

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**OREGON SCHOOL DISTRICT**

and

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

Case 43  
No. 68849  
MA-14365

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**Appearances:**

**Mr. Douglas Witte**, Melli Law, S.C., Attorneys at Law, P.O. Box 1664, Madison, Wisconsin 53701-1664, appeared on behalf of the District.

**Mr. Neil Rainford**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

**ARBITRATION AWARD**

On April 30, 2009 Dane County Wisconsin Municipal Employees, Local 60, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint a member of its staff to hear and decide a dispute pending with the Oregon School District. Following concurrence from the District, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on September 4, 2009, in Oregon, Wisconsin. A transcript of the proceedings was taken and distributed to the parties on September 24, 2009. Post-hearing briefs and reply briefs were filed and exchanged by December 18, 2009.

This Award addresses the discharge of employee P.F.

**BACKGROUND AND FACTS**

The Oregon School District operates five kitchens in grades K-8 to serve students. The District employs approximately 28 employees in the kitchens. This includes cooks, prep cooks and food service assistants. One of the kitchen facilities is located at the Rome Corners Intermediate School. 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 is staffed by two employees. 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.

P.F., the grievant, worked in the Rome Corners kitchen since its start up in August of 2001. At that time she worked as a food service assistant for 3½ hours per day. Her first evaluation, issued on March 27, 2002 indicated that she met expectations in her job performance. The evaluation contains narrative comments that generally described the grievant in very positive terms. From the record, it appears she was not evaluated again for some period of time. It further appears that she was a satisfactory employee for the next several years.

In early October, 2006 the District posted a .91 FTE Prep/Baker/Ala Carte position vacancy. The grievant applied for the position and was turned down. It was the testimony of Robyn Wood, the Food Service Director for the District that the grievant was not offered the job because Wood and Holly von Allmen, the Food Service Production Manager, did not regard the grievant as qualified. Upon being advised that she had been denied the job, the grievant filed a grievance, on or about October 23, 2006. The grievance proceeded through the grievance procedure, was denied, and was ultimately dropped.

The District subsequently increased the hours, and assignments, of the grievant. On or about February 12, 2007 the grievant began to work a 5½ hour day. It was the testimony of Wood that the increase of hours was designed to give the grievant more experience and expanded duties in order to help prepare her for future promotional opportunities.

Holly von Allmen is the Food Service Production Manager, and as such is the first line supervisor of the position occupied by the grievant. Ms. von Allmen has worked for the district for many years as a prep cook/ala carte baker. She was promoted to her supervisory position in the fall of 2006. von Allmen began having issues with respect to the grievant's job performance. The grievant's performance evaluation dated 5/18/07 indicates that she generally meets expectations, but has critical remarks relating to certain aspects of her performance. von Allmen began recording notes as to concerns she had relative to the grievant's performance. Some were shared and some were not. Subsequent evaluations reflected a decline in the grievant's performance. von Allmen noted numerous concerns related to the grievant's performance over the course of the 2007-08 school year. There were a number of meetings held at which von Allmen indicated to the grievant, and typically her Union steward, the concerns she had. By January, 2008, the grievant was given copies of the concerns noted by the District, and initialed receipt of those concerns.

Ultimately, on October 2, 2008 the grievant was given two one-day suspensions, one of which was for poor work performance. The performance suspension was grieved and arbitrated. In that matter [OREGON SCHOOL DISTRICT, WERC Case No. 42, No. 68629, MA-14289, Levitan, 11/6/09] the suspension was upheld. The Arbitrator in that matter summarized his conclusion as follows;

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.

The Award outlines in detail the events, evaluations, meetings that led to the suspension. In sustaining the suspension, the Arbitrator found that there was poor performance and sufficient notice to warrant discipline.

Following the suspension, the grievant was evaluated on January 9, 2009. There are numerous areas of the evaluation which indicate that the grievant is not meeting basic job expectations. She is given the lowest rating possible in several areas. There are long narrative portions of the evaluation which are very critical of the grievant. The comments go to the core of whether she is performing competently, or is capable of taking and following direction. The lengthy evaluation document concludes with; "P. will show marked and consistent improvement within 30 days or be subject to termination." Both the grievant and her Union steward participated in the evaluation, and signed the evaluation document.

