with the ing. used on those recipes. In Robyn's denial of my grievance she acts like this is a bad thing when I look at it as helping myself. Why do recipes we don't use when I could use those we do use. They are the recipes that matter. I don't use recipes at home but that doesn't mean I can't at work.

Robyn says when "I" filled in for 2 mos. F.T. I did not show the ability to confidently read + follow recipes. I did then + do now have the ability to read + follow recipes by myself. I was never told I can't ask any ?'s. Everyone else asks ?'s. I was told from a co-worker when they all started they all had ?'s + they all made mistakes. Nobody's perfect.

I was never told how to fix a mistake, Holly just done it.

I can change recipe amounts + if I'm in ? we do have a conversion chart + a calculator.

A co-worker did not go over recipes the 1<sup>st</sup> time or a 2<sup>nd</sup> time with me – she did answer a ? if I had one. Each ind. hand writing goes on what you did for each day. Pull out those 2 mos. worth of production sheets + you will see what "I" had done.

I can ready + followed recipes by myself.



I do know how to cook + check pasta.

I do know what to do if you don't have enough for production.

I do know the proper temps.

I do know the pan sizes.

I never based my 2 mos. of F.T. on being hired when a F.T. position opened but I did assume it would benefit me.

A co-worker had told me that another co-worker told her "if {P} gets the job - I'm not helping her." She has been helping Lisa quite a bit + she answers her ?'s to. She has even had to show her where to put the day's end food in the freezer. She's been P.T. for over a year + she should know where the food goes.

As far as help goes, I don't need physical help, maybe just a ? answered once in a while. Nobody's knows everything.

As far as I know Lisa is a very good friend of Holly's that had quit the P.T. work in the RCI kitchen because her other job offered her better pay + better hours. A couple weeks later Lisa's hired back in the RCI kitchen F.T. She has a bad back + she can only raise her arms "so high" due to surgeries. She wants the school's insc. so her husband can work from home. A co-worker said "whatever Lisa can't do, someone else will have to do for her." This position requires raising your arms + lifting heavy items.

I have been running line 3 since the beginning of this school year. They pulled the F.T. that recently quit off to do P.T. duties once I got there. I thought they were getting me use to line 3 so I would know it by the time the F.T. quit. I guess now - that they gave me that line because nobody else wants to do it.

The F.T. that recently quit wanted to stay thru Dec. but she couldn't take the grief she was getting any longer.

There have been many P.T. employees that have also been pushed out.

I file this appeal of the denial of my grievance because I do feel I do qualify for the position + I still feel I was wrongfully denied.

On November 27, 2006, District Business Manager Andy T. Weiland responded as follows:

The appeal to the District's Step 1 Grievance Response was received by the Business Office on November 9<sup>th</sup>, 2006. It was received within the 15 days required by section 13.02.02 of the grievance procedure.

As I understand the grievance appeal, it centers on the question of whether Mrs. P.F. is qualified for the position of Cook (Prep-Baker-Ala carte), at the Rome Corners Intermediate School Kitchen. The issue of whether the position was posted the required amount of time detailed in the original grievance appears to be resolved since it was not mentioned in the appeal (step 2).

It is my belief that this grievance relates to section 9 (pages 8 and 9) of the 2005-07 Collective Bargaining Agreement between the Oregon School District and Dane County Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, Food Service Unit. The specific sections in question appear to be 8.03.05 B through D which details how a vacancy will be filled. The grievant believes that she should have been offered the position of Cook (Prep-Baker-Ala carte) at Rome Corner's Intermediate School. The District believes that Mrs. P.F. does not meet the criteria stated in the job description for the position and as a result was not a "qualified person" as is required in section 8.05.03 B for the position to be offered to her prior to a qualified person within the district or an outside applicant. No other staff within the district applied for the position and it was offered to an outside candidate whom the district believes is qualified.

