BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MADISON EMPLOYEES, LOCAL UNION NUMBER 60 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

BOARD OF EDUCATION OF THE CITY OF MADISON, WISCONSIN, BEING THE BOARD OF EDUCATION FOR THE MADISON METROPOLITAN SCHOOL DISTRICT

Case 314
No. 69914
MA-14803

Appearances:

Neil Rainford and **Michael J. Wilson,** Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717, for Madison Employees, Local Union Number 60 of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Malina R. Piontek, Assistant Director of Labor Relations, and **Heidi S. Tepp,** Labor Relations Attorney, Madison Metropolitan School District, 545 West Dayton, Madison, Wisconsin 53703, for Board of Education of the City of Madison, Wisconsin, being the Board of Education for the Madison Metropolitan School District, referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Donald Taylor, who is referred to below as the Grievant. On September 21, 22 and 28, 2010, hearing on the matter was conducted in Madison, Wisconsin. Anne Jacobs filed a transcript of the hearing with the Commission by October 12, 2010. The parties filed briefs and reply briefs by February 9, 2011.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate Section 3.04 of the Collective Bargaining Agreement when it discharged the Grievant, Don Taylor, for the allegations set forth in the letter dated February 22, 2010?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

PART III
GRIEVANCE AND ARBITRATION PROCEDURE

. . .

3.04 DISCIPLINE, SUSPENSION, DISCHARGE.

Employees shall not be disciplined, suspended or discharged without good cause. A suspension shall not exceed twenty-one (21) calendar days. . . . If the parties agree, or the Arbitrator finds that such discipline, suspension or discharge was improper, such disposition of the matter may be made as appears proper without regard for the suspension time limitation contained in this paragraph.

BACKGROUND

The grievance, filed on February 25, 2010, alleges that the Grievant "was terminated without cause." Robert Nadler, the Employer's Executive Director of Human Resources, issued the Grievant's termination letter, dated February 22, 2010, which states:

> This letter serves to inform you that your employment with the District is terminated effective, Monday February 22, 2010 for engaging in the following conduct:
>
> Between the period of February 2008 and August 2009 using the word "nigger" in conversations with custodial employees at Memorial High School, including the following:
>
> - In approximately February 2008, referring to a custodial trainee (initials B.J.) as a "real nigger" in the presence of at least one co-worker (initials H.A.)

- Between February 2008 and June 12, 2009, using the word "nigger" in conversations with a co-worker (initials R.G.).

- Sometime after January 5, 2009, telling a custodial trainee (initials R.S.) that he couldn't or shouldn't use the word "nigger" around two particular Caucasian custodians (initials R.R. and R.M.).

- Between January 5, 2009 and April 10, 2009, stating to R.S. something substantially similar to, "I don't like niggers and they know it."

- Between January 5, 2009 and April 10, 2009 telling R.S. a story about a former employee in which you used the term "dumb nigger."

- In approximately May 2009, in the presence of R.S., calling a custodial employee at Randall Elementary a "nigger lover."

Between the period of February 2008 and August 2009, on at least one occasion, making a statement to a co-worker (R.G.) substantially similar to "I'm the biggest racist. I don't care."

The totality of the circumstances has been taken into consideration in making the disciplinary decision that the above-identified course of conduct warrants termination, including, for example, the nature of your position as a lead worker, as well as potentially mitigating information from your overall employment record. The District believes that the full list of incidents identified above exceeds the minimum threshold for such racially-charged and workplace-related conduct as would justify the termination of an employee holding your position. At the same time, the District wishes to be clear that although additional allegations were raised in connection with the investigation that lead to this disciplinary action, the District has given no weight and no consideration to any of the other alleged incidents in determining discipline, and the District in fact concluded that certain other alleged incidents were not sufficiently proven.

. . .

The Grievant's Background

The Grievant grew up in Madison, graduating from East High School. He entered the army, and is a Vietnam veteran. After leaving the army, he returned to Madison and started

work with the Employer on March 25, 1991. He started as a Custodial Trainee I, working twenty hours per week. After six months of service, he became a Custodial Worker I, which is an automatic progression step. He moved into a forty hour per week position in July of 1994. On December 29, 1997, he promoted to the position of Custodial Worker II. He took a voluntary demotion effective March 22, 1999, to the position of Custodial Worker I. His service to this point was in the District's Building Services Department and at elementary and middle schools. On March 31, 2003, he took a Maintenance Worker position at La Follette High School. On March 30, 2005, he went on a Medical Leave of Absence, returning to a demoted position with rights to a higher rated position when one became available. On October 16, 2006, one became available and he took the position of Building Custodian II at Memorial High School.

His disciplinary history with the Employer includes a one day suspension, effective December 8, 1997, for missing "the past three Building Services Monthly Safety Meetings." In a memo dated November 20, 2002, the Grievant received the following notice of termination from Bob Darm, the Employer's Coordinator of Facilities Operation:

> This is to advise you that your employment with the Madison Metropolitan School District is being terminated effective November 20, 2002. This action is being taken as you falsified your night differential timesheet indicating that you worked until 10:00 p.m. by activating the building alarm system. You left 129 minutes early on October 23, 2002; 179 minutes early on October 4, 2002; 62 minutes early on October 11, 2002; 58 minutes early on October 23, 2002; and 41 minutes early on October 29, 2002, just to mention a few of the dates on which you left early but received pay as if you worked your eight-hour shift, which also included a night shift differential of 60 cents/hour.
>
> It is your responsibility to complete your assigned work shift and to accurately fill out your time records. You intentionally falsified your night differential timesheet. This is considered theft and cannot be tolerated by the District.

The Union grieved the termination. In a Memorandum of Understanding executed by the Employer on December 16, 2002; by the Union on December 20, 2002; and by the Grievant on January 6, 2003 (the MOU); the parties resolved the grievance thus:

. . .

1. (The Grievant's) termination of employment on November 20, 2002 for falsification of his night differential time sheet has been rescinded and converted to a six-(6) day suspension without pay. The days of suspension will be November 20, 21, 22, 25, 26, and 27, 2002.
2. (The Grievant) will receive holiday pay for Thanksgiving Day and the day after Thanksgiving.
3. By executing this Agreement, no party is making an admission of any wrongdoing or contract violation. . . .

Darm issued a "notice of suspension, dated December 16, 2002, which states that, "You are not to leave your work shift early and then fill out your night differential time sheet to reflect that you worked your entire shift." The notice adds, "The District considers this to be falsification of time records." The notice concludes that a recurrence "will be subject to more discipline up to and including termination of your employment with the District."

The Union entered into evidence a number of the Grievant's Performance Evaluations. His final probationary Performance Evaluation from September of 1991 lists his performance as satisfactory or better on the eleven evaluation categories. His March, 1992 evaluation lists his performance as less than satisfactory in eight evaluation categories and satisfactory or better on the remaining three. His March, 1994 evaluation lists his performance as satisfactory or better on each of the eleven categories. His March, 1996 evaluation lists his performance as less than satisfactory in three of the eleven evaluation categories and satisfactory or better on the remaining eight. His March, 1998 evaluation lists his performance at the top rating for six of the eleven evaluation categories and satisfactory or better on the remaining five. His evaluation for the 2006-07 school year rates him at satisfactory or better on all of the eleven evaluation categories.

The Policy Background

The demographics of the District have changed over time. As of the arbitration hearing, roughly one-half of the student population was Caucasian and roughly one-half was non-Caucasian. Daniel Nerad is the Employer's Superintendent and testified that he expected the Caucasian portion of the student population would soon become the statistical minority. An increasingly large component of the student population does not come into the District with English as their native language.

To respond to the diversity of its student population, the District has for many years required all employees to undergo mandatory anti-harassment in-service training. This training is not limited to issues of race, but includes race discrimination as a significant component. New employees must attend mandatory anti-harassment training within their first year of employment. The training covers legal definitions of harassment, the categories of harassment and the Employer's expectations with regard to maintaining a no-harassment educational setting. The Grievant attended, in pay status, such in-service training in December of 1991. In addition to this, all employees undergo full-day in-service training on the Board's anti-harassment policies on an ongoing basis. The Grievant attended such in-services in September of 2003; September of 2004; November of 2004; January of 2005; September of 2007; and September of 2008. He missed one-half day of the November, 2004 training due to illness, and missed in-services in July of 2005; September of 2005; and September of 2006 due to his Medical Leave of Absence. The Employer maintains work rules and policies, including Custodial Guidelines, directing employees to treat each other, students, teachers and members of the public with respect and without harassment.

In September of 2006, when the Grievant posted into the Building Custodial II opening at Memorial High School, the job posting included a Position Description. Item 8) under the "Required Knowledge, Skills & Abilities" section reads thus:

> Experience working cross-culturally and/or commitment to work toward one's own cultural competence, i.e., valuing difference/diversity, recognizing personal limitations in one's skills and expertise, and having the desire to learn in these areas.

The Employer also has a commitment to progressive discipline. The Employer has used progressive discipline, including cases involving employee use of the racial epithet "nigger".

The Circumstances Preceding The Discharge

In June of 2008, the Employer terminated the employment of Brian Jackson. Jackson worked at Memorial High School. Sometime in the Fall of 2008, Jackson initiated process to determine whether he suffered from a racially hostile work environment at Memorial and whether his termination was based on race. In January of 2009 he filed a complaint with the Equal Rights Division of the Department of Workforce Development (ERD). ERD issued an initial determination that there was probable cause to believe the Employer violated the Fair Employment Act. As a result of the probable cause finding, the District started its own investigation, using in-house counsel, Dan Mallin, and outside counsel, David Rohrer. The investigation involved interviews of many District employees and took several months.

In mid-September of 2009, two custodians at Memorial, John Moncrief, Jr. and Summer Hillman, filed complaints with the ERD. ERD captioned Moncrief's as ERD Case No. CR200903030; EEOC Case No. 26G200901734C. ERD captioned Hillman's as ERD Case No. CR200903031; EEOC Case No. 26G200901735C. Each complainant alleges ongoing discrimination at Memorial, based on their African-American race. Each complaint alleged the discrimination was "ongoing." Moncrief's dated the discrimination from 1991, and Hillman's dated the discrimination from 2000. Each complaint alleged the "most recent discrimination" was "Continuous". In mid-October of 2009, Terrence Tompkins filed a complaint similar to that of Moncrief and Hillman. ERD captioned Tompkin's as ERD Case No. CR200903212; EEOC Case No. 26G201000078C. Each complaint includes a "Summary of Discriminatory Acts" section. Each complaint alleges acts of discrimination by the Grievant and knowledge of those acts on the part of his supervisors. Each complaint cites specific behaviors by the Grievant as reported by Ryan Sater, Randy Grover and Hamilton Arevalo. All of these employees, including the complainants, are members of the bargaining unit represented by the Union.

