

BEFORE THE ARBITRATOR

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In the Matter of a Dispute Between

CITY OF KEWAUNEE

and

KEWAUNEE CITY EMPLOYEES, LOCAL 1470-B

Case 19  
No. 72104  
MA-15236

AWARD NO. 7892

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**Appearances:**

William J. Wolske, Kewaunee City Attorney, Office of the City Attorney, 510 Main Street, P.O. Box 146, Kewaunee, Wisconsin, appearing on behalf of the City.

Mark DeLorme, Staff Representative, Manitowoc-Sheboygan District, Wisconsin Council 40, AFSCME, 701 North 8th Street, Manitowoc, Wisconsin, appearing on behalf of the Union.

**ARBITRATION AWARD**

On June 6, 2013, the City of Kewaunee and Kewaunee City Employees, Local 1470-B, selected William C. Houlihan from a panel of Arbitrators provided by the Wisconsin Employment Relations Commission to serve as a grievance arbitrator in a dispute pending between the parties. A hearing was conducted on October 16, 2013, in Kewaunee, Wisconsin. No record of the proceedings was taken. Post-hearing briefs were filed and exchanged by December 2, 2013.

The Award addresses the termination of Dennis Grulkowski.

**BACKGROUND AND FACTS**

Dennis Grulkowski, the Grievant, was employed by the City of Kewaunee in the Department of Public Works since March 3, 2008. He was the Operator in Charge at the Wastewater Treatment Plant since June 8, 2011.

There were a number of complaints about Grulkowski over the years. Matt Murphy, a coworker, testified that he transferred out of the Wastewater Plant, in part, to get away from Grulkowski and, in part, to get a pay raise. According to Murphy, Grulkowski would raise his voice, complain about the council, and, if something went wrong, swear and scream. Murphy indicated that he was uncomfortable around Grulkowski and complained to Charlie Petersen, Public Works Director, ten to fifteen times.

Andy Smits was also a coworker of Gulkowski. Smits testified that he would complain to Murphy about Grulkowski once in a while. He found Grulkowski a little unfriendly and unpleasant at times. Smits indicated that, for the most part, he was comfortable with Grulkowski but at times the Grievant was a little over the top.

On or about January 12, 2013, Grulkowski met with Petersen and Brian Kranz, the City Administrator. Grulkowski was told of the complaints of his coworkers and that his behavior was regarded as disrespectful. He was further told that it had to stop and, if it did not, termination was possible.

At some point, in mid-February, Smits initiated a conversation with Murphy relative to Grulkowski. According to Murphy, Smits indicated that things would have to change or he (Smits) would look for another job. Murphy testified that Smits indicated that he felt intimidated by Grulkowski. Murphy advised Smits to talk with Petersen, but Smits responded that Murphy should talk with the Public Works Director.

Murphy went to Petersen and indicated that Smits felt intimidated and might quit. Petersen testified that he asked Smits if he was looking for work and that Smits replied it never hurt to look. Petersen further testified that Smits indicated that there were days that he (Smits) was scared to come to work.

Smits testified that Murphy never indicated he would talk with Petersen. According to Smits, had he known Murphy would go to Petersen he never would have said anything. Smits testified that he felt he was in the middle of a big circle, with Grulkowski, Murphy and Petersen all venting to him. He testified that he talked with Petersen after Murphy contacted the Public Works Director, but denies that he told Petersen he was looking for a job. Smits testified that he would never have left his job because of Grulkowski.

Petersen testified that he talked with Murphy and Smits one or two times per week. He indicated that they complained about Grulkowski's anger, tone of voice, and swearing. Petersen indicated that he talked with Grulkowski approximately every other week and that Grulkowski indicated he would change. Petersen described the sessions as one worker talking to another. The sessions were not counseling sessions nor were they considered disciplinary.

Grulkowski was never disciplined. Petersen indicated that there was no progressive discipline because he did not think the behavior was serious enough to warrant discipline.

Petersen's meetings with Murphy and Smits occurred while Grulkowski was out of town for two weeks at a training program. Following his meetings with the two men, Petersen determined that Grulkowski should be terminated. He brought his concerns and conclusions to City Administrator Brian Kranz who concurred.