In the initial response to Mrs. F.'s grievance, the Director of Food Services, Robyn Wood described the areas of deficiency in Mrs. F.'s performance that resulted in the District deciding she was not qualified for the position. The areas of concern involve essential job functions and qualifications of the position. The ability to quickly modify recipes based on the number of students taking lunch on a particular day in order to insure menu items are available on time, at the proper temperature and in sufficient quantity is of critical importance to the Cook (Prep-Baker-Ala carte) position. Other concerns expressed by Mrs. F.'s supervisors include a lack of confidence and knowledge in a position that frequently requires the position holder to make quick adjustments based on student daily preferences and attendance. During the almost two months that Mrs. P.F. filled in for a co-worker on medical leave, Mrs. F. demonstrated this inability to work independently in a consistent way.

As a result of information contained above, the Step 2 grievance appeal is denied.

On February 1, 2007, District Board President Doug Kornetzke wrote P.F. as follows:

Thank you for attending the Board of Education Meeting on January 22<sup>nd</sup>, 2007. After reviewing the information presented to the Board of Education that evening, the Board voted to deny your grievance.

The union did not advance this grievance to arbitration.

### **POSITIONS OF THE PARTIES**

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

The employer has not met its burden to provide evidence that anything out of the ordinary much less in violation of any policies or work rules actually occurred on October 2, 2008. All of the employer's testimony was hearsay and cannot establish the truth of the matter asserted. The employer elected not to call any witnesses who could testify about what really happened. The employer's hearsay evidence should be rejected as a means of establishing what actually happened that day. Having failed to establish any alleged events, the employer's allegation of misconduct must also fail.

Following from the employer's failure to prove misconduct, it has also failed to prove that the grievant violated any policies or work rules, much less that the violations were so severe that they required a day's unpaid suspension.

The employer has also failed to meet its burden that a one-day suspension was warranted. The grievant has no prior discipline related to the alleged offense. If there was any action warranting discipline for what allegedly happened on October 2, 2008, then actual discipline for such action must commence with a verbal warning.

The District's argument that the evaluations act as a surrogate for prior discipline and enable it to ignore the requirement that the grievant be given a verbal and written warning prior to a suspension must fail because the District itself admitted that the evaluations were not disciplinary. The collective bargaining agreement between the parties clearly spells out different processes for evaluation and discipline. The employer cannot be allowed to sneak around the just cause and grievability requirements by unilaterally deciding that it may substitute the process for evaluations until it decides to suspend or discharge an employee.

Any argument by the employer that certain exhibits be considered verbal or written warnings will not be convincing because the employer admitted it never shared the contents with the grievant. The supervisor's secret notes are highly

suspicious and cannot be considered a warning.

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The District has the burden to prove that the grievant engaged in misconduct, that this misconduct violated a reasonable policy or work rule and that the misconduct warranted the unpaid suspension. The district has failed at every turn to prove that misconduct occurred, that anything out of the ordinary occurred much less that any work rules were violated, and that a suspension is warranted. The grievance should be sustained and the grievant made whole.

In support of its position that the grievance should be denied, the District asserts and avers as follows:

The District had just cause to suspend the grievant for one day for poor performance. Its job expectations were reasonable and related to the orderly, efficient and safe operation of the food service department. The record is replete with instances of the grievant's inability to perform her duties correctly, including failing to cook food properly, failing to have sufficient food available, not properly recording food on the production sheets. Ms. F. experienced these troubles despite the District counseling her on numerous occasions and providing explicit instructions.

The District gave Ms. F. sufficient warning of possible disciplinary consequences of her continued poor performance. In addition to the constant counseling that took place over an 18-month period, the District gave Ms. F. three formal evaluations; in her June, 2008 evaluation, she was specifically told that her job was in jeopardy if her performance issues continued.

The District conducted a prompt, fair and objective investigation prior to issuing the suspension, and did not rush to act. Despite the Union's claim that the investigation was faulty, it offered no evidence to challenge any portion of the investigation. Neither the union nor the grievant ever offered any exculpatory evidence or information. The investigation uncovered substantial and compelling evidence that Ms. F. committed the acts as alleged. The union does not even appear to challenge the facts as the District alleged in the suspension letter, or any of the performance issues prior to the "popcorn chicken" incident.

The District has applied its expectations even-handedly and without discrimination, and there is no evidence in the record to the contrary.