After the filing of Moncrief's and Hillman's complaints, but prior to the filing of Tompkins' complaint, the Employer retained an investigator to look into the allegations of a hostile work environment at Memorial. The Employer retained Moria Krueger, a Dane County Circuit Judge of many years of experience, who was then a Reserve Judge.

In a letter to the Grievant, dated September 28, 2009, Darm stated:

> This is to advise you that I am placing you on administrative leave with pay effective September 28, 2009, pending the investigation of allegations that you have engaged in harassing and discriminatory conduct that has created a hostile work environment based upon race for multiple members of the custodial staff at Memorial High School. While you are on paid leave, you may be contacted to answer work-related questions and/or to participate in interviews.
>
> By this letter, you are warned and reminded to avoid any type of harassment or retaliation of any person who you may believe to be a complainant, witness, or otherwise participating in the resolution of the allegations. Contacting other persons, including co-workers from Memorial High School, in connection with the pending allegation of race discrimination can lead to additional and independent allegations of harassment and/or retaliation. Any retaliatory conduct would itself be grounds for possible discipline, up to and including possible dismissal, even if the initial allegations are not substantiated.
>
> The decision to place you on a paid leave is not disciplinary, and shall not be characterized as discipline by the District in any manner: It is being done for the protection of all concerned and to ensure the District's ability to conduct an appropriate investigation. You will be contacted in the near future regarding an interview. You will be entitled to union representation in regard to all matters involving the pending allegations.

Krueger interviewed the Grievant on October 14, 2009. The Grievant responded to her questions under oath and a court reporter transcribed the interview. Krueger taped the interview.

Krueger issued a report, dated December 3, 2009. The report notes that she interviewed each member of the Grievant's chain of command, including James Martinson, who was the Grievant's immediate supervisor; Dale Zimmerman, who is Martinson's immediate supervisor; and Bob Darm, who is Zimmerman's immediate supervisor. She also interviewed Duane McCrary, the Employer's Director of Labor Relations; Amos Anderson, the Employer's Affirmative Action Officer; Donald Freeman, then on a medical leave of absence; and Jeff Fisher, the Employer's Facility Supervisor at La Follette High School. She interviewed the following employees, then on active duty and members of the bargaining unit represented by the Union: the Grievant; Brian Jackson; Summer Hillman; John Moncrief, Jr.; Randy Grover; Hamilton Arevalo; Dennis Jetzer; Terrence Tompkins; Ryan Sater; Ryan Morrison; Eric Likness; Melissa Baker; Tammy Stalsberg; Dawn Hauge; Keith Frederickson; and Javier Ayala. Her report notes that Stalsberg; Hauge; Frederickson; Fisher; and Ayala were "Interviewed at the request of (the Grievant)". None of the witness interviews other than the Grievant's were taken under oath or transcribed.

The issuance of Krueger's confidential report sparked controversy between the Union and the Employer regarding disclosure of its contents as well as other parts of the Employer's investigation. That controversy was ongoing throughout the arbitration process.

The Employer interpreted Krueger's report to state that the environment at Memorial High School was a hostile working environment. The Employer did not, however, take action toward the Grievant based on the report, but determined further investigation was appropriate. Malina Piontek was responsible for the additional investigation. As a part of her investigation, she interviewed the Grievant on January 19, 2010. The interview included June Glennon, the Employer's Employment Manager. Two Union representatives accompanied the Grievant. The interview was tape-recorded, then put into written form.

After this meeting, Piontek issued a letter dated January 22, 2010. The first paragraph of that letter reads thus:

> This letter serves to inform you that the District has completed its investigation into personnel matters affecting your employment. Based upon the investigation, which included opportunities for you to respond directly to the District's concerns about your conduct and at which meetings you had the benefit of representation, it is the District's conclusion that the following charges are presently supported by the evidence:

The second paragraph of the January 22 letter is preceded by a bullet point, but reads the same as the first indented paragraph of the February 22 discharge letter. The six paragraphs of the February 22 letter preceded by a hyphen are stated identically as six hyphenated paragraphs in the January 22 letter. The paragraph starting "Between the period of February 2008 and August 2009" from the February 22 letter is stated identically in the January 22 letter, which uses a bullet point to introduce the paragraph. The January 22 letter includes another paragraph preceded by a bullet point, which does not appear in the February 22 letter:

- Between approximately June 15 and August 15, 2008, wearing a t-shirt with a Confederate flag and the phrase ''The South Will Rise Again" to work, which you knew or should have known would be offensive to others viewing the t-shirt being worn in a public school building.

The January 22 letter concludes thus:

> Significant disciplinary consequences could result from these very serious charges. The next step of the process is that you are hereby called to a meeting with District officials . . . At this meeting, and before any sanctions are levied, we will be prepared to listen to and consider any questions, concerns or final response(s) you may have to the charges as outlined herein.

> You may choose to waive this meeting with the result that we will move to levy consequences based on the charges as outlined herein. Regardless of whether you choose to waive or attend the . . . meeting, you will be entitled to challenge any disciplinary sanctions that may be levied and obtain a hearing before an impartial arbitrator under the terms and conditions of the applicable collective bargaining agreement.

The parties met on January 25. Nadler, Erik Kass, the Employer's Assistant Superintendent for Business Services, Piontek, Glennon, the Grievant and Jennifer McCulley, the Grievant's Union Representative, attended the meeting. Following this meeting, Nerad met with various administrators and determined that the Grievant should be discharged. He was responsible for the decision, and approved the contents of the February 22 letter.

The parties disputed the Union's need for a number of documents, including Krueger's report. On February 17, 2010, they executed a Memorandum of Understanding which states:

> WHEREAS, following the District's receipt of the Krueger Report, which made findings and reached conclusions based upon a "probable cause" standard, the District continued its own internal investigation of the matters addressed in the Krueger Report; and
>
> WHEREAS, the District has, as of the date of this Agreement, completed its investigation into the alleged conduct of (the Grievant), and in doing so the District reached its own findings and conclusions concerning (the Grievant's) conduct, which have been summarized as formal charges for (the Grievant) and his representatives; and
>
> WHEREAS, in making decisions with respect to (the Grievant's employment, the District is relying on its own findings and conclusions, and is not considering other allegations or other findings and/or conclusions from the Krueger Report that were based upon the "probable cause" standard; and
>
> WHEREAS, the Krueger Report reaches findings and conclusions, under a "probable cause" standard, concerning supervisors' knowledge of and response to various allegations made against (the Grievant).
>
> NOW, THEREFORE,
> the parties hereby agree as follows . . .
>
> 3. Only Local 60 shall be permitted to have access to the records identified herein until the earlier of (a) an agreement between the District and Local 60 to modify this agreement concerning disclosure; or (b) such

> time as Local 60 applies to an arbitrator, administrative agency or court for an order modifying the conditions under which such records may be used, disclosed, and/or reproduced. For example, it is understood by Local 60 and the District that the records disclosed pursuant this Agreement would be admissible as evidence in any grievance arbitration hearing initiated by (the Grievant).
>
> 4. It is the intent of Local 60 and the District to agree that the District grant Loca1 60 access to these documents under conditions that are essentially the same as discovery that is conducted pursuant to a mutually agreed upon protective order. . . .

On February 24, 2010 ERD issued an initial a determination of no probable cause and dismissed Case ERD Case No. CR200903030, EEOC Case No. 26G200901734C; ERD Case No. CR200903031, EEOC Case No. 26G200901735C; and ERD Case No. CR200903212, EEOC Case No. 26G201000078C.

The balance of the evidentiary background is best set forth as an overview of witness testimony.

June Glennon

Glennon noted that the Employer is subject to frequent lawsuits, including ERD and EEOC claims, and that the Employer reviews each claim. She assists in the review process. The review process regarding circumstances surrounding the Grievant's discharge was unique, reflecting the Employer's extended attempt to determine if there was a racially hostile work environment at Memorial. The Employer investigated supervisors at Memorial, but did not discipline any.

In-service training and Employer policy seek to have employees report harassing behavior, but she understood that employee willingness to bring such issues forward varied widely based on individual considerations and that it was not common for unit employees to complain about other unit employees. The February 22 letter is imprecise because the employees did not document the incidents and the Employer became aware of them well after the fact. She did not feel this compromised the Grievant's ability to respond to the charges against him, and she felt his responses during the investigation were instructive:

> The district absolutely found the fact that (the Grievant), when asked if he used the word – if he used the "N" word when talking about a particular person, said I don't recall or I might have. Sometimes he would say, "I might have, but I don't recall" – absolutely found that to be revealing because it would roll off my

> tongue unequivocally that I have never used the word in the context of discussing another person; and yet, he wasn't sure. He couldn't recall. It was revealing. He also acknowledged using it off – off of work – using that word off of work. Transcript (Tr.) at 94.

Glennon believed that the Grievant understood the allegations against him. She found the use of "nigger" and its variants to be racial slurs that promote racism in the work place, particularly if used by an employee in a position of responsibility such as a lead worker.

Randy Grover

Grover has worked for the District since 1999, working at Memorial from 2007 until August of 2010. While at Memorial, he worked the second shift, from 4:00 p.m. through 12:00 a.m., Monday through Friday. A typical day at Memorial started with a group meeting to allow supervisors to go over non-routine issues, such as permits for building use. After this, each custodian would leave for their area of responsibility. The vast bulk of a workday, but for lunch and break time, was spent by employees working alone. Grover, unlike most other second shift employees, worked second shift during summer hours.

Grover did not view the Grievant as a demanding supervisor. To the best of his recall, roughly six months to one year into his service at Memorial, the Grievant began to use racial epithets in their conversations. This did not happen when Grover first came to Memorial. Grover took this to mean the Grievant had begun to feel more comfortable in his presence. He could not recall when it first happened, and could not recall specific conversations when the Grievant first used "nigger" in a conversation. He estimated it occurred "six to ten times" (Tr. at 119). One specific conversation, however, stuck with him:

> I was taken aback by the fact that he said it four times in one sentence basically or one little paraphrase where he – we were speaking, and I just happened to count it that time. He said it four times (Tr. at 119).