It was the testimony of von Allmen that the poor performance continued following the evaluation. von Allmen testified that the grievant continued to run out of food, that she did not get her prep work done timely, that she mismanaged the food handling. It was her testimony that the grievant mis-cooked certain foods, and when told how to correct her errors failed to follow up. She testified that there were complaints about the grievant's line being backed up, because it ran out of food. It was the testimony of Ms. Wood that she was being advised almost daily of a concern that the grievant was not preparing food on time or was not able to help the prep cooks or was running out of food. Both von Allmen and Wood acknowledged that other employees ran out of food or mis-cooked dishes. Both testified that others did so on occasion and corrected their errors. It was their testimony that the grievant made errors far out of proportion to those of co-workers, and that she was incapable of correcting those errors. The conduct complained of was the same that led to the one-day suspension.

The event that prompted discharge occurred on February 6, 2009. von Allmen testified as to the events of that day:

Q And can you describe what led up to that decision?

A It was a Friday. She had French toast and pancakes on her line with an omelet and hash browns. I was in the kitchen that day, and I was over with her on her line. She started out the line by having the spoodle for the hash browns out for the children to serve themselves.

Q What is a spoodle, being not in food service?

A I'm sorry. A spoodle is a measuring device that we use to serve the kids. It's a half-cup spoodle, so if you scoop that of your product and you make that level, you have a half-cup of product that you are putting on the student's tray.

And the hash brown potatoes is a product that we would never let the children serve because of our wellness policy in the district. It's not a product that they could have a double portion of, and she was allowing the children to serve themselves, which could allow them to overserve and not stay to the half-cup which we are to give them.

So I moved the spoodle back, and I was standing next to her actually doing the hash browns for them with the spoodle, staying on the line with her. Her line was moving through, and she started to run out of omelets and did run out of omelets on the first serve with that group.

She did not have any more omelets in cooking while she was serving, so we had to go to the cooler and start cooking the omelets. Therefore, we're on the first serve, and we had children standing waiting to get their omelet before we could start tearing down the line and getting ready for a la carte.

When we went into the second service, as we were coming down to the end, that time she was running out of French toast sticks, and she totally ran out of French toast sticks. Other cooks came to assist and help her get stuff ready and get things cooked and to her line.

She -- P at that point when everybody started to help proceeded to start picking up dirty dishes to take them to the dish room while other people were taking care of her food. I asked P if there was more French toast sticks, and P told me that they were all in the oven.

When I went to the freezer, there was another two and a half cases. So there was more French toast sticks in the kitchen, but she had made no attempt to go to the freezer and get them out when she clearly

knew she did not have enough in the ovens to finish the line. And between those incidents is what led to the discharge of her.

Q What was the significance of P picking up her dishes and going to the kitchen, if any, rather than -- should she have been doing something else at that point?

A Well, she should have definitely been going to the freezer to get more French toast sticks out and getting them ready and on the line, and she should have been making sure that all her food and everything was going to make it to the children. At the point when she was running out of food, there were people taking some of the French toasts that were in the oven, putting them on plates, taking them to the microwave. Others were making the shift to the a la carte.

And while all of this commotion was going on, P. felt she should pick up the dishes and take them to the dirty dish room as opposed to getting something for her line. I mean, no attempt to get the ones out of the freezer, to just let whatever was in the oven go and then be out is not a practice we have or is acceptable.

The District reviewed the events of the day, and concluded that discharge was appropriate. The grievant was called in on Monday, February 9, 2009 and the grievant was terminated. The following, a cross-examination of Ms. von Allmen, is the only summary in the record of the conversation that occurred on February 9:

. . .

Q I'd like to start by asking a couple questions about the February 9<sup>th</sup> discharge meeting. Now, we've heard who was present and that Andy terminated the employee's employment. Can you tell me what was said at this meeting?