The degree of discipline was reasonably related to the seriousness of Ms. F's offense and to her record of past service. If this were the first time Ms. F. had misplaced food or forgotten how much food she had prepared, the appropriateness of a one-day suspension could be debatable. But that is not the case. Ms. F. was not given the suspension for the Oct. 2 incident alone, but

school years. Her performance issues began in the 2006-07 school year, and continued in 2007-08, when she was specifically warned that her job was in jeopardy if her performance did not improve. This was not even the first incident of the 2008-09 school year. The District repeatedly gave Ms. F. instructions on how to perform her job properly and improve her performance, instructions which it appears she largely ignored. The one day suspension was necessary to get her attention, in that verbal counseling and written documentation were not having the desired effect, and there is no reason to believe they would. That Ms. F. knew her job was in jeopardy is evident because she accepted her co-worker's offer to lie and accept responsibility in order to protect Ms. F., whose performance over the preceding 18 months more than warranted a one-day suspension for the incident on October 2, 2008.

The grievant had a substandard and deteriorating record of job performance for at least 18 months. Verbal and written counseling did not have the desired effect and the District believed it was necessary to use a one-day suspension as further progressive discipline to address the situation. There was just cause to issue the suspension so the grievance should be dismissed.

In reply, the Union posits further as follows:

The District errs in claiming that it issued the grievant "warnings" about her performance, apparently believing that to repeat the statement often enough might make it true. But the District's claims are not accurate, and Ms. F. was not issued any verbal or written warnings that reasonably related to the offense the District alleges occurred on October 2, 2008. Under the just cause provision in the collective bargaining agreement, the District must first issue a verbal and written warning before it advances to an unpaid suspension. The District failed to do so, and thus violated the just cause provision.

The District further errs in contending that a verbal warning would not have done any good. The District issued Ms. F. a verbal warning on May 30, 2009, and Ms. F. has not repeated the conduct at issue. More importantly, the District is not free to disregard the progressive discipline required by just cause based on what it believes may or may not occur.

The District has made a number of unsubstantiated allegations about the grievant's conduct on October 2, and now appears unable to follow the simple rules set by the collective bargaining agreement. Secret notes, evaluations and counseling sessions are not disciplinary warnings, and the District should not be allowed to unilaterally void the clear language requiring just cause for discipline. The grievance should be sustained and the grievant made whole for her losses.

In response, the District posits further as follows:

The union's argument that there was nothing out of the ordinary nor any violation of work rules or policies in the "popcorn chicken" incident shows that it neither understands the issue in this case nor recognizes that PF's performance was unsatisfactory and getting worse. The district's use of a one-day suspension was a reasonable step to attempt to correct her unsatisfactory performance.

Contrary to the union's attempt, this is not a case of misconduct; it is a case of poor work performance that deteriorated over time.

The union's attempt to suggest that the district's evidence is hearsay is an interesting tactic, but one which must fail. Because the union called no witnesses – not even the grievant -- and did not even cross examine the district's witnesses, the district's evidence is un rebutted. All of the documents and testimony establishing PF's poor performance are not hearsay.

The district's job expectations were clear and had been communicated to PF on numerous occasions. She had received a copy of her position's job description and no fewer than four performance evaluations and extensive counseling regarding her performance and the district's expectations.

None of the union's arguments about progressive discipline are convincing. PF was counseled and warned repeatedly that she needed to improve her job performance or that her job was in jeopardy. That is all that is required.

The union is wrong in contending that the three performance evaluations play no part in PF's counseling or warnings; there is nothing in the collective bargaining agreement prohibiting the use of evaluations as warnings. The union claims to do so violates the intent of the parties, but it offered no evidence or testimony to support that claim. The district used the evaluations to communicate with PF about its performance expectations, just as the agreement calls for. If PF or the union disagreed with any of the evaluations pointing out the areas she needed to improve upon, a grievance could have been filed, but none were. The district gave PF notice of her problems and an opportunity to correct them. The district gave her constant and continued counseling throughout the 2007-08 school year, at the end of which she was specifically warned that she needed consistent performance "or her job may be in jeopardy."

Contrary to the union's claim, there is nothing in the agreement requiring the district to start with a verbal or written warning. Had the parties intended that a specific disciplinary progression be followed, they could have bargained such a procedure, but they did not. Moreover, many arbitrators have recognized that

progressive discipline does not really work with poor job performance.