To the best of Grover's recall, this conversation happened in the Spring of 2009, perhaps April. The two of them were alone, and the conversation took place when students were not in school, but he did not think it occurred during Spring break. Grover was "stunned . . . Because I – I thought a person in his capacity shouldn't be – be talking that way" (Tr. at 121). This was not the Grievant's sole use of the term:

> Whenever he used the "N" word, he would always follow it up with this quote: "I am the biggest fucking racist there ever was. I don't give a fuck what they think. What are they going to do – fire me?" (Tr. at 121-122).

Grover specifically recalled the Grievant's use of profanity, and specifically denied the accuracy of the non-profane quotation stated in the February 22 letter. He never complained

of these conversations to Martinson. He first related the conversations to Krueger, during her investigation. He considered reporting to his supervisors futile: "I felt that if I were to bring it to the supervisor, that it would just be kind of blown off or where it – it might even be turned around on me." (Tr. at 124).

On several occasions prior to the Grievant's being placed on administrative leave, he reported these conversations to Moncrief. He told other employees that he viewed the Grievant as lazy. Grover testified that he had no history of discipline; had no grudge against the Grievant; did not conspire with other custodians to have the Grievant disciplined or fired; and did not apply for the Grievant's job.

Ryan Sater

The Employer hired Sater as a trainee on October 20, 2008. As other trainees, he served a six month probation period. He is now a Custodial Worker I at Memorial. The Grievant oversaw Sater's work during the probation period. Sater worked the second shift, from 4:00 p.m. through midnight, Monday through Friday. He worked day shift during school breaks.

After January of 2009, the Grievant started to use "nigger" in conversations with Sater. Sater thought this reflected that the Grievant had grown comfortable with him and may have reflected that Sater worked with Eric Likness over the winter break. Sater thought Likness may have spoken highly of him to the Grievant.

Sater specifically recalled a conversation with the Grievant in which the Grievant approached him in the Fox Neighborhood Study Hall. The Grievant then told Sater that Sater should not use "nigger" in the presence of Ryan Morrison or Rainbow Rickey. Both worked at Memorial and both are white. Sater had never used "nigger" in conversation with the Grievant and could not understand why the Grievant made the statement. During this same conversation, the Grievant also said words to the effect that, "I don't like N's, and they know it" (Tr. at 149).

During Spring break, in the custodial break room early in the first shift, the Grievant spoke with Sater about a former black employee, who "was going out – or married to a rich lady, and he was messing around on her" (Tr. at 149). The Grievant referred to the former employee as a dumb nigger. As opposed to any other incident, this occurred in front of a number of employees, including, probably, Jetzer. Sater heard other comments from the Grievant that carried racial overtones. He heard the Grievant express the following view toward diversity training: "I want to stand up and say that these are against white people" (Tr. at 197).

Sater spoke with Hillman shortly after he passed probation on April 20. After passing probation, Sater served as a sub, reporting to different schools. During this process, Sater subbed at Thoreau School, where Hillman worked. Hillman relayed her concerns regarding

the Grievant's racial views. Sater shared with her that he had heard the Grievant use racial slurs, and that he thought the Grievant treated Likness better than Tompkins.

After this, Sater was assigned to sub at Randall Elementary School. Sater believed this happened on Thursday and Friday, May 7 and 8, 2009. Missy Baker was a custodian then assigned to Randall. She was leaving early in her shift on Thursday, and asked Sater to work with her while she was available to show him around. They spoke comfortably together until they discussed Memorial. Baker had worked there, and Sater mentioned that he felt there were issues at Memorial, which he described thus:

> I kind of felt like the environment at Memorial had a lot of tension . . . because of race . . . And I also felt that . . . there was a different treatment going on between a few employees. . . . I talked to her a lot about that kind of treatment – between how I felt Terrence was treated to how Eric Likness was treated. . . . I just questioned some of the – Terrence was getting a lot of – was kind of under the microscope; and I felt Eric was doing pretty severe, questionable acts that were going kind of undisciplined (Tr. at 152).

Sater noted that Baker was interested but that near the end of her shift her demeanor changed:

> She got really mad at me; and she kind of said, you know, "You didn't do anything about it." And she called me, like, a good ole boy and said, "You can go back there, and you guys are probably friends." (Tr. at 153)

Baker referred to the Grievant as "a redneck" and a "fat fuck".

Sater returned to work at Randall the following day. Sater was unsure how the shift would go, but Baker again asked him to work as a team and the shift went without incident.

Sater's next shift was Monday, May 11. Because he was rotating through schools, he had to phone in to find out where to report. He was surprised to find out he was assigned to Memorial. Sater reported to Memorial and was even more surprised when, at the close of the group meeting to start the shift, the Grievant instructed Sater to report to Martinson's office prior to starting his cleaning duties. The Grievant made this announcement in the presence of the entire crew. Sater reported to Martinson's office, which is adjacent to the Grievant's, separated by a hollow core door. Next to the door is a window, and Sater saw through the window that the Grievant took a seat by his computer. Although the door was closed, Sater assumed the Grievant could overhear his conversation with Martinson.

Martinson started the conversation by asking Sater what happened at Randall. Sater was uncomfortable, and indicated that he got in a fight with Baker, who called the Grievant a redneck, and was upset because Sater called him a good guy to stick up for him. Martinson pressed the point, asking Sater what was said about Moncrief and Tompkins. Sater tried to

avoid the point and responded in a general fashion that Sater had noticed some things at Memorial. He illustrated the point by saying he had overheard Tammy Stalsberg and Dennis Jetzer complain about having to take Martin Luther King's birthday as a holiday rather than Good Friday. Jetzer and Stalsberg are white. Sater told the story to test how Martinson would react to a racial issue. He interpreted Martinson's response to indicate he did not take the issue seriously. Sater had already taken comments he had heard between Martinson and Moncrief regarding diversity training to indicate that Martinson did not take racial issues seriously. Sater did not offer further detail on his conversation with Baker. Sater was apologetic about the incident and Martinson eventually let him go back to work. Sater tried to divert Martinson from further pursuing the point with Baker, even telling Martinson that Baker was crazy. Sater did not want to become embroiled in a dispute over race and particularly to be viewed as a racist. He did not mention to Martinson that the Grievant had used racial epithets with him.

After his meeting with Martinson, virtually every employee at Memorial wanted to know why Martinson summoned Sater to his office. Sometime after Sater returned to work after the Martinson meeting, he found he needed supplies located in the garage, which is close to the custodial office. While getting his supplies, the Grievant motioned for Sater to come into his office. The Grievant asked what happened with Martinson and at Randall. Sater responded that Baker had called the Grievant a redneck but Sater had told her the Grievant was a good guy. Sater did not tell the Grievant that Baker had called him a "fat fuck". The Grievant became angry when he learned how Baker had spoken of him, and called Baker "an 'N' lover" (Tr. at 164). Sater described the Grievant's reaction thus, "He was pretty upset . . . he probably said it a dozen times" (Tr. at 164). His voice was raised. Baker is white, but has bi-racial children. Sater found the experience disconcerting and worried who might pass in the hallway and hear the Grievant.

Sometime after speaking with the Grievant on May 11, Sater spoke with Grover, Likness, Stalsberg and Hauge. Stalsberg approached Sater later in the shift, telling him that she understood that Martinson was going to talk to her, Baker, Tompkins and Moncrief about Sater's May 7 conversation with Baker. Sater apologized. As he left work at the end of his shift, Stalsberg and Hauge were taking a smoke break and asked him to talk. Sater told them about his conversation with Baker, and how mad she got at him when he told her the Grievant was a good guy. Stalsberg asked if Baker had referred to her, and in response to Stalsberg's repeated questioning, nodded in the affirmative when Stalsberg asked if Baker had called her "a bitch and a slut and a whore" (Tr. at 411). Sater told Hauge that the only thing Baker said about Hauge was that Hauge abused sick leave. This conversation was the last amicable conversation shared between Sater and Stalsberg.

Neither Moncrief nor Tompkins was working at Memorial on May 11, but Sater spoke with them sometime shortly after that evening. Sater told Moncrief about his conversation with Baker, and told Moncrief about the racial epithets he had heard from the Grievant. He spoke to Moncrief in greater detail than he did with Hillman.

Late in May, Sater spoke with the attorney representing Hillman and Moncrief. The conversation took place while Sater was moving into a new home. He did not find it convenient, but felt obligated to do so because he had earlier committed to it, when he and Moncrief discussed the racial tension at Memorial. Sater thought that it might be preferable to address the matters within the Employer's chain of command, but Moncrief convinced him it was necessary to go outside the Employer. At no point did Sater see himself as part of a lawsuit or in a position to be compensated if it proved successful. This conversation was essentially the last time Sater spoke with Moncrief, Hillman and Tompkins.

Sater first spoke openly about racial issues with Krueger because it was the first time he was asked about the issue in a neutral setting. Mallin interviewed Sater, and Sater perceived Mallin's focus to be the Jackson complaint. He understood Mallin to be concerned that the source of Jackson's complaint could be the source of other complaints. He understood Mallin to be concerned that the Grievant used "nigger" in reference to other employees and that Mallin needed to put a stop to it. Sater did not deny that the Grievant used the term, but indicated to Mallin that he was uncomfortable discussing the point. Sater perceived that Mallin had been informed by others that Sater could corroborate that the Grievant used racial epithets to refer to District employees. Mallin did not record their conversation, but Krueger did.

Sater testified that he had no had no grudge against the Grievant; did not conspire with other custodians to have the Grievant disciplined or fired; and did not apply for the Grievant's job. He did not find the Grievant to be a demanding supervisor, but he did worry about whether he would pass his probation period, particularly after the Grievant indicated a building principal had questioned his desire to be at the school. Baker phoned a number of employees after their May 7 interaction, including Zimmerman. He believed she told Zimmerman she never wanted to work with Sater again. He feared that Zimmerman deliberately put Sater into an awkward situation by sending him back to Memorial to speak with Martinson.

Hamilton Arevalo

Arevalo has worked for the Employer since September of 1995. He worked at Memorial from early summer of 2006 until November of 2008. While at Memorial, he worked as a Custodial Worker III, on Tuesday through Saturday from 3:00 p.m. through 11:00 p.m. While at Memorial, he worked as the Grievant's "right hand man" relaying instructions from the Grievant to other unit employees throughout the facility. He did not find the Grievant to be a demanding supervisor.