A Exactly.

Q Yes, please.

A I believe Andy came in and stated that he heard that we had a problem on Friday, and I believe P.'s response was yes, that she was doing French toast and pancakes and that it was a difficult line. And I think at about that point Andy said that we were going to part our ways and cut our losses and that she was going to be let go. And I don't know that those were the exact words, but --

Q Did P. respond to Andy?

A Yeah. P. told Andy that it wasn't over and that she was going to fight it.

Q Was anything else said at the meeting that you recall?

A No -- I mean, that was pretty much the gist of it, I guess.

. . .

The termination was confirmed by the following summary letter;

Dear P:

This letter is to confirm our brief conversation on Monday, February 9th, 2009. Your termination as a Food Service Assistant with the Oregon School District is effective immediately.

Please watch for a letter from Employee Services regarding your payroll and benefit information.

Respectfully,

Andy Weitland /s/  
Andy Weitand  
Business Manager  
Oregon School District

The termination was grieved on, or about, February 13. The grievance was accompanied by the following electronic message;

**From:** "Neil Rainford"

. . .

**To:** Robyn Wood; Andrew Weiland; Holly von Allmen

. . .

Dear Ms. Wood, Ms. von Allmen and Mr. Weiland:

Please find, attached, a grievance on behalf of Ms. F. Ms. F. has been denied basic due process in your efforts to terminate her employment. On the morning

of February 9th, 2009 the three of you met with Ms. F. You notified her that her employment was terminated in connection with her conduct at work on the previous Friday, February 6th. On February 10th you sent Ms. F. a letter (attached), dated February 9th that is completely lacking in the due process requirements. It makes no mention of any specific conduct that forms the basis for the District's decision to discharge Ms. F. Without a specific statement of the reasons for her discharge, there is no basis for discharge and no way Ms. F., or her representative, can evaluate the reasons for discharge or prepare a defense. In light of the District's failure, there can be no just cause for the discharge of Ms. F. as required by the Collective Bargaining Agreement. Please reinstate Ms. F. immediately and make her whole to the time of her discharge on the ninth of February.

Thank you for your attention to this matter. I would be glad to discuss this matter with you further at your convenience.

Sincerely,

Neil Rainford

There occurred an exchange of correspondence relating to the termination. On April 1, 2009 the District provided the Union with the following list of incidents;

**Incidents since October 3, 2008 concerning P. F.**

- |          |  |
|----------|--|
| 10-7-08  | Had to leave line numerous times to get hot dogs, hot dog buns and more quesadillas. Was going to have students wait for food instead of moving them to other line and set up for ala carte. Spoken to by Holly about this. Reacted with bad attitude. |
| 10-13-08 | Left yogurt on cart while prepping pretzels. Did not have all items needed to prepare yogurt parfaits. Product should not be left out while not working with it.   |
| 10-15-08 | Discovered that 2 boxes of same type of apple were opened in cooler. Gave inaccurate count of how many apples remained when ordering food.   |
| 10-20-08 | P did not know there were 3 types of apples being used.<br>Undercooked new pizza product.<br>Forgot to change oven temperature for remaining pizza.<br>Did not take food temperature correctly.  |

10-21-08 Holly spoke to entire kitchen staff about not slamming steamer doors. P did not look like she was paying attention.

10-29-08 Apple count for kitchen is off for the week (and the following week as well). P is primarily responsible for tracking apple usage.

P out on leave from November 3-17, 2008.

11-18-09 P wanted to use applesauce cups when they ran out of peaches, even though there were more peaches on the shelf. She was told to use peaches. Holly found out later another cook went and got the peaches so they were ready because P did not.

P went to line 1 to get more corn when she had no students in her line. Problem is she waited until she was totally out before doing anything about it.

11-20-08 New soft pretzel stick served. Holly noticed none were without salt, despite the fact some soft pretzels have been left without salt for 6 years. Some students did ask for them without salt.

Failed to put sign up for students to take 2 sandwiches (just like she repeatedly fails to put sign up for peanut butter & jelly sandwiches to take 2 since beginning of school year).