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The grievant was given every fair and reasonable opportunity to demonstrate she could perform her job in a consistent and satisfactory manner. She failed. The district did not terminate her for these failures; rather it gave her a one-day suspension, for which it had just cause.

Because the district has demonstrated through unrebutted testimony and documentation that PF was not performing her job at a satisfactory level, and repeated counseling and warnings had not resulted in improved performance, it had just cause to impose a one-day suspension.

### DISCUSSION

This case involves discipline that was unrelated to misconduct, imposed entirely for poor job performance. But before I meet the merits of the matter, I must first address the union's unusual, and unsuccessful, litigation strategy – to neither cross-examine any of the district's witnesses nor object to any of their testimony, nor to offer any witnesses of its own, and then challenge the district's case as being built on hearsay.

Were this a court of law, and were I a judge bound by the rules of evidence, and had the union objected to certain testimony at hearing, the union's concerns regarding hearsay may have had some validity. For the union is correct that neither of the district's witnesses had personal first-hand knowledge of the events of October 2, 2008, and that their testimony – based on comments made by other employees who were presumably available but not called at hearing – was explicitly given to establish the truth of the matters asserted. As hearsay, the union asserts that all of the employer's evidence should be disregarded. I disagree, and find support in several published arbitration awards.

In COLGATE PALMOLIVE CO., 50 LA 504, 506 (McIntosh, 1968), after the grievants (who had been fired) declined to testify, the union moved unsuccessfully for a directed verdict based on lack of evidence. "In this case, the grievants did not see fit to take the witness stand in the defense of their position," the arbitrator explained in upholding their discharge, "so that while that act would not be considered against them, the absence of any evidence explaining their conduct leaves the Company's testimony unrefuted." In PEPSI COLA BOTTLING CO., 70 LA 434, 435 (Blackmar, 1978), the grievant testified that his resignation was coerced, rather than voluntary. The supervisor whom the grievant testified engaged in the coercion did not testify. The arbitrator accepted the grievant's version, explaining that, since the supervisor "was available to the company and did not testify, it is proper to conclude that he would not dispute the grievant's testimony that he was given the choices of resigning or being fired." In GUERIN SPECIAL MOTOR FREIGHT, INC., 48 LA 1036, 1038 (Hardy, 1967), company supervisors testified the grievant told them he had quit and taken a delivery job with a competitor, which was why they declined to return him to work when the other company fired him shortly thereafter. In denying the grievance, the arbitrator explained, "(a)lthough [the grievant] was present at the hearing, he did not testify or make any effort to rebut the

inferences to be drawn from the evidence presented.”

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In this case, the testimony by von Allmen and Wood about what the other food service employees told them about the popcorn chicken incident would not, by itself, establish the truth of the matter. However, that sworn testimony went entirely un rebutted by the union, which did not even ask a single question on cross examination. The testimony was also corroborated by Woods’ letter to P.F. of October 7, 2008, in which she recounted her understanding of the incident; that letter also went without challenge. While the record would indeed have been made more complete by the testimony of food service workers McCartney and Vogel, that would have necessitated having two bargaining unit employees testify against another. Rather than put P.F.’s co-workers into that awkward situation, the district offered the sworn testimony of the two senior supervisors and contemporaneous documentation. P.F. and the union were aware as early as October 7, 2008 of the district’s understanding of what had transpired, yet the union took no steps – not even raising a hearsay objection at hearing – to challenge that evidence. As noted above, other arbitrators take a dim view of such a strategy, as do I.

Accepting the district’s unchallenged narrative as an accurate account, I then proceed to consider whether the district had just cause to impose a one-day suspension for P.F.’s poor performance on October 2, 2008.

The district is correct that “at some point an employer needs to be able to take the next step in an effort to improve the employee’s job performance.” When P.F. lost track of the tray of popcorn chicken on October 2, 2008, the district indeed had just cause to “take the next step.” The question is how far that “next step” could go.