Petersen drafted a letter of termination and, upon Grulkowski's return to work on February 15, 2013, convened a meeting involving the Mayor, Petersen, the Public Works Chairman, Kranz and Grulkowski. As the meeting opened, Petersen advised Grulkowski that he was immediately terminated. He thereafter read the following termination letter:

February 15, 2013

Dear Mr. Grulkowski:

You are hereby advised that pursuant to the City of Kewaunee Personnel Policy Manual and the Disciplinary Policy therein, your employment by the City of Kewaunee as Waste Water Plant Operator-in-Charge is immediately terminated.

Your termination is a result of disrespectful behavior in the workplace and your inability to communicate with coworkers. Following are some of the reasons for this termination:

1. You have been counseled many times by former Public Works Director Balleine, City Administrator Kranz, and I regarding your rudeness and angry outbursts in front of or at your co-workers causing a hostile work environment.
2. Your inability to control your anger has resulted in a workplace environment that is intimidating to those who work with you to the point that they are fearful to be in your presence and not wanting to work with you.
3. A lack of communication exists when you fail to acknowledge or ignore your co-workers by not speaking to them or by walking out of the room when they appear. Your lack of communication is also shown in failing to provide proper training on plant operations to co-workers and instead, assign menial tasks.

You are further advised that you are required to surrender all Kewaunee Waste Water Treatment Plant keys and computer

equipment immediately and all issued clothing in your possession to your supervisor by Monday, February 18, 2013.

You are further directed to the Personnel Policy Manual Sec. 5.10 concerning the grievance appeal procedure, a copy of which is attached.

Sincerely,

Charlie Petersen  
Public Works Director

Upon completion of the reading of the letter, Petersen asked Grulkowski if he had any questions and Grulkowski said “No.” Grulkowski was then escorted out.

On or about February 21, 2013, Grulkowski filed a grievance consistent with the provisions of the Personnel Policy Manual referenced in the termination letter.

Shortly after the termination, the Mayor advised the workers that the City had terminated Grulkowski. It was at that time that Robert Thompson, the Union President, found out about the termination. Thompson subsequently discovered that Grulkowski had filed a grievance. Grulkowski called Thompson for support. Thompson talked with Petersen on February 21, 2013, and asked why Grulkowski had been terminated. Thompson represented Grulkowski in the contractual grievance procedure thereafter.

Post discharge Smits opened up an email exchange with Grulkowski. In the exchange Smits explained that he did not start any of this, that he never said anything bad about Grulkowski, that he felt it was “bullshit” what they did, and that he tried to explain but nobody would listen. The men exchanged friendly correspondence for a period of four months following the termination.

### **ISSUES**

The City regards the issues to be:

Is the grievance arbitrable? If not, what is the appropriate remedy?

Did the City violate Article I – Management of the collective bargaining agreement when it terminated the Grievant due to his misconduct? If so, what is the appropriate remedy?

The Union believes the issue to be;

Did the Employer terminate the Grievant with just cause? If not, what is the appropriate remedy?

**RELEVANT PROVISIONS OF THE PERSONNEL POLICY MANUAL**

**SEC. 1.1 PERSONNEL OBJECTIVES AND ADMINISTRATION.**

(a) **Applicability; Collective Bargaining and Employment Agreements.** The personnel policies, procedures, rules, and regulations set forth in this City of Kewaunee Manual shall be applicable to all City of Kewaunee employees including sworn and non sworn personnel. The policies, procedures and rules set forth shall take precedence over any previously adopted work rules with the exception of any policy or procedures established in an existing Collective Bargaining Agreement or an Employment Agreement, Federal law or the Wisconsin State Statutes. In such an event, the language in the Collective Bargaining Agreement or an Employment Agreement shall be considered binding and shall supersede the policies contained herein.

\* \* \*

**SEC. 5.4 RESPECTFUL WORKPLACE POLICY (includes sexual harassment prevention)**

(a) **General Policy.** The intent of this policy is to provide general guidelines about the conduct that is and is not appropriate in the workplace. The City acknowledges that this policy cannot possibly predict all situations that might arise, and also recognizes that some employees are exposed to disrespectful behavior, and even violence, by the very nature of their jobs.