At some time on a snowy day in February of 2008, early in his shift, the Grievant saw Jackson walking toward the custodial office from outside of the building. Jetzer was in the area, on his break. The Grievant said, "I'm sorry but that Brian Jackson is a real 'N' word" (Tr. at 207). Arevalo thought Jetzer heard the remark. Arevalo could not date the comment precisely, but it did not occur on February 6, 2008, when the District closed due to a snowstorm. The day was near the snowstorm, but was a student contact day. Arevalo was

offended by the remark, which is not used in the District. At some point in his many discussions with the Grievant, the Grievant told Arevalo words to the effect that, "my mouth is going to get me in trouble someday" (Tr. at 398).

Arevalo did not report the Grievant's remark about Jackson to District supervisory staff, but mentioned it when asked by Mallin, by Krueger, and by Piontek. Arevalo was not sure when Mallin interviewed him, but thought it might have been in July of 2009.

Arevalo does not hold a grudge against the Grievant; did not wish to see him fired or disciplined; and did not conspire with others to use the remark against the Grievant or for his own personal purposes. He did apply for, and was placed in, the position made vacant by the Grievant's discharge. He saw Likness and the Grievant speak in the Grievant's office frequently, particularly toward the end of Likness' probation. He believed the Grievant and Likness were friends.

Daniel Nerad

Nerad has served as Superintendent for a little more than two years. Nerad made the decision to discharge the Grievant after consulting with Nadler and Kass. The Employer's mission demands that employees model appropriate behaviors. Those behaviors rest on the changing demographics of the district and its increasingly diverse cultural composition. Racial diversity and tolerance are crucial to the Employer's mission, and the Grievant's conduct flies in the face of that mission. That he was a lead worker exacerbates its severity. To underscore the egregious nature of the misconduct, "there was no evidence . . . of . . . taking responsibility for this behavior" (Tr. at 221). The investigation showed the Grievant responded equivocally to allegations against him and offered no sense that the remarks had occurred or that he bore any responsibility for them.

Nerad read the Krueger report and directed that follow-up information be obtained. The investigation, viewed as a whole, afforded solid, consistent proof that the Grievant used racial epithets when dealing with employees and refused to be accountable for his misconduct. Nerad viewed the discharge, detailed in the February 22 letter, to rest on misconduct. That the Grievant did not direct racial slurs at an employee was not, to Nerad, a mitigating factor regarding the severity of the Grievant's misconduct. Whether other employees, including supervisors, used racial epithets or failed to effectively respond to them were not mitigating factors. Rather, use of harassing language must be addressed on a case-by-case basis. The Grievant's misconduct was, standing alone, egregious.

Dennis Jetzer

Jetzer has worked at Memorial for the past five and one-half years on the day shift, as a Custodial Worker I. He has worked for the Employer for sixteen years. He worked with Sater only when Sater was working day shift, on non-student contact days. During Sater's probation period, that would have been during the Easter break, in March or April. When

informed that Sater had testified that the Grievant told a story before a group of employees, including Jetzer, that ended with a reference by the Grievant to a "dumb nigger", Jetzer responded that he did not hear such a story and would have remembered it if he had. He acknowledged that he told Mallin and Krueger that he did not recall hearing the Grievant make a racial slur.

Jetzer knows Arevalo. While Arevalo worked at Memorial, Jetzer's and Arevalo's shifts overlapped when Jetzer worked a mid-shift, from 9:30 a.m. through 6:00 p.m. On a mid-shift, Jetzer took a break from 3:00 p.m. through 3:20 p.m. Arevalo's shift started at 3:00 p.m. When informed that Arevalo had testified that as he was starting a shift, the Grievant called Jackson a "real nigger" in Jetzer's presence, Jetzer responded that he did not hear such a reference and would have remembered it if he had, because such a very racist epithet does not occur in the workplace.

Jetzer observed Hillman interact with the Grievant and felt that Hillman was inflexible regarding the assignment of duties. She resisted duties outside of her normal assignments.

Tammy Stalsberg

Stalsberg has worked in a custodial position at Memorial for over ten years, on the third shift, from 10:00 p.m. through 6:00 a.m. On non-student contact days, she works the first shift, partnering with Jetzer. Moncrief and Grover remain on second shift during breaks. Stalsberg has heard the term "nigger" used in conversation at Memorial. This occurred perhaps three years ago, when a black, female custodian, Robertha White, who is no longer employed by the Employer, said, while emptying trash on a rainy day, "This nigger can't go outside in -- in the rain. It makes my hair all nappy" (Tr. at 261). She overheard Hillman and Moncrief tell Jackson that if he was terminated, it was motivated by race and should be brought before the ERD. Stalsberg viewed such a complaint as ridiculous. Arevalo informed her that Hillman and Moncrief wanted him to talk to an attorney, roughly a year before the arbitration hearing, about suing the Employer. Arevalo told Stalsberg that he did not want to be involved. Roughly one week before the arbitration hearing, Arevalo told Stalsberg that Hillman and Moncrief would no longer talk to him.

When Sater told her about his conversation with Baker at Randall, he informed her that Sater was glad the Grievant was watching Tompkins more than Sater, because Sater was worried about passing probation. She understood Sater's account to have included Baker calling the Grievant or Sater a racist or a redneck as well as Baker calling Stalsberg a whore, a slut and a bitch.

Her shift overlapped Grover's, and she knew Grover did not like the Grievant, particularly when the Grievant asked Grover to cover for work other than his own, as when the Grievant asked Grover to take over Stalsberg's duties when a car/deer accident made it impossible for Stalsberg to make it to work on time. She and Grover used to get along well, but their work relationship had deteriorated and she did not feel he was trustworthy regarding

his interactions with other employees and management. She has perceived racial tension at Memorial, and stated that Grover informed her that he "hates me because I stuck up for (the Grievant" (Tr. at 278).

Dawn Hauge

Hauge has worked the third shift at Memorial since 2001 as a Custodial Worker II. She works the second shift during the summer recess. On the second shift, she worked with Grover, Hillman, Tompkins and Moncrief. She is Native American, a Bad River Chippewa. She would speak with Hillman, Tompkins and Moncrief about their experiences as legal minorities in a white culture. She never heard the Grievant use the term "nigger", but heard Hillman, Tompkins, White and Moncrief, in different contexts, use "nigga" between themselves as a term of endearment. She thought the Grievant maintained a strict work relationship with employees, but perceived Moncrief and Hillman to regard him as lazy.

She noted that Moncrief, throughout the summer of 2009, approached her to inquire whether she had heard the Grievant use racial epithets. She consistently denied hearing the Grievant use racial slurs. Moncrief continued to inquire, and she described his inquiries thus:

> (H)e had told me that I had called in sick; and when I had called in sick, (the Grievant) had called me a cunt for calling in sick . . . I never called in sick that night. Tammy was off that night, and I had to cover her area; so therefore, it never could have happened. And he told me on other occasions throughout that summer how Don would call me a bitch and a cunt. To me, trying -- and lure me to get me mad at (the Grievant) to try and say something bad about (the Grievant). Tr. at 292-293

Hauge never believed Moncrief's assertions, and brought the matter to the Grievant. Near the end of the summer, Moncrief again approached her and, "said that there was going to be a lawsuit, and it's going to be big . . . if I keep my mouth shut and don't tell anyone about it, I'll be fine." (Tr. at 293)

James Martinson

Martinson retired from the Employer on August 6, 2010, after eighteen years of service as Memorial's Facilities Supervisor. He oversaw the operation of Memorial and of the facilities that fed Memorial. His position was not in the bargaining unit, and he was the Grievant's immediate supervisor. His normal work hours were 6:30 a.m. through 3:00 p.m. He typically met with his lead personnel at the start of their second shift.

Martinson never received any employee complaints that the Grievant used racially charged language, but did receive complaints that the Grievant did not do enough maintenance work. Martinson felt that this reflected no more than a misunderstanding of the amount and

nature of his office duties. At some time during the investigation into the tension at Memorial, Martinson and the Grievant briefly discussed what was happening. Martinson relayed it thus:

> And he says, "Yeah. It looks like I'm going to be in trouble because I supposedly used the "N" word one time." He says, "I don't remember ever using it, but . . ." (Tr. at 305)

When questioned more specifically, Martinson responded, thus:

> Q Now, did Don ever call anyone a nigger that you know of?
> A Not as far as I know. Not -- not in front of me I know. (Tr. at 306).

Martinson felt the Grievant communicated well with him and felt that when the Grievant started as a lead worker, the employees got along well with him. No Employer personnel asked Martinson what he thought of the discharge, and Martinson was not aware of any reason for the Employer to discharge him.

Rainbow Rickey

Rickey has worked for the Employer for roughly ten years. She worked at Memorial for roughly eight years, transferring from Memorial in January of 2009. For roughly three years preceding her transfer, she worked from 4:00 p.m. through 12:00 a.m. For this period, the Employer assigned substitutes to other schools through inverse seniority. Absent a volunteer to sub, the least senior available employee moved to the school with a temporary vacancy. While she worked at Memorial, Rickey was not the least senior employee on her shift. Even though she and Hillman were hired on the same day, Rickey was, through a tie breaking procedure, treated as the more senior employee. Rickey volunteered for substitute duty "to keep the peace", since if Hillman was assigned, "it would get kind of loud and ugly when she had to go" (Tr. at 313). Rickey understood Hillman's complaints reflected Hillman's view that she was selected because she was female and black. To Rickey, the assignments reflected no more than seniority. Rickey never heard the Grievant use a racial slur. Arevalo did tell her that he had heard the Grievant refer to Jackson as a real nigger.

Grover viewed the Grievant as lazy. Tompkins, Hillman and Moncrief shared the opinion, and would refer to the Grievant as fat and lazy. Rickey had no complaints regarding the Grievant, and felt he treated her and other employees well. She traced whatever tension existed at Memorial less to the Grievant or to racism than to Moncrief's and Hillman's complaints about workloads.

Eric Likness

Likness started work for the Employer in August of 2008. He worked primarily at Memorial until September of 2009. While at Memorial, he worked from 4:00 p.m. through

midnight, except for non-student contact break periods, when he worked first shift. He was employed prior to Sater, but each was a probationary employee while at Memorial. He denied ever working for an extended period with Sater, and denied ever putting a good word in for Sater with the Grievant. Likness in fact resented the insinuation, which he actively sensed in Krueger's interview, that Likness and the Grievant were "buddies". Likness took this to imply he was a "suck-up". This has no basis in fact, since "I got ridden really hard by (the Grievant) during my probationary period; and I kind of felt like I got ridden hard and the most." (Tr. at 325) Likness never heard the Grievant use "nigger" and never told the Grievant it would be safe to use "nigger" around Sater.