11-25-08 P told not to wear street coat while working. Bad attitude when being spoken to.

12-05-08 Early release day so easy prep day, and P got no extra work done at all.

12-12-08 P did not have enough chicken nuggets on her line and she had to be told to cook more. Other staff ended up cooking more nuggets while P re-filled fresh fruit when she should have been getting ready for ala carte.

P ran out of pretzels for first group that day and made no attempt to cook more.

12-15-08 Forgot to put out all condiments for chicken products.



- 12-16-08 P was down to 1-2 servings of corn at end of first group and had only 2 servings of corn left for 2nd group with 15 students left in line.
- Ran out of peanut butter and jelly sandwiches. Went to cooler and took sandwiches which were set up for next day and gave them out still frozen. Two students brought them back. Holly gave one student a cheese sandwich. The second student P was going to give another frozen sandwich. Holly told P to make a cheese sandwich as the pbj's were frozen. P rolled eyes at Holly when told to make sandwich.
- 1-12-09 Meeting with P to go over evaluation. Very combative. Additional incidents described in evaluation and discussed.
- 1-13-09 Still doing condiments at 10:30 when they should have been completed by 9:45-10:00.
- Ran out of cinnamon pretzel sticks for first group with 15 students in line. Told Holly she was not going to make more because it was close to the end of the line. Argued with Holly about having enough for all students.
- For 2<sup>nd</sup> group she ran out of cheddar chex mix. Holly went over numbers with her again and told her to increase the amount by 10. She added a few to the pan but at the end of the line only had 1 left.
- 1-19-09 Added 5 bags of chex mix when she ran out but she did not keep track of whether it was cheddar or strawberry.
- 1-20-09 Holly discussed keeping new fresh fruit separate from older fresh fruit. P had put old and new bananas (just came in that morning) together in the pans. P said she would just eat the older ones that were left. Holly told her to put older ones out first, and then the newer ones once the rest were gone.
- 2-6-09 P forgot to set out strawberry cups the day before despite writing herself a note.
- She has not finished prep work before 10:00 a.m. this week (was able to do so last week)

Ran out of omelets with first group, P said she did not know where she was with her line meaning she did not know how much food she had going into next group.

Jean and Julie were cooking and traying P's food. Julie had to get more hash browns.

P ran out of French toast slicks and told Holly there were no more left when there were 2.5 cases in the freezer. Others cooked more and served it.

P took dirty dishes to the dish room rather than getting more food or seeing what else was needed.

The grievant responded to the various documents in her personnel file, going back to the early part of 2007 in a document provided to the District on November 3, 2009, the day before the hearing in this matter. Much of her response takes issue with the factual assertions set forth in the District documents.

### **ISSUE**

There is no stipulation as to the issue.

The District views the issue as:

Did the District violate Section 9.02 of the collective bargaining agreement when it discharged P.F.?

The Union regards the issue to be:

Did the Employer violate the collective bargaining agreement when it terminated P.F. on February 9, 2009?

## **RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

### **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 reservation 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.
- 6.06.02 Evaluations will be conducted by the Immediate Supervisor in consultation with the Employee's Direct Supervisor.
- 6.06.03 New Employee Evaluation – A new Employee is to have an informal discussion midway through the employee's probationary period. There shall be a formal written evaluation prior to the end of the employee's probationary period.
- 6.06.04 Summative Evaluation - The Employee and Immediate Supervisor will state in writing at the end of the probationary period how and when evaluations will be handled from that point on. A formal evaluation can be requested by the Employee or Immediate Supervisor at any time.

. . .

## **8.0 Job Posting/Vacancies/Transfers**

### **8.01 Transfers**

- 8.01.01 A transfer is defined as a change in an employee's position within a classification, due to a vacancy.
- 8.01.02 Where the interests of the Employer as determined by the Business Manager would be served, the Employer may involuntarily transfer an employee to a vacancy within the classification.

8.01.03 Where the authority is exercised, the basis therefore will be given in writing to the Union. If the basis is a temporary need, the employee has the right to return to their previous position.