(b) **Applicability.** Maintaining a respectful work environment is a shared responsibility. This policy is applicable to all City personnel including regular and temporary employees, volunteers, firefighters, and City Council members.

\* \* \*

(d) **Types of Disrespectful Behavior.** The following types of behavior cause a disruption in the workplace and are, in many instances, unlawful and subject to disciplinary action:

(1) Violent behavior includes the use of physical force, harassment, or intimidation.

...

(3) Offensive behavior may include such actions as: rudeness, angry outbursts, inappropriate humor, vulgar obscenities, name calling, disrespectful language, or any other behavior regarded as offensive to a reasonable person. ...

\* \* \*

**(f) Department Head's Response to Allegations of Disrespectful Workplace Behavior.** Employees who have a complaint of disrespectful workplace behavior will be taken seriously. In the case of sexual harassment or discriminatory behavior, a Department Head must report the allegations within two (2) business days to the City Administrator, who will then report the incident to the Mayor and a determination will then be made whether an investigation is warranted. A Department Head must act upon such a report even if requested otherwise by the complainant. In situations other than sexual harassment and discriminatory behavior, a Department Head will use the following guidelines when an allegation is reported:

Step 1. If the nature of the allegations and the wishes of the complainant warrant a simple intervention, the Department Head may choose to handle the matter informally. The Department Head may conduct a coaching session with the alleged offender, explaining the impact of his/her actions and requiring that the conduct not reoccur. This approach is particularly appropriate when there is some ambiguity about whether the conduct was disrespectful.

Step 2. If a formal investigation is warranted, the individual alleging a violation of this policy will be interviewed to discuss the nature of the allegations. The person being interviewed may have someone of his/her own choosing present during the interview. The investigator will obtain the following description of the incident, including date, time and place:

- Corroborating evidence.
- A list of witnesses.
- Identification of the alleged offender.

Step 3. The Department Head must notify the City Administrator about the allegations.

Step 4. As soon as practical after receiving the written or verbal complaint, the alleged policy violator will be informed of the allegations. The alleged violator will have the opportunity to answer questions and respond to the allegations.

Step 5. After adequate investigation and consultation with the appropriate personnel, a decision will be made regarding whether or not disciplinary action will be taken.

Step 6. The alleged violator and complainant will be advised of the findings and conclusions as soon as practicable.

## **SEC. 5.9 DISCIPLINARY PROCEDURES.**

### **(a) Disciplinary Procedures.**

- (1) The following disciplinary procedures shall be employed in disciplinary matters of City employees, unless these procedures are superseded by more specific procedures contained in a current employment or Collective Bargaining Agreement. Whenever rules and policies of the City are broken or an employee unsatisfactorily performs, the following disciplinary procedures will be followed. In each instance, the disciplinary action taken is to be fair, just and in proportion to the seriousness of the violation.
- (2) Whenever an employee violates any of the rules and regulations outlined in this Manual, the City may begin progressive disciplinary action with any of the steps listed below, depending on the seriousness of the offense committed and provided that immediate discharge is not warranted by the seriousness of the violation.

...

**(b) Classification of Misconduct.**

- (1) Minor Offenses. Violations or conduct which are unacceptable if repeated, but for which the employee will not be discharged for the first offense.
- (2) Serious Offenses. Willful or deliberate violations or conduct of such a nature that the first offense may indicate that continued employment of the employee is not in the best interest of the City.

**(c) Disciplinary Considerations.**

- (1) Prior to taking disciplinary action, the Department Head or other authority reviewing the violation should give full consideration to the following guidelines:
  - a. Do the reviewing officials know all the facts accurately?
  - b. Is the rule that has been violated reasonable?
  - c. Did the employee know the rule or should the employee reasonably have known it?
  - d. Has the rule been strictly enforced in the past? If not, what recent notice to employees warned of enforcement on violations of certain rules?
  - e. In this instance, is the rule being applied reasonable?
  - f. Is this employee personally guilty of the violation or is the employee only guilty by association with another?
  - g. Can the employee's guilt be proved by direct, objective evidence, or is the evidence hearsay?
  - h. Does the employee have a reasonable explanation for the infraction of this rule or not following a direction of his or her Department Head?
  - i. What is the employee's record of past violations, warnings, disciplinary action, etc.?