Likness did not appreciate Krueger's investigation. He felt she confronted him with a series of unfounded accusations, including that he told the Grievant that he could use "nigger" and that he had put a caustic solution on toilet seats as a practical joke. When Likness attempted to rebut the accusations, she would cut him off. He described his feelings thus:

> I felt like I was the guest of honor at a Salem Witch Trial, straight out. I was guilty until proven innocent. (Tr. at 329).

Krueger asked Likness if he knew what she meant by the "N" word and Likness felt she had treated him as a child.

Likness knew Grover did not like the Grievant and viewed him as lazy. Moncrief told Likness the Grievant was his "buddy". Likness resented the reference, telling Moncrief he should not even imply Likness was a suck-up. Likness felt sorry for Sater, who was scared that he would not pass probation. Likness perceived Sater to be constantly worried about it, to the point of tears. Sater told him that he could not keep up with the pace needed to cover his assigned area. Likness assisted Sater by cleaning his area when Likness could spare the time.

Likness learned of Sater's conversation with Baker after Martinson summoned Sater into his office. Likness and several other employees then played a lottery pool, by which one custodian would purchase a group of tickets and the participants agreed to share any winnings. On the evening Martinson had summoned Sater into his office, Likness tried to deliver Moncrief's lottery numbers, roughly an hour into the shift. He saw Moncrief talking with Sater in a classroom, with the door closed. He let them alone, and returned to work because he could not leave his area for any length of time because students were still in the building and if he did not make his presence known, vandalism was likely. He returned to the classroom roughly an hour later, finding the door still closed, with Sater and Moncrief inside, still talking. He knocked, then entered and gave Moncrief the lottery numbers. He perceived Moncrief to be upset with the intrusion, but felt he could not waste any more time waiting for their discussion to end.

Likness saw Sater later in the shift and asked why Sater was in trouble. Sater told him that he and a female custodian had gotten into a fight of sorts and that she had accused Sater of racism. Sater would not supply details, but indicated, "that now everywhere he goes, all the

minorities in the district corner him -- up into a corner of the room and start asking him what happened at this school" (Tr. at 336-337). Likness could not get Sater to detail the experience, and asked what Martinson had done with him. Sater would not offer any details and Likness did not force the issue.

Likness found the amount of work difficult to keep up with, and tended to take break-time while working. He preferred to work alone. He was relieved to get the opportunity to transfer from Memorial.

Patrick Smith

Smith worked for the Employer for thirty-four years prior to retiring in December of 2008. He served as Union President from 2000 through 2008, and was part of the negotiations that resulted in the MOU. As he recalled it, the underlying circumstances brought in perhaps eight employees, including the Grievant, and turned on the submission of night differential slips. The submission of a differential slip for a non-day shift in which an employee flexed hours by leaving early with permission resulted in an overpayment of night differential. He recalled the amounts at issue ranged from several dollars to seventeen or eighteen dollars annually.

Smith's testimony covered an extensive series of disciplinary incidents involving employees other than the Grievant. In his view, the Union has consistently and successfully argued that the labor agreement demands adherence to progressive discipline. He did recall one discharge in which the Employer acted without the use of any lower level of discipline.

Jennifer McCulley

McCulley has served as an AFSCME Staff Representative for roughly eleven years, and has served as the representative for the Union. The Union sought the Krueger report when it was issued, as well as the three ERD complaints that prompted the Employer to retain Krueger. The Employer resisted disclosing the documents until the Union agreed to the execution of a release, which is the February 17, 2010 Memorandum of Understanding quoted above. District counsel drafted the release.

The Grievant

After leaving active Army duty, the Grievant joined the Army Reserves and worked as a mechanic and at the University of Wisconsin before starting work with the Employer. He has also run his own boat-repair business for about twenty years. In direct response to the Union's asking whether he made any of the statements attributed to him in six paragraphs of the February 22 letter which are introduced by a hyphen, the Grievant responded: "No, I didn't" (Tr. at 389); "No" (Tr. at 389); "No" (Tr. at 390); "No" (Tr. at 390); "No" (Tr. at 390); and "No" (Tr. at 390). When asked whether he made the statement alleged in the paragraph starting, "Between the period of February 2008 and August 2009", he responded, "No" (Tr. at 391).

On cross-examination, the Grievant responded to questions concerning his comments to others thus:

Q Isn't it true that in a meeting on January 25, 2010, with Erik Kass, Bob Nadler, Jen McCulley, John Erlandson and myself -- when you were asked about the charges, you said, "I told the crew I may slip sometimes; if I ever say anything that offends you, please let me know."
A I think I said that.
Q And isn't it true that you told Hamilton Arevalo, my mouth is going to get me in trouble one of these days?
A I don't remember that.
Q Isn't it true that you were allowed -- you were given the opportunity to let Judge Krueger know of employees that you wanted her to talk to as part of her investigation?
A I don't really remember how that went -- all went about. (Tr. at 392-393)

On cross, the Grievant was asked about his response following the January 19, 2010 interview:

Q June Glennon and I met with you and John Erlandson and Jen McCulley on January 19, 2010; do you recall that?
A I don't know the exact date, but I remember.
Q Sure. And I said to call me if you remembered anything or had any other information to tell me; does that sound right?
A Yes.
Q And you did call me?
A Yes.
Q You told me that you had made a mistake with what you told me about Missy Baker; is that right?
A Right.
Q You told me that you knew Kenny Green-Young was Missy Baker's husband or partner. You weren't sure which; does that sound right?
A Something to that effect, yes.
Q And you also told me that you were friends with Kenny Green-Young?
A We were -- we were acquaintances; we worked together.
Q You also told me that Kenny would complain to you about having to pay child support to Missy Baker for their children; right?
A He did say that on occasion.
Q And you did share that with me on the phone?
A I guess I did if you got it.
Q And Kenny Green-Young is African-American; right?
A Yes. (Tr. at 394-395)

Erik Kass

Kass has worked for the District since July 1, 2008. He read the Krueger report and was part of the decision-making process regarding the imposition of discipline. He was present at the meeting when the Employer decided to discharge the Grievant and was one of the people who reviewed the discharge letter. The discharge letter omitted references to profanity in the comments attributed to Grover because the Employer wanted to emphasize that the underlying misconduct traced to use of racial slurs rather than profanity.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Employer's Initial Brief

After a review of the record, the Employer notes that "good cause" is the contractual standard governing discharge. Four prior arbitration awards involving the Employer applied "the same two-pronged analysis", stating the analysis thus, "1) Did the individual commit the transgression or offense with which he was charged, and 2) was the disciplinary action the appropriate penalty under the circumstances?"

The discharge letter states the offenses the Grievant committed, and the record "shows that the Grievant engaged in this offensive conduct." Proof turns on conflicting witness testimony thus establishing that "resolution of the present matter . . . rests upon the Arbitrator's determination as to witness credibility." More specifically, the determination pits Grover's, Sater's and Arevalo's testimony against the Grievant's. This demands determination of which version "of the facts is the *more likely* to be true." The factors that influence this determination are "the consistency of the stories told"; "the plausibility of the story told"; and "motive."

Detailed review of Grover's Sater's and Arevalo's accounts establishes a consistency lacking in the Grievant's. Grover "provided the same information to the internal and external investigators" as well as providing the same information to "an attorney representing other employees". The same considerations apply to Sater, who also provided the same account during testimony at an Unemployment Compensation hearing. Arevalo's account matches Sater's for consistency across external and internal investigations. In marked contrast stands the evasive and unresponsive testimony on the Grievant's part.

Beyond this, Grover's account is plausible. He noted the Grievant did not use racial slurs in Grover's presence until the Grievant was comfortable with Grover. That Grover recalled them reflects their offensive content. That he could only roughly recall when the statements were made reflects that he did not think anything could come of them. That his recall of their timing was rough cannot obscure that he could broadly date them based on his

work hours, and work schedule. These objective factors heighten the plausibility of his account. Sater, like Grover, set the time of the remarks by his work schedule. He, too, felt the Grievant brought him into the racially offensive comments when objective factors such as time worked and growing familiarity with the Grievant and employees close to the Grievant. Sater's vivid recall of where the comments occurred plausibly reflects their shock value. Sater's interaction with Baker was so long and had such uncomfortable results that it was vivid in Sater's recall. Beyond the plausibility of his account, the record establishes that Sater's recall of the circumstances of the ongoing conversations fits well into the objective routine of the Grievant's schedule. It is undisputed that Arevalo was the Grievant's "right hand man" and that they "got along very well at work." His account of the context and content of the February, 2008 comments "is entirely plausible." The Grievant implausibly denies the racially offensive portion of his comments while not denying he told Arevalo that "my mouth is going to get me in trouble some day." This makes implausible the Grievant's denial that the conversation ever took place.

The contrast with the Grievant's account is stark. The Grievant acknowledged to Glennon that he may have used racially offensive terms off work. He objected to diversity training, and spoke derogatorily about the training's impact on white people. Unlike District witnesses, the Grievant's interest in preserving his job gave him strong inducement to lie. Arbitral precedent underscores the significance of this factor.

District witnesses had no incentive to be less than honest. That they did not report the incidents to supervision as they occurred only enhances their credibility. Grover saw no purpose in trying to go to supervision to complain about a lead worker. He had no grudge against the Grievant and no desire to see him fired. Grover's work record is excellent and free of any discipline. He considered the Grievant lazy, but this says nothing beyond a normal reaction of those who must do physical labor regarding their supervisor's office duties.

Sater was so uncomfortable reporting the offensive language that "he first was vague with Dan Mallin about Grievant's language". He had no grudge against the Grievant and no motive to lie about him. Arevalo did not report the offensive language until confronted with the internal investigation. He respected the Grievant. That he applied for the Grievant's job reflects no more than an appropriate and consistent ambition, much less a motive to lie.

In contrast to this stands the Grievant's account. Its weakest element is "the information he provided about Missy Baker". His account with Krueger and Mallin shows the same tension between alleging he knew nothing about her, yet acknowledging that he knew her partner and that they had two children together. His lack of credibility establishes itself.