8.01.04 No less than one (1) week (seven days) advance written notice to the employee will be given of such a transfer.

. . .

#### **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 procedures.

### **POSITIONS OF THE PARTIES**

It is the view of the Union that the grievant worked for the District for a period of 6 years without complaint. Her performance evaluation was good and she successfully trained others to perform the work. It is the view of the Union that the grievant had a good relationship with her supervisor until she filed a grievance over her failure to be awarded the position of Cook/Baker in the fall of 2007. After that, the Union contends that the relationship with her supervisor was fundamentally altered.

It is the Union's contention that in May of 2007 Holly began to respond with a series of performance related appraisals that far exceeded the appraisal of anyone else in the kitchen. The Union contends that in September of 2007 Holly began to record secret notes containing accusations of poor performance. It is the Union's view that in this time frame the grievant was being watched by supervision, and that the kitchen management was frustrated with the grievant and wanted to get rid of her.

By the spring of 2008 the Union argues that the District was intent on terminating the grievant, and was not interested in meeting with the Union to address its concerns relating to the grievant. The Union contends that the District ignored the progressive discipline provided by the contract and suspended the grievant. The Union contends that the District issued a last chance proclamation in January, 2009 as a part of the performance appraisal. This is alleged to be critical because the Union asserts that the appraisal was not disciplinary and not subject

to due process and just cause. It is the view of the Union that it could not be grieved as discipline.

It is the view of the Union that the discharge was without due process. The grievant was never asked for her account of what happened on February 6, or offered an opportunity to tell her side of the story. There was no pre-disciplinary meeting held between February 6 and February 9. The Union asked for the specific allegations against the grievant and was only provided confirmation of the reasons two months later.

It is the view of the Union that the District bears a heavy burden of proof. The Union contends that the District committed a host of due process violations that violate the just cause provision of the contract. It is the Union's view that the District was required to bring specific charges, secure the employee's side of the story before levying discipline, commence discipline at lower levels, move to more severe levels if the conduct is repeated and allow the employee access to the grievance procedure to challenge the discipline.

It is the view of the Union that the District failed to investigate any of the alleged performance issues because the grievant was singled out for extreme scrutiny. The Union contends that the District stockpiled allegations against the grievant that were not always known or shared with the grievant. Those matters were not treated as discipline at the time, but were subsequently resurrected in support of the discharge. It is the view of the Union that the contract requires that these lesser matters, if viewed as disciplinary, must be handled through the progression from warnings to suspensions to discharge. It is the view of the Union that the District's failure to provide the allegations against the grievant for her conduct on February 6 until nearly two months later and then to attempt to insert four months worth of conduct for which she was never disciplined violates her rights under the contract.

It is the view of the Union that the employer stockpiled complaints against the grievant and then dragged them out in support of its decision to discharge. The Union regards this as violative of the just cause standard.

It is the view of the Union that the grievant was subject to disparate treatment for her conduct. The Union contends that the grievant was subject to a higher level of scrutiny. The Union also contends that the record supports a finding that employees routinely run out of food, yet none have been disciplined for doing so. The grievant was terminated.

Finally, the Union argues that the District could have transferred the grievant back to her shorter work day assignment under Article 8.01.

It is the view of the District that the grievant had acceptable performance when she began work as a food service assistant. Her performance issues arose when her hours increased. The District reviewed the behaviors and events that gave rise to the evaluations and criticisms of the grievants' work.

It is the view of the District that it had just cause to terminate the grievant. In asserting that contention, the District argued that the seven tests of just cause first enunciated by Arbitrator Daugherty in ENTERPRISE WIRE COMPANY, 46 LA 359 (1966) are a useful guide. In that context the District contends that its expectations were reasonable and related to the orderly, efficient and safe operation of the food service department. Her job was to prepare food. This was the same requirement expected of her co-workers.

The District argues that it gave the grievant sufficient warning of possible disciplinary consequences. In the view of the District, there were two years of almost constant counseling, with four formal evaluations. The District points to various places in the record which indicate that the grievant knew her job performance was a concern.