- j. What is the employee's length of service?
- k. Is the employee receiving the same treatment others received for the same offense?
- l. Does the discipline fit the offense?

...

(d) **Progressive Disciplinary Procedures.** If, in the opinion of the Department Head, immediate discharge is not warranted by the seriousness of the violation, the following progressive disciplinary measures shall be followed:

(1) Verbal Warning – Step One. ...

(2) Written Warning / Reprimand – Step Two. ...

(3) Suspension – Step Three.

- a. Any action on the part of any employee which is in violation of the orders of the employee's Department Head or contrary to the Wisconsin Statutes, City ordinances or policies/rules of the City, but not serious enough to warrant immediate dismissal; may be disciplined by suspension without pay by the City Administrator after being provided written notice of the City's intent to suspend and the grounds for suspension. Such notice shall be personally delivered or by certified mail.

\* \* \*

(4) Dismissal – Step Four. The City Administrator shall recommend and upon approval of the City Council, shall discharge a non-law enforcement or non-firefighter City employee as a result of a serious offense or as the final step in the accumulation of minor offenses. Prior to dismissal, the employee shall be given an opportunity to discuss the reason(s) being considered for his or her dismissal in a meeting with the City Administrator. The notice of dismissal shall be in writing and shall state the specific charges with such clarity and particularity that the employee will

understand the charges made against him or her and will be able to answer them if the employee so desires.

...

- (e) **Serious Violations.** It should be emphasized again that the City is not required to go through all the steps (Steps One – Four) above involved in this disciplinary procedure. Discipline may begin at any step in the procedure depending on the seriousness of the offense committed. Any discipline should be commensurate with the offense committed.

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#### **SEC. 5.10 GRIEVANCE PROCEDURES.**

- (a) **Policy.** It is the policy of the City to ensure that employees receive fair and equitable treatment; to provide employees with an easily accessible procedure for expressing dissatisfaction; and to foster sound employee-supervisor relations through communication and reconciliation of work-related problems. The employee Grievance Procedure described herein has been established as a primary means of meeting these policy objectives. ... An employee may appeal any level of discipline under this grievance procedure. If, however, the employee has already used another grievance procedure, such as one available under a Collective Bargaining Agreement or one provided under laws and administrative rules of the state or federal governments, the grievance procedure described here cannot be used. ...
- (b) **Definitions.** For the purposes of this policy, the following definitions apply:

\* \* \*

Discipline. Discipline means any employment action that may result when an employee's actions do not conform with generally accepted standards of good behavior, when an employee violates a policy or rules, when an employee's performance is not acceptable, or when the employee's conduct is detrimental to the interests of the City. ... Discipline includes all levels of progressive discipline, but shall not include the following items:

- Oral reprimand that is not memorialized in writing and placed in the employee's personnel file;

...

- Counseling, meetings or other pre-disciplinary action;

\* \* \*

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

### **ARTICLE I - MANAGEMENT**

Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or discharge or otherwise discipline for proper cause, and the ... is vested exclusively in the Employer. ...

## **ARTICLE X – GRIEVANCE MACHINERY**

The Employer and the Union agree that the prompt and just settlement of grievances which may arise from time to time is of mutual concern and to mutual advantage. Should a grievance arise, a grievance committee elected by the members of the Union shall investigate the complaint, and if in its opinion, it determines that a grievance exists, shall proceed in the following manner:

Step 1: The grievance committee shall discuss the matter with the Director of Public Works, and if a satisfactory solution is not reached, the grievance shall proceed to Step 2.

Step 2: The grievance shall be reduced to writing and presented to the Personnel Committee of the Common Council of the City of Kewaunee, and if no satisfactory adjustment of the grievance can be reached, the procedure in Step 3 shall be followed.

Step 3: The written complaint shall be presented to the Common Council, and if no satisfactory adjustment can be reached, the grievance shall be submitted to arbitration.

Arbitration: Should any differences arise between the Employer and the Union as to the meaning and application of this Agreement, or as to any questions relating to wages, hours and working conditions, failure to negotiate in good faith, or deadlock in negotiation, they shall be settled as follows: ... If neither party opts for a panel, the WERC shall select an arbitrator from its staff, who shall serve as sole arbiter.