Against this background, discharge was appropriate. Arbitral precedent makes review of discipline something other than an arbitrator's application of their own theory of discipline. Rather, it is a review of the Employer's discretion. In this case, the Grievant knew the Employer "did not tolerate the use of racially charged language in the workplace." His status as Lead Worker demanded that he be a role model within a diverse and changing workplace.

His position description notes the need for a lead worker "to work cooperatively and effectively with District staff and students", including those from different cultures. He had received training regarding "the prohibition against racial harassment and the detrimental impact of racism in the workplace." There is no doubt the use of racial slurs was prohibited.

Against this background, the Grievant's conduct was egregious. It "was not a case of a single utterance on one lone occasion." He used racial epithets repeatedly and "has refused to acknowledge his misconduct and thus has showed no remorse." The evidence shows "no mitigating factors that warrant a lesser penalty than termination". He has a long service record, but it includes high levels of discipline, including discipline for "misrepresenting things to the District for his own benefit". It follows that "the Arbitrator must deny the grievance and find in favor of the District in this matter."

The Union's Initial Brief

The Union notes that the stipulated issue on the merits makes "Beyond a reasonable doubt . . . the appropriate standard of proof." This reflects that "these allegations would tend to brand the employee as a hardened racist and might make it very difficult for the employee to gain employment elsewhere." A review of the evidence establishes the Employer did not meet this standard. Rather, it "relied exclusively on the testimony of a very few employees who have made disparate, conflicting, and unreliable claims".

Unlike his accusers, the Grievant' responses, "at the hearing and in previous recorded statements", were "credible, consistent and detailed." Employer assertion that the Grievant was evasive "is nonsense." In stark contrast to his responses, the Employer "failed to identify the time, the date, the place or almost any of the context surrounding the allegations". Against this background, it would be impossible to make a detailed response. Due process and the contract demand more specificity regarding the allegations.

Contrary to this, the Employer held the Grievant's accusers to a lower standard. The Grievant had to make sworn, transcribed statements to Krueger. His accusers' responses were not under oath or transcribed. This violates the Grievant's due process rights. The Employer's failure to provide statements and recordings sought by the Union highlight the weakness of the due process offered by the Employer to the Grievant. In spite of this, the Grievant's account "shines through . . . as honest consistent and credible."

None of the Grievant's accusers reported the incidents in anything approaching a timely manner. Months or years are spanned between the underlying events and the witnesses' recall. That the accusers spoke freely to employees with a material interest in establishing a racially charged work environment further compromises the credibility of the Grievant's accusers.

More specifically, Jetzer "directly refuted" Sater's allegation that the Grievant used a racial slur in the Spring of 2009. Sater's direct testimony obscured that the statement occurred in the presence of others. Even after reminded of this point, Sater's testimony wavers on how

many employees were present. In any event, Jetzer's "flat out denial" of Sater's accusation means "Sater's claim is simply not worthy of belief and suggests that his other claims are probably also fabrications." That the Employer has the records to determine what other employees were present and failed to call corroborating witnesses underscores this.

Beyond this, Sater's claim that the Grievant cautioned him about using racial epithets around Rickey is improbable and contradicted by other witnesses. Sater never claimed to be interested in racial epithets, so there was no reason for the Grievant to caution him. Rickey's testimony shows no reason to believe that any hostility at Memorial traces to the Grievant.

Sater's testimony "indicates that he changes his story – or lies about what happened – depending on who he is telling." Sater was not candid with Mallin; changed "the story about what Missy Baker said about (the Grievant)"; and lied on two occasions to Martinson. His testimony that it was not a "'huge lie' . . . strongly suggests that he is frequently dishonest and that he ranks his levels of dishonesty according to his own internal system." The weakness of his account to Martinson shows that Sater "was over at another school attempting to stir the pot by ginning up stories". Beyond this, Sater was afraid of being branded a racist by Baker and thus be made to "suffer rejection by the minority employees at Memorial and throughout the District." This "serial dishonesty" makes Sater's testimony incredible.

Arevalo's testimony "suffers a major credibility problem." The Grievant and Jetzer credibly denied Arevalo's accusation and as a result "Arevalo's hearing or recollection simply cannot be considered reliable." Grover's testimony "lacked specificity". He lacked any meaningful recall on the context of the remarks. He wavered on how he felt about the Grievant's use of racial epithets. At one point, he stated he could not recall only to state later that he was "stunned." Incredibly, he stated that he was so shocked by the Grievant's use of "nigger" in a conversation that he counted the number of times it occurred. The assertion he was stunned by the comment cannot obscure that he could not even recall the year in which it occurred. The clarity of Grover's recall of specific epithets cannot be reconciled to the vagueness of his recall on the surrounding context. His testimony of his conversations with Moncrief is vague. His testimony regarding how he felt about the Grievant is totally unreliable and contradicted by reliable testimony from other employees. It is evident that he "wanted a different supervisor and was clearly willing to lie about his feelings to get one".

The accusers' accounts are irreconcilable to each other. Grover linked the Grievant's use of "nigger" to the "I'm the biggest racist" proclamation. No other witness confirmed this. Grover relayed comments to the effect that the Grievant self-proclaimed his racism, yet Arevalo testified that the Grievant was not a racist.

Significantly, other witness testimony credibly overwhelms the accusations against the Grievant. No witness beyond the three noted above ever heard the Grievant make racist comments. Jetzer's refusal to corroborate the testimony of Employer witnesses is noteworthy. The testimony of Stalsberg, Hauge, Martinson, Rickey and Likness make it impossible to credit the accusations. Beyond this, Hauge testified that Moncrief aggressively tried to get her

to accuse the Grievant of using racially charged language. She refused and discussed the matter with the Grievant. That Moncrief bragged to her about a big lawsuit underscores his interest in the matter.

Stalsberg similarly highlighted that "Summer Hillman and John Moncrief were encouraging employees to make race based complaints . . . to join them in those race-based complaints". Self-interest is evident. Likness confirmed that Sater "was facing pressure from minority employees." While this may not offer "conclusive proof that the accusers were prompted by the employees who stood to gain from the creation of a hostile work environment" it does indicate that Hillman and Moncrief "were instrumental in the generation of the accusations made" by Grover, Arevalo and Sater.

Review of the record establishes that "the Arbitrator (should) sustain the grievance, set aside the summary discharge and make the grievant . . . whole."

The Employer's Reply Brief

Arbitral precedent establishes "that the 'preponderance of the evidence' is the appropriate standard to be applied in this case." Because the Grievant is not "subject to any threat of criminal prosecution", the "beyond a reasonable doubt" standard is inappropriate.

Nor are there due process infirmities in the Employer's case. Union representation was made available to the Grievant at every interview. The Employer was transparent with its allegations and with the identity of the Grievant's accusers. The Union could have conducted as thorough an investigation as it chose, and it is undisputed that the Grievant felt he effectively responded to all questions.

That Employer witnesses did not immediately report the incidents proven at hearing does not diminish their credibility. "There are a variety of reasons why people will not report", including "not being believed, concern about being labeled a troublemaker, and conviction that nothing will be done about the problem." That the accusations are less than detailed indicates credibility rather than a lack of credibility. The comments were egregious and the witnesses could remember them in context but not in great detail given the passage of time.

Detailed analysis of the testimony establishes the credibility of Employer witnesses. Jetzer's testimony does not detract from Sater's credibility. Sater was unsure if Jetzer was there, and was too new on the job to identify specific individuals. That he did not mention the presence of others in direct testimony is inconsequential. There is no conflict between Sater's testimony and Rickey's. Rickey was not present when the Grievant made the comments to Sater. Sater's unwillingness to be candid with Mallin cannot persuasively point to a lie. If Sater was "concerned about lying to the District, he never would have made mention of witnessing any events to Mr. Mallin." That Sater eventually opened up to the external and the internal investigation underscores how difficult and honest the effort was. Sater could not be

candid with Martinson because the Grievant sat outside of the door while Martinson interviewed Sater. Union reference to Baker affords no basis to undercut the Grievant's testimony, since the Union never called Baker to testify. Testimony of other witnesses regarding the Baker/Sater conversation affords no guidance on Sater's credibility, since none of the other witnesses were present at the conversation. In any event, Sater had no motive to discredit the Grievant.

That Jetzer did not hear the Grievant label Brian Jackson "a real nigger" says nothing about Arevalo's testimony. Jetzer may not have heard the comment, and there is no motive for Arevalo to fabricate the comment.

The Union mischaracterizes Grover's testimony. Even if the Union had not done so, its assertion that Grover's testimony got more detailed over time affords no reason to doubt his credibility. So did the Grievant's. If the increasing detail undermines Grover's testimony, it cannot support the Grievant's. Nor did Grover hide his feelings toward the Grievant. He openly stated to other workers what he testified to. He believed the Grievant was lazy.

Nor is there inconsistency within the testimony of Employer witnesses. That the Grievant did not self-proclaim his racism to Arevalo is unsurprising since Arevalo "himself is a minority." That several witnesses did not hear the Grievant use racial epithets does not mean he did not use them in front of Employer witnesses. Likness' testimony on the point is less than clear in any event. Nor will the record show "some sort of plot on the part of Summer Hillman and/or John Moncrief to fabricate these allegations against Grievant." Employer witnesses had no motive to support, and nothing to gain from, such a plot. The discrimination complaints were dismissed.

As the Union's arguments confirm, the allegations, if proven, make the Grievant a hardened racist who would learn employment is hard to find. The allegations have been proven and his "conduct is so egregious that it could not be tolerated" by any employer. The sole reasonable disciplinary option is discharge.

The Union's Reply Brief

The "three measures of credibility" posited in the Employer's brief "reveal that the accusers' stories are much less credible than the testimony" of the Grievant and other employees. Regarding consistency, the Employer has nothing to fault the Grievant for. The breadth of his answers is directly related to the breadth and lack of focus of the questions he responded to. In fact, "his answers were generally more specific and less equivocal" than the questions he confronted. The attempt to "gin up some inconsistencies" involving the Grievant's testimony about Baker has no record support. That the Grievant knew the identity of Baker's partner and her children has no bearing on his statements that he neither knew her nor worked with her. In fact, he offered this information to the Employer "of his own volition" after his first interview with Krueger. In any event, the Grievant's "testimony was held to a much higher standard than that of his accusers whose previous statements were not

sworn and were not provided to the Union so that they could be used for cross examination purposes." Ignoring substantial due process issues, the record establishes that the testimony of his accusers was "anything but consistent." Apart from the inconsistencies manifested within Sater's testimony by the Union's initial brief, review of Moncrief's ERD complaint establishes that Sater dated key conversations differently for the complaint than at the arbitration hearing and that Sater put an entirely different content to his conversation with Martinson at hearing than he did for Moncrief's attorney.