The District argues that it conducted an investigation prior to terminating the grievant for poor performance. The grievant was observed regularly. Higher management was consulted before discipline and termination were imposed. It is the District's view that the investigation was fair and objective. The District discussed performance issues with the grievant repeatedly. During many of the discussions, the grievant was accompanied by her Union representative. The grievant had regular opportunity to present evidence challenging the District's investigation. It failed to do so. The District contends there is no evidence to support the claim that the District acted in retaliation for the grievant filing a grievance.

It is the view of the District that it presented compelling evidence that the grievant could not perform her job. The District argues that its evidence stands un rebutted. It is the view of the District that the grievant was treated even handedly. The District acknowledges that other employees made mistakes, including running out of food. The District notes that a part of the testimony of those employees was to the effect that if a mistake was made, it was corrected and not repeated. The grievant made the same mistakes repeatedly and with far greater frequency.

It is the view of the District that the degree of discipline was appropriate. The District disagrees with the Union contention that the contract requires a specific progression of disciplinary steps. It is the view of the District that it repeatedly told the grievant of its concern over her performance. The termination was brought about as a culmination of counseling and warnings that came to a head on February 6.

### **DISCUSSION**

All parties agree that the grievant worked successfully for the first several years of employment with the District. Both parties note there was a change in the level of success experienced by the grievant. The Union attributes that change to an animosity that occurred as a result of the grievant filing a grievance in the fall of 2006. The District believes that the grievant was unable to handle the increased work hours and responsibilities that she was given in February, 2007.

I credit Ms. Wood's testimony that the grievant was given more hours in order to provide training and experience to the grievant. Her testimony was uncontradicted. The testimony has facial credibility. The grievant was the only internal candidate for the job, and was not selected due to a lack of qualifications. In essence, Wood testified that the added hours and responsibilities would serve to prepare the grievant for a future promotion. There is no evidence to support the Union's claim. It appears that the contention that the scrutiny and discipline was a response to the filing of a grievance was either not argued or not addressed by the one-day suspension grievance.

The Union is correct in its observation that the grievant was being watched and observed. All testimony supports that claim. The level of scrutiny of the grievant was greater than was that for others. It was Ms. Von Allmen's uncontradicted testimony that she had concerns with the performance of the grievant. It is common for employers who have concerns with the performance of employees to focus on the areas of concern. Employers typically do not heighten the level of scrutiny of the entire workforce in order to balance or equalize the level and scope of supervision.

The Union advances a claim that the grievant was subject to a greater level of scrutiny and discipline than were her co-workers. The record supports a finding that the grievant made errors and omissions with greater frequency than did her co-workers. This fact explains the greater level of scrutiny and discipline.

It is the Union's claim that the District is required to use a series of progressive discipline steps, and that it failed to do so. The collective bargaining agreement provides for a just cause standard against which to measure discipline. It does not articulate specific steps that must be followed. The same argument was put to the Arbitrator in the one-day suspension and rejected. As a result of the prior Arbitration Award, the discipline through a one-day suspension has been sustained. I do agree that performance based discipline is normally a progression. It should serve to put the employee on notice as to what is expected and to enforce the need to correct certain work behaviors. It should allow for the opportunity to correct the deficiencies. If the employee does not understand how important the shortcomings are, the use of increasingly more severe discipline brings home the point.

It is the view of the Union that the contract requires that a 3 day or 5 day suspension must be imposed before the District is free to terminate. I am reluctant to impose such a requirement in the absence of specific language and in light of the disposition of that very argument in the Arbitration Award addressing the one-day suspension. I think the real questions are whether or not the grievant was performing her job; if not, whether or not she was on actual notice of that fact. I think the grievant was entitled to the opportunity to correct deficiencies.

I think the District has established that the grievant was not performing her job adequately. The number and frequency of mistakes appear to be far in excess of anyone else. Her January 9, 2009 performance evaluation is a three page narrative of criticism. It details

exhaustively numerous concerns relating to attitude, cooperation, basic cooking skills, errors, organization, judgment and effort. I believe the evaluation questioned the grievants' core capacity to do the job. It concludes with "P. will show marked and consistent improvement within 30 days or be subject to termination."