## **DISCUSSION**

The City believes this matter is not arbitrable because there was no committee within the meaning of Article X. The record testimony indicates that there has never been a multi-member grievance committee. Thompson testified that, as President of the Local, he was elected by the membership and is a member of all committees. It appears that the Local has determined to operate with a one-person committee. Thompson testified that there was one prior grievance involving the parties.

The parties to this proceeding are not sophisticated users of the grievance procedure. The Grievant was directed to use the Personnel Policy Manual, Section 5.10, should he elect to file a

grievance appeal. Section 5.10 indicates that it is to be used unless "... the employee has already used another grievance procedure, such as one available under a Collective Bargaining Agreement ... ." The Grievant filed a grievance under the Personnel Manual. The Union was not brought into the dispute until post discharge. Once brought into the dispute, Thompson talked with Petersen about the basis for Grulkowski's termination. Thompson testified that he was dissatisfied with the reasons for the discharge. This appears to satisfy Step 1 of the grievance procedure. Step 1 is the only place the committee has a role.

The City would like to go back and have the Union elect more members to the committee and re-investigate the grievance. The Union is satisfied that a one member committee is adequate to the task set forth in the grievance procedure. I do not think it is the province of the City to tell the Union how many members it is to elect to the committee. The contract is silent. The law generally reserves to each party the right to identify who will represent it in its dealings with the other side.

Having guided the grievant to the Personnel Policy Manual grievance procedure, I believe the City is estopped from complaining that Grulkowski used it as the initial step. The provisions of the collective bargaining agreement have been complied with. There is no purpose in starting all over. All parties were on notice as to the existence of a grievance and its underlying claim. The matter proceeded in a timely fashion.

There are no deadlines in Article X. This is not a case where the grievance would be void or time barred because a deadline was missed. Directing this back for reconsideration would be wasteful and expensive.

The grievance is arbitrable.

The substance of the discharge was drawn from the Personnel Policy Manual. The Personnel Policy Manual treats employees as employees-at-will. Under the terms of the collective bargaining agreement, an employee has just cause protection. However, much of the process laid out in the manual is common to that found in traditional just cause analysis.

The manual has a provision, Section 5.4, which addresses the need to maintain a respectful workplace policy. The policy identifies types of disrespectful behavior. The behaviors described are the kinds of activities that have generated just cause analysis. The conduct described in Section 5.4(d) form the basis for Grulkowski's discharge.

Section 5.4(f) lays out the responsibility of the department head following allegations of disrespectful workplace behavior. In this proceeding Petersen determined that the conduct was such that a Step 2 response was appropriate. He thus initiated the formal investigation described in Step 2. However, Step 4 requires that a part of the investigation include the "alleged violator." A part of the investigation requires that "[a]s soon as practical after receiving the written or verbal complaint, the alleged policy violator will be informed of the allegations." The manual describes why the "alleged violator" must be a part of the investigation. It goes on to provide that "[t]he alleged violator will have the opportunity to answer questions and respond to the

allegations.” That was not done here. The investigation was completed without Grulkowski’s involvement. He was called into a meeting and summarily fired. He was then read the letter that set forth the reasons for his termination and thereafter asked if he had anything to say.

Step 5 requires that the investigation be completed, including consultation with the appropriate personnel, before a decision is made regarding discipline. The Grievant was certainly an “appropriate personnel” within the meaning of Step 5. He is the one person who is required to be interviewed under Step 4.

The manual has a detailed Disciplinary Procedure, Section 5.9. The disciplinary procedure has a progressive discipline component. The City regards the progressive discipline provision to be discretionary and felt the conduct in this matter to be so serious as to warrant discharge. It is not clear why.

Grulkowski had worked for the City for just under five years and had never been disciplined. Concerns about his workplace demeanor had been raised on a number of occasions. Petersen had addressed the concerns with Grulkowski. No discipline had been issued. Petersen indicated that no discipline was forthcoming because he did not regard the conduct to be such that discipline was appropriate. As late as January 12, 2013, Petersen and Kranz cautioned Grulkowski about his conduct and warned him about the consequences of his future behavior. No discipline was issued. Section 5.10 of the manual contains a description of discipline; and oral reprimands, counseling sessions, and the like are specifically excluded from the definition of discipline.