The accounts of Employer witnesses "contain a host of plausibility problems." Apart from the inconsistencies noted in the Union's initial brief and apart from the fact that only a very few employees of the many the Grievant worked with over time ever heard him utter a racial epithet, Sater's claim that the Grievant "told him not to use the word nigger in front of two employees is entirely implausible." Contrary to Sater's testimony, Likness, never "put in a good word" for Sater. Beyond this, Sater never claimed to use the word "nigger" in conversation with anyone. This makes it implausible that the Grievant would spontaneously caution Sater not to use a word Sater never used.

Contrary to the Employer's arguments, Sater's conduct with Martinson does not manifest honesty. Rather, Sater was uncomfortable about lying in front of his boss. This was "a moment where his character was tested". Sater, "true to his character, took the easy way out and lied to his boss." In any event, if Sater was uncomfortable with the Grievant's presence outside of Martinson's office, all he had to do was ask for "a more private meeting at another time."

Employer use of motive is unpersuasive. The better part of arbitral precedent objects to the "simplistic approach" that a discharged employee has an incentive to lie to protect his job. In any event, the approach ignores the motives of the Grievant's accusers, "and their friends and or protectors who filed EEOC complaints". Moncrief has successfully filed such complaints and bragged of his feats to Hauge. The evidence shows they made a determined push to enlist support and turned on Arevalo when he refused to join the effort. Grover admitted he was a close friend of Moncrief's. Sater relied on Moncrief and Hillman for protection against being ostracized as a racist: "there is a wealth of evidence that Moncrief and Hillman were using powerful tools including friendship, dishonesty, manipulation, and their own racial-political capital with others in the District, to pressure the accusers into making these false allegations against (the Grievant)." Detailed analysis of the testimony show Grover and Sater had significant and active interest in fabricating stories to the Grievant's detriment. Arevalo "appears to have been more neutral" but was swept into the effort.

Beyond this, the Employer "was noticeably silent about the motives of the other six employees whose testimony exonerated (the Grievant)." It is not evident why all of these employees, including the Grievant's supervisor, would lie. The absence of corroboration for any of the Grievant's accusers is a glaring weakness in the Employer's case. The Employer's arguments even gloss over the problem by asserting the Grievant made racial slurs only when he was alone with his accusers.

The Grievant was a long-term employee who had advanced in rank three times. He had solid evaluations. His disciplinary record is insignificant, with the most significant allegation eight years old and handled through the grievance procedure without any admission of fault. The record will not support the Employer's claims and it follows that "the Arbitrator (should) sustain the grievance, set aside the summary discharge and make the grievant . . . whole."

DISCUSSION

The parties stipulated that Section 3.04 governs the grievance. Section 3.04 requires "good cause" for discharge. The Employer cites prior arbitration awards that use two elements to define "good cause." The Union did not address the standards that define "good cause."

In the absence of stipulation, I view the good cause analysis to consist of two elements. The first is that the Employer must establish employee conduct in which it has a disciplinary interest. The second is that the Employer must establish that the discipline imposed reasonably reflects its disciplinary interest. Like the standard cited by the Employer, this states a skeletal outline, which the parties' arguments flesh out. The difference between the standards, like the absence of a stipulation on them, poses at most a technical point.

Application of the first element is deceptively straight-forward. The most troublesome issue the first element poses is finding fact. This should not obscure that the record poses a series of intractable issues. Some of them are addressed after application of the two-element standard, but resolution of the grievance turns on the two-element standard. The first questions whether the Grievant made a series of racial slurs.

The parties agree that resolution of this issue turns on whether the Grievant should be credited over Grover, Sater and Arevalo. Their arguments on the credibility analysis are well-stated, highlighting the interplay of three criteria. In my view, the most reliable guide to credibility is how conflicting accounts fit within a core of proven or undisputed fact. This record largely defies that, since the accounts turn on one-to-one conversations. The broader context of undisputed tension in the work environment at Memorial affords little guidance. There is no dispute that tension, tinged by race, was present. The dispute is who actively contributed.

Against this background, the weakest part of the Union's case is the Grievant's testimony, standing alone. His testimony was well-framed. Responding to the allegation of the Krueger report and of Employer investigators that his responses were equivocal, the Union framed questions to him specifically and directly, permitting him an unequivocal denial of the less than precisely defined allegations of the February 22 letter. His hearing testimony was brief. As the portion set forth above should convey, his responses on cross-examination belie the simplicity of his responses on direct. His answers showed excessive consideration of what

the questions sought, unpersuasively coupled with less than responsive answers. This cannot be explained by the lack of clarity in the allegations against him. His answers are equivocal to questions seeking recall on peripheral points.

This equivocation is not restricted to his arbitration testimony. Glennon sensed it in the January 19 interview. The narrative of that interview bears this out. The Grievant, represented by McCulley and John Erlandson, answered questions from Glennon and Piontek. The recorded interview was typed, and entered into evidence as Employer Exhibit 8. The document identifies the speaker by their initials. Glennon's testimony at hearing focuses on the following exchange:

> MP Okay. In April 2009 – and I don't have any context with this other than it was a conversation with Randy Grover says to have had with you that in a one-on-one conversation with him, in Randy's area with no one else present, that you used the word nigger four times in one sentence or paragraph.
> DT No (laughter). And that's -- you don't say that word.
> JG You don't say that word?
> DT I don't use that word. . . . (Employer Exhibit 8 at 2)
>
> JG Could I just clarify because I'm not sure I know what's going to be on this tape but I can't recall – I know Malina asked you whether or not you ever used the "n" word and you said no.
> DT No, I don't remember ever using that word. I don't remember ever using it.
> JG I don't remember ever using it at work.
> DT At work. I might have said it off of work, but not pertaining to anybody or anything. It just might have came out – you stub your toe or something and you say the 'f' word you know sometimes when it hurts so damn bad, and I might have said something – I don't know, but it's not a regular word in my vocabulary.
> JG Okay, I guess that's what I was wondering.
> DT It's not a word in my vocabulary that I would use regularly. No. Uh uh.
> JG It is something that you may have said, you said, in a moment where –
> DT It might, but I know I've never said it at work because I'm not supposed to. I mean – and then what other words can't I say – I'd like to know, too. They come up with this I said they or something – what is that? I mean how many words can't I say. Do you have a list of words we cannot say? Do we have policies? Are they written down – Board policies and stuff. I know I've called Building Services on something and Dale or Bob Darm – well that's Board policy. I've never seen it written – Board policy – this and that. Then you call them back on something else and it's changed – well, they got a new Board policy. You know. (Employer Exhibit 8 at 29-30)

Piontek sensed it with the Grievant's denial of knowing anything about Missy Baker, which followed his denial of speaking with Sater about Sater's conversation with Baker at Randall.

> DT No, I don't remember any conversations about Missy Baker. I don't even know Missy Baker. . . . Never worked with her. I don't even know what she looks like. I have no knowledge of Missy Baker.
> MP Do you know whether she's married?
> DT No, I don't know. (Employer Exhibit 8 at 9)

The Grievant's hearing testimony, quoted above, stands in contrast to this. He voluntarily supplemented his responses after the January 19 interview. Whether the Grievant's accounts are contradictory poses subtle points. What is not subtle is that his answers are consistently inscrutable. This pattern underlies major issues, such as whether he used racial epithets, and peripheral issues, such as the quality of his working relationship with the employees he oversaw. The record thus bears out Glennon's and Piontek's perception that the Grievant's account of his own actions is inconsistent and difficult to follow.

The Grievant's testimony does not stand alone, and the strength of the Union's case is Jetzer's testimony. Arevalo and Sater believed he may have heard comments directed by the Grievant to them. Jetzer denied each. His denial is nuanced. As he acknowledged, it is not certain that he heard the conversation that Arevalo recounted. Nor is it clear that he was present at the conversation Sater recounted. The absence of detail to corroborate that the witnesses heard the same conversation undercuts the strength of Jetzer's testimony, but its strength must be acknowledged. It is the core of the Grievant's defense.

Against this stands the testimony of Arevalo, Sater and Grover. Union arguments on the weakness of these accounts have force. However, their force is undermined by the depth of what the Union asserts – that these three accounts are deliberate, complete fabrications.

There is no reliable evidence to support the view that they are deliberate fabrications. Viewing the accounts as a whole, there is nothing to establish a common interest in the alleged deception. The evidence points the other way. There is no evidence of anything beyond a casual work relationship between the witnesses. It is not even clear if whatever casual relationship exists is cordial. There is no evidence that they actively shared their accounts. Rather, the accounts were relayed separately to individual employees and then separately to the various investigators.

Viewing the accounts individually affords no reliable evidence of fabrication. The assertion that Grover sought to rid himself of an unwanted supervisor ignores that he never actively asserted the interest. Rather, he responded to questions put to him well after the underlying events. Even at that point, he could not have known that the Employer would discharge the Grievant. Any sanction short of discharge exposed him to a more draconian environment than the Union asserts motivated him to lie in the first place. Grover's testimony

has a consistent core that withstands the undoubted personal animosities characterizing employee relations at Memorial. One of the strongest is his insistence on the veracity of his recall of the Grievant's statements in spite of the Employer's editing of the February 22 letter. Employer use of quotation marks for the "I'm the biggest racist" references poses troublesome points. Grover resolutely defended his testimony that the Grievant used "fucking" and "fuck" in making these remarks. The Employer deleted the profanities to highlight the racial content of the comment. This is problematic, indicating the Employer was less concerned with fact than its interpretation of fact. The February 22 letter does, however, mute this by use of "substantially similar to". More to the point, Grover's testimony highlighted the strength of his recall.

As the Union concedes, Arevalo's more neutral testimony is not easily dismissed. He liked the Grievant and worked as his right hand man. The Grievant respected him. Even if it is assumed that he was interested in the Grievant's position, this interest cannot explain his silence from February of 2008 until the summer of 2009. Nor can it explain the brevity, simplicity or consistency of his account. He relayed an account of a single conversation with little else. This is an implausible way either to force the Grievant's discharge or to secure a promotion. His conduct is consistent with his testimony. He came forward reluctantly.