The grievant, and her steward, signed the evaluation. The grievant noted, "Will respond in writing later."

The evaluation is not ambiguous. The grievant was marked as not meeting expectations in a number of categories. The narrative is filled with criticism. The very fact that the grievant had her Union steward along suggests that everyone knew there was a problem. The evaluation concludes with a threat of termination. The context of the evaluation was the grievant coming off a suspension for inadequate performance. The Arbitrator in that matter concluded that the grievant had performed poorly.

Following the evaluation there were numerous complaints, which are outlined in the post discharge submitted document. Some are trivial. Some are not. It appears some were expressly shared with the grievant. It may be that some were not. I think the record supports a conclusion that the grievant was on notice that her performance was unsatisfactory to her employer.

There was time and opportunity to address the performance concerns. Employer witnesses testified that the grievant made little or no improvement. Four co-workers testified on the grievant's behalf. Their testimony was supportive. Three of the witnesses were unable to indicate whether or not the grievant was more prone to error than others. They were not asked if the grievant was a competent performer. The fourth witness testified that in her opinion, the grievant did not make more mistakes than did others. However, she also testified that she was not in a position to judge whether or not the various notes and evaluations of the grievant, which she reviewed, "...were credible indicators of how P. performed..."

I believe that the testimony, taken as a whole, leads to a conclusion that the grievant was not performing her job, and that she was on notice of that fact. I believe she understood that she faced further discipline absent improved performance. I believe she had the opportunity to improve her performance.

Finally, the Union complains of a lack of due process in the termination. The Union contends that the grievant was never asked for her account of what happened on Friday, February 6, was never allowed to tell her story, and that her letter of termination did not advise her as to the conduct that led to the termination. The sole account of the termination meeting is the cross-examination of Ms. Von Allmen, which is set forth above. I found her capacity to recall and recount detail to be poor. No other participant to the meeting testified. By all accounts the meeting was brief. It appears there was a brief exchange about Friday including a response that it was a difficult line. It appears there was little else said. It is unclear whether Andy Weitland cut the conversation off or whether the exchange had been concluded. There is no indication in this record that there was a desire to say more.



I do not believe the factual record is sufficient to conclude that the grievant was denied an opportunity to tell her side of the story or to confront the District's view that her performance on Friday was unsatisfactory.

It is the view of the Union that both the grievant and the Union are entitled to be advised as to the conduct which prompted the termination. There is no indication in the record that anyone explained to the grievant what she had done wrong on Friday, Feb. 6. The description of the exchange on February 9 lacks all detail. The follow up letter confirming the termination references no specific conduct. However, the grievant was told that the events of Friday were the basis for her termination. She was a participant in those events. By April 1, 2009 the District had provided the employee and the Union with a written summary of the events leading to the discharge. I believe that opened the door to whatever response the grievant desired, and also permitted the Union to undertake the investigation and evaluation it needed. There is no claim that the delay prejudiced the Union.

The grievant's response, served the day before the hearing, and five months after being provided with specifics, essentially denied the factual claims set forth by the District as the basis for the termination. This response reaches back to prior evaluations and incidents and disputes the factual basis of many of the adverse comments or observations. At the time the various criticisms were made the grievant did not dispute the allegations, at least not in writing. She signed most of the written documents. On some she indicated that she would respond at a later time. The grievant did not testify at the hearing. I am left with the District's account of the grievant's performance.

I believe the grievant was terminated for the events of Friday, February 6. The day was the culmination of protracted unsatisfactory performance. The bill of particulars that followed formed no more than the most recent context for that decision. I do not believe the grievant could do the job. As a consequence, I am not prepared to award front pay or to direct reinstatement for the failure to provide a summary of the events that led to the termination.

### **AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 10th day of February, 2010.

William C. Houlihan /s/

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William C. Houlihan, Arbitrator

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