I agree with much of the district’s argument. Its expectation – that employees not lose track of trays of food – was indeed reasonable and related to the orderly, safe and efficient operation of the food service department. It did warn P.F. about possible discipline from her continued poor performance. It did conduct a fair and objective investigation prior to the imposition of discipline. The investigation did uncover substantial and compelling evidence that P.F. committed the acts as alleged. There is no evidence of discrimination, or that the district did not apply its expectations even-handedly. The only remaining question is whether the discipline was reasonably related to the seriousness of P.F.’s offense and her record of past service.

I reject much of the union’s argument. I have already addressed the flaws in its attempt to challenge the evidentiary record. The union is also wrong in raising the concept of misconduct; misconduct is not the issue, performance is. And any reasonable person would conclude, I am sure, that a food service employee who completely loses track of an entire tray of food has done something “out of the ordinary,” which is certainly “in violation of any policies or work rules” of the employer. In light of the district’s un rebutted testimony that von Allmen discussed her observations with P.F., the union also misstates the record in referring to the district’s “secret notes.” Finally, the union is wrong in asserting that, “(u)nder the just cause provision, the district must issue Ms. {F.} a verbal and written warning before it advances the discipline to the level of an unpaid suspension.” Certainly, there are acts of misconduct, and even of poor performance, which justify immediate suspension or termination.



The decisive factor for me is whether P.F. reasonably should have known that an incident such as occurred on October 2, 2008 would result in a disciplinary suspension. Here, the district's extensive counseling of P.F. may actually argue against an affirmative answer.

In just a five-week period in January – February, 2008, von Allen noted several instances of poor performance, including inadequate servings, improper preparation, and inaccurate reporting. These instances were recorded for the file, each entry shared with P.F., who certainly was on notice that the district was concerned about her performance (making the instant incident even more disturbing.)

But none of the instances of poor performance resulted in discipline. P.F. was not disciplined when she ran out of taco meat because she used the wrong pan; she was not disciplined when she ruined 29 pizza wraps because she cooked them improperly; she was not disciplined when she completed her production sheet improperly. In light of the absence of any discipline on those occasions, could P.F. have reasonably expected that the misplacement of a tray of popcorn chicken -- an example of poor performance not substantially worse than using the wrong pan or cooking pizza wraps improperly – would result in a disciplinary suspension?

Moreover, the evaluations themselves, which the district has cited as giving P.F. adequate notice that her job was at risk if she didn't improve her performance, also produce a mixed message. Her most recent evaluation, June 2008, ranks her as meeting expectations on meal prep and following production sheets; needing improvement on meal service, and needing corrective action in "responsibility for performance of assigned duties," and complying with rules and regulations. Among the most recent comments in the Job Performance area, von Allmen wrote, "Doing well, keep it up!," and "Doing well, keep up the good work." But the evaluation concludes on a far less positive note:

{P.} needs to be consistent with her performance or her job may be in jeopardy.  
{P.'s} job performance is sporadic, and we need to see scores consistently at a level "2." {P.} needs to show consistent improvement.

von Allmen and Wood both testified under oath that they also made this point to P.F. at the evaluation conference -- that her job could be in jeopardy if she didn't consistently improve her performance. Their testimony was not hearsay, and it was not rebutted by either P.F. or her union steward, who was present at the evaluation conference.

Absent that final note on the evaluation and that conference, I do not believe P.F. could reasonably have understood that her actions on October 2, 2008 would lead to a disciplinary suspension. However, an employee who is informed in writing and verbally that a failure to consistently improve performance could lead to her termination, is reasonably on notice that something as serious as losing track of an entire tray of chicken could result in a suspension. To address one final union argument – this is not using the evaluations *for* discipline, but rather using evaluations as giving notice *of* possible discipline; in the words of the collective bargaining agreement, this is using the evaluations "to allow for communication about ... the performance expectations."

After a prolonged period of counseling for poor performance, the evaluation and conference in June, 2008 gave P.F. adequate notice that further incidents of poor performance could result in discipline up to and including termination. With that notice, and given P.F.'s work history, I cannot find that a one-day suspension for the incident of October 2, 2008 is excessive. It may not have been the discipline I would have imposed, but it is a discipline for which the employer had just cause. Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

**AWARD**

That the grievance is denied

Dated at Madison, Wisconsin, this 6th day of November, 2009.

Stuart D. Levitan /s/

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Stuart D. Levitan, Arbitrator