Experiencing or reviewing Sater's testimony is an adventure. He is an unrestrained gossip, willing to relay almost anything to almost anybody. As the Union asserts, this casts doubt on his reliability. However, there is a line between gossip and deliberate fabrication. Stalsberg's recall of Sater's account of the Baker conversation is that Sater told Baker he was glad that Tompkins diverted the Grievant's attention from Sater. Sater's testimony focuses on his telling Baker of his concern for Tompkins. This highlights the difficulty of crediting a gossip. There is reason to believe he tailored his story to his audience. However, inferring fabrication ignores the consistency of his accounts over time and across employees. That he tailored his message to his audience cannot be equated to lying. Doing so cannot explain his unwillingness to speak to Martinson or to Likness. The Union contends that his testing Martin with information that was not "a huge lie" means he was a liar. The point has force, but is over-stated. The approach of the powerless to those in authority is complex. That Sater feared candor with Martinson cannot be lightly brushed aside. Significantly, the consistency of his account points in the opposite direction. As with Grover's and Arevalo's accounts, there is a core to his testimony that withstands the questions directed at him.

In sum, none of these witnesses had an interest in hurting the Grievant and none gained by relaying their accounts to Employer investigators. Each approached those investigators with reluctance. Each was consistent. None shared their accounts with each other. What weakness their testimony manifests does not point to fabrication. The assertion that these three accounts were independently fabricated, for no evident purpose, is implausible and unsupported.

In sum, the evidence demonstrates that the Grievant used racial slurs with Grover, Arevalo and Sater as asserted in the February 22 letter of discharge. This conclusion turns on a credibility determination that compounds the proven misconduct. The Employer has thus met the first element of the good cause analysis.

This conclusion largely and regrettably addresses the second element. Smith's testimony was more detailed than the summary above. His testimony and the underlying discipline it covers support the use of progressive discipline. The discipline includes at least one instance of employee use of "nigger." Nerad's testimony that the Employer views its mission to demand modeling conduct by its employees is laudable, but subject to question. Presumably, the Employer's educational mission, as highlighted by its in-services, permits employee education. Progressive discipline is an educational process, since it highlights improper behavior and grants an incentive to alter that behavior. The Grievant's status as a lead worker underscores the responsibility of the position, but opens the possibility of demotion. In any event, the sanction of discharge is more punitive than remedial. Presumably, the educational process is more remedial than punitive. The terms of Section 3.04 provide broad flexibility regarding the imposition of a suspension.

The difficulty with concluding the Employer unreasonably used discharge to sanction the Grievant's misconduct is that his account makes the litigation an all or nothing proposition. To credit the Grievant means Arevalo, Grover and Sater are deliberate liars. The record will not support that conclusion. Discrediting the Grievant's account, against this background, necessarily means he refused responsibility for proven misconduct. As the Employer asserts, the absence of such accountability affords no reason to believe progressive discipline could be effective. The evidence establishes that the Employer considered his length of service as well as the quality of his work performance. While either or both could reasonably point away from discharge, his unwillingness to candidly address the allegations undermines the effort. The good cause analysis is a reasonableness review of an Employer's exercise of disciplinary discretion. In the absence of any personal accountability by the Grievant for the misconduct, the Employer's conclusion that discharge was its only reliable option cannot persuasively be characterized as unreasonable.

As noted above, application of the two-element test can make analysis of the record deceptively straight-forward. It is thus necessary to tie the conclusions reached above more closely to the parties' arguments.

The parties dispute whether the burden of persuasion should be judged by a "preponderance of the evidence" or a "beyond reasonable doubt" standard. The record makes this an academic issue. Use of these standards comes into play when, after the development of an evidentiary record, doubt remains on determinative fact. The standards are used to resolve that doubt against one of the parties. See, RICHLAND COUNTY (HIGHWAY DEPARTMENT), MA-2313, DEC. NO. 5211 (MCLAUGHLIN, 5/82). What makes the standards unhelpful on this record is that the litigation poses an all-or-nothing issue. The determinative fact is whether the Grievant used racial slurs. The issue is all-or-nothing because the Grievant asserted the slurs never happened and all or virtually all of the slurs were made one-on-one. To treat this as a burden of persuasion issue does not resolve doubt on proof of a fact. Crediting one account over the other necessarily determines fact. Declining to credit either of the conflicting accounts does not resolve an evidentiary conflict, it ignores it.

Union arguments on the "beyond reasonable doubt" standard highlight the risk of error. The severity of discharge cannot be minimized. The current state of the economy and the Grievant's age make a job search an unwelcome prospect. This does not make the analogy to criminal standards of proof persuasive. Loss of work based on employer assessment of misconduct cannot be equated to governmental deprivation of personal liberty. Beyond this, whatever simplicity and informality the arbitration process offers cannot easily be reconciled to the full application of legal rules, including the rules of evidence and standards of proof.

The Union's statutory and due process arguments are forcefully put. The parties' arguments flirt with, but do not pose, whether or not the Employer complied with its statutory duty to bargain regarding the disclosure of investigatory materials.

The Union's more practical arguments on due process have persuasive force. It is not clear why no witness, other than the Grievant, was sworn to testify before Krueger. It is not clear what, if any, records the Mallin investigation generated. This complicates the determination of fact in arbitration. I have compared the Grievant's account to that of Sater, Grover and Arevalo only on arbitration testimony and on the January 19 interview. It is evident that the earlier investigations created doubt concerning the Grievant. I have neither used the Krueger report as a basis on which to find fact, nor attempted to determine what any witness in fact said to Mallin.

This does not mean all of the Union's due process concerns are persuasive. The lack of specificity to the allegations of the February 22 letter did not compromise the Grievant's ability to respond to them. Denying a less than specific allegation put no more burden on the Grievant than would denying a specific allegation. If he never used "nigger" in conversations with other employees, denial is simple, without regard to the Employer's difficulty in specifically dating the conversations. His equivocation speaks for itself.

That Grover, Sater and Arevalo did not report the comments in a timely manner does not undercut their testimony. The ease of approaching management should not be overestimated. In any event, there is no reason to believe that a prompter approach would alter the fundamental issue that the Grievant denies ever making the comments. The assertion that the testimony of Employer witnesses lacks corroboration is unpersuasive. The Grievant interacted with each differently, and the conversations were one-on-one. Jetzer's testimony offers some corroboration for the Grievant, but it is unclear if Jetzer heard the disputed conversation. His denial was general, and offers no specifics that could confirm that he and Arevalo were testifying about the same discussion. In any event, Rickey affirmed that Arevalo told her the same story regarding the Jackson reference that he told at hearing. This does not corroborate Arevalo's testimony, but underscores its consistency.

Stripped to its essence, this award seeks to address, as narrowly as possible, employment based misconduct. Broader issues swirl around this. All are troubling. Was Memorial a racially hostile work environment within the meaning of the State and Federal fair

employment acts? If so, did employees other than the Grievant contribute to that environment? Did the Employer's focus on the Grievant's use of "nigger" ignore the contributions of other employees? However problematic these broader issues may be, the good cause analysis turns on weighing the credibility of the Grievant's account against that of Grover, Sater and Arevalo.

This does not make the testimony of Union witnesses incredible. Hauge and Rickey were excellent witnesses. Their regard for the Grievant has a solid basis in his long service with the Employer and underscores the dilemma the grievance poses. This cannot obscure that they were not involved in the conversations involving racial slurs. Stalsberg and Likness were animated witnesses. This does not make their accounts incredible. As noted above, Stalsberg's testimony regarding how Sater relayed his conversation with Baker is credible and affords reason to question the degree to which Sater's penchant for gossip interfered with the reliability of his testimony. Stalsberg's and Likness' testimony indicates a belief that the Grievant was treated as guilty until proven innocent. This is troublesome, but cannot obscure the weakness in the Grievant's ability to account for his own actions or the implausibility of three witnesses fabricating events without any evident reason to.

In my view, the Union persuasively argues that the Grievant's interest in keeping his job does not establish an independent basis to consider his testimony incredible. Interest inevitably colors perception, but this explains nothing by explaining everything. Sater's tailoring his account of the Baker conversation to his audience can be traced to his interest in being accepted. This does not mean "tailoring" means "fabricating." The consistency of his account and his unwillingness to "tailor" it for Martinson and Likness points beyond an interest to be accepted. Even assuming discharge dictates such a high degree of self-interest that fabrication is highly probable unduly simplifies the analysis. How does self-interest in keeping his job explain the Grievant's equivocation? Did the same self interest in giving emphatic "no" responses on direct dictate his equivocal responses on cross? Why would his interest in self-preservation not dictate that he feign regret for however his statements were perceived and accept whatever discipline resulted? The imprecision of the allegations would support a defense that the Grievant's comments were misconstrued. The assertion they never happened makes the imprecision of the allegations less significant. The all-or-nothing posture of the litigation forces credibility determinations that could otherwise be finessed. Recourse to self-interest cannot explain the all-or-nothing posture of the grievance. This does not make resolution of the credibility issue any easier or less regrettable. In the end, Grover, Sater and Arevalo were more credible, rather than less interested, witnesses than the Grievant.

If the Grievant's speech was the sole basis for the discharge, it would stand on weaker ground. Part of the Grievant's account at the January 19 interview questions whether politics rather than work lie at the core of the tension at Memorial. Hearing testimony poses a series of dilemmas regarding speech. Is a racial slur worse than labeling a female employee a whore, slut or bitch? Is a racial slur not a slur if used by a sympathetic person, such as Grover or Sater? Is a racial slur not a slur if used by a minority such as Arevalo? Is a racial epithet benign if used by those included within the epithet, but malignant if used by the not included?

Were the racial slurs anything beyond the personal animosities swirling around Memorial? None of these issues dictate a specific conclusion, but highlight that the fundamental problem posed for the Union is that the Grievant did more than use the slurs. He asserted those who heard them lied, and he took no responsibility for the slurs. To credit their accounts over his means that more than speech was at issue and that the Employer reasonably viewed his speech as a part of broader misconduct that impermissibly contributed to the toxic work environment at Memorial.

AWARD

The Employer did not violate Section 3.04 of the Collective Bargaining Agreement when it discharged the Grievant, Don Taylor, for the allegations set forth in the letter dated February 22, 2010.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 19th day of April, 2011.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/rb
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