According to both Kranz and Petersen, Grulkowski was terminated for the incident or concerns arising from Petersen’s conversation with Smits. Between January 12, 2013, and the date of his discharge, Grulkowski was away from work attending a training program for two weeks. It is not clear from the record that Grulkowski’s behavior deteriorated, improved, or remained the same during the period January 12 to February 1, 2013, or so. There was no outburst or other precipitating event reported. Smits testified that the conversation he had with Murphy was intended to be a venting session and no more.

The City determined to proceed directly to dismissal. Under the terms of the manual, Section 5.09(d)(4), the approval of the City Council is required to terminate an employee. There is no indication in the record that such pre-discharge approval was sought. This provision also provides that the employee will be given a bill of particulars and an opportunity to address the concerns before the discipline is invoked. As previously noted, the termination preceded the reading of the letter and opportunity for a response.

The City did not honor any of the processes set forth in the manual.

At hearing, Smits testified that he was generally comfortable working around Grulkowski, though at times the man was a little over the top. He further indicated that he was not looking to leave and would not have left because of the Grievant. Kranz testified that, if Smits had indicated that he was not intimidated by Grulkowski, it would change his view as to

the application of discipline. At hearing, Murphy indicated surprise that Grulkowski had not previously been disciplined. He found it very surprising that Smits would initiate an email exchange with Grulkowski, and indicated that the content of that exchange was inconsistent with what Murphy had said to him. At hearing, Petersen indicated that Smits testimony was far different from what he had conveyed to him.

The lack of progressive discipline, the lack of a meaningful investigation and the failure to provide Grulkowski a meaningful opportunity to confront the employer's concerns had significant influence in this matter. The purpose of all this process is to identify and sort out all of the facts before invoking discipline. It is intended to prevent a rush to judgment.

This Award addresses the existence of just cause under the terms of the collective bargaining agreement. I do not believe the City had just cause for the termination of Grulkowski.

There was no progressive discipline. I regard the lack of progressive discipline as important in this case. Whatever the Grievant's workplace behavior was, Petersen did not believe that it was sufficiently onerous as to warrant a verbal warning prior to the discharge. He talked with Grulkowski on a number of occasions. Kranz and Petersen met with the Grievant on January 12, 2013, and warned him about his behavior, but no discipline was issued.

Grulkowski was away from work at a training session for the two weeks preceding his discharge. There was no evidence in the record as to how the Grievant's behavior from January 12 to February 1, 2013 compared to previous behavior. It is possible the behavior was no more serious than the conduct that caused Petersen to talk with him in the past but not so serious as to warrant even a verbal warning. It is possible that the January 12, 2013 talk had an impact and the behavior was toned down. The record is silent. There was no evidence of a precipitating incident.

The discharge was brought about because of conversations between Murphy, Petersen and Smits. It appears that the conclusions drawn from those conversations was that Smits was intimidated, reluctant to come to work, and looking to leave his job. Those conclusions are more concerned with how Smits was reacting to Grulkowski than with any particular behavior of Grulkowski. The interview with Smits should certainly have been more rigorous. It appears that Smits conversations were all over the place. Grulkowski should have been interviewed as a part of the pre-termination process. At a minimum, it would have provided an opportunity for a discussion or an explanation of the concerns. Grulkowski had a right under the manual, the contract, and the Constitution (Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)) to be confronted with the concerns and allowed an opportunity to respond before he was terminated. If the conduct was really deemed unacceptable, someone should have put Grulkowski on notice with some form of progressive discipline.

I do not believe the punishment fit the crime. There is no evidence that Grulkowski said or did anything between January 12, 2013 and his termination that would warrant discharge.

**AWARD**

The grievance is sustained.

**REMEDY**

At hearing, the Grievant testified that he did not seek reinstatement. There is therefore no order to reinstate the Grievant. The discharge was without cause and the City is directed to expunge the Grievant's files of all references to the discharge. The City is also directed to make the Grievant whole for his economic losses incurred between the date of his discharge and the date the Grievant secured a new job. The City is entitled to offset the back pay with interim earnings or Unemployment Compensation, if appropriate.

Dated at Madison, Wisconsin, this 23rd day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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William C. Houlihan, Arbitrator