MICHIGAN EMPLOYMENT RELATIONS COMMISSION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration
between
Employer Issue: Termination/Grievant

-and-

Union
_____/

SUBJECT

Discharge for alleged poor performance.

ISSUE

Did the Employer have just cause to discharge Grievant?
If not, what shall the remedy be?

CHRONOLOGY

Discharge: June 3, 2010
Grievance Filed: July 8, 2010
Arbitration Hearing: January 6, 2011
Briefs Received: January 28, 2011
Award Issued: March 23, 2011

APPEARANCES

For the Employer: Employer Law Firm, by Employer Representative
For the Union: Union Representative

SUMMARY OF FINDINGS

The grievance is GRANTED in part. The Employer had just cause to discipline Grievant, but not to discharge her for failure to follow regulations and failure to treat students with dignity and respect. The discharge shall be reduced to a two-day disciplinary suspension. In order to maximize her potential for success upon reinstatement, Grievant shall be offered reinstatement to her former position as a dishwasher. Grievant shall be awarded back pay in accord with the parties' negotiated agreement.

RELEVANT CONTRACT PROVISIONS

ARTICLE III - MANAGEMENT RIGHTS

The Employer retains all rights, powers and authority vested in it by the laws and constitution of Michigan and the United States. The Board reserves unto itself all rights, powers and privileges inherent in it or conferred upon it from any source whatsoever, provided, however, that all of the foregoing being manifestly recognized and intended to convey complete power in the Board shall nonetheless be limited but only as specifically limited by express provisions of this Agreement and under the Public Employment Relations Act as amended. Rights reserved exclusively herein by the Employer which shall be exercised exclusively by the Employer without prior negotiations with the Union either as to the taking of action under such rights or with respect to

the consequence of such action during the term of this Agreement shall include by way of illustration and not by way of limitation, the right to:

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(c) Direct the working forces, including the right to hire, promote, suspend and discharge employees, transfer employees, assign work to employees, determine the size of the work force and to lay off employees, but not in conflict with the specific provisions of this Agreement.

ARTICLE IV - UNION'S RIGHTS

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Section 7: **NOTICES TO UNION.** The Employer shall promptly notify the Union President in writing of the names of employees who are laid off for lack of work, recalled to work after such layoffs or discharged for cause. For the purpose of the time limits specified in Section 2 of Article VI and Section l(a) of Article VII the delivery of such written notice shall constitute knowledge of such action and the time limits shall date from such delivery.

ARTICLE V - EMPLOYEE'S RIGHTS

Section 1: **EMPLOYEES' RIGHTS.** Nothing contained herein shall be construed to affect any rights or obligations any bargaining unit employee may have under the Michigan General School Laws or any other State or Federal laws and regulations.

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Section 4: **COMPLAINTS AGAINST EMPLOYEES.** In the event a complaint or charge is made by any person or group, not employed by the Employer, against any bargaining unit member, if such complaint or charge is to be made a part of the employee's personnel record it must be signed by the complainant, delivered to Administration and the employee shall be given full information with respect thereto and with respect to any investigation conducted by the Employer. If such complaint or charge is to precipitate discipline, the Employer will invite the complainant to meet directly with the employee and school officials. If the employee so chooses, he/she may attach his/her explanation or statement in reference to said complaint.

ARTICLE VII - DISCIPLINARY PROCEDURE

Section 1. No non-probationary employee shall be disciplined (including warnings, reprimands, suspensions, demotions, or other actions of a disciplinary nature) without just cause. Any such discipline of non-probationary employees, except oral reprimands, shall be subject to the grievance procedure as provided in Article VI. The specific grounds forming the basis for disciplinary action, excluding verbal warnings, will be made available to the employee and the Union in writing.

(a) In the event an employee is discharged and the employee believes he/she has been unjustly discharged, he/she may file a grievance as described in Article VI. Such discharge shall constitute a case arising under the grievance procedure, provided a written grievance is presented to the Supervisor or official who initially processed the termination within five (5) regularly scheduled working days after such discharge. Such grievance shall be processed starting at the second step of the grievance procedure.

(b) If it is decided under the grievance procedure that the employee has been unjustly discharged, the Employer shall reinstate the employee according to the terms of the grievance resolution. If back pay is awarded, the back pay will be reduced by an amount equal to the employee's earnings during the period of discharge from any

employer in excess of the earnings level prior to the discharge and the amount of any disability or unemployment compensation received by the employee during the discharge period.

Section 2: **DISCIPLINARY ACTION.** Any disciplinary action against an employee shall be taken in accordance with the following guidelines, namely:

(a) The employee shall be advised as to the specific violation(s) for which disciplinary action is to be taken and shall be provided with all necessary information forming the basis for such action.

(b) The Employer shall affirmatively advise the employee that the employee has a right to have a representative of the Union present at any conference or meeting investigating possible discipline and at a formal conference at which an employee is to be disciplined, provided that the conference need not be delayed for an unreasonable time until such representative can be present and in no event shall the Employer be restricted from taking such protective action as the Employer may determine to be necessary in order to protect the rights of students or other persons pending the holding of the formal conference. For the purpose of this provision, a "formal conference" is defined as one that has been pre-arranged.

Article XVIII - GENERAL

Section 1: **RULES OF CONDUCT.** The Employer shall have the right to establish reasonable rules of conduct and change or add to the same from time to time, as, in its judgment, the need to do so arises...

BACKGROUND

At the time of her discharge the Grievant had been employed by Employer ("the District") for nine and one-half years. She was initially hired as a dishwasher, but more recently and until her discharge worked as a food service/cook's helper at the elementary building. Grievant was a member of the bargaining unit represented by the Employer Educational Support Personnel Association ("the Association"). The District and the Union are parties to a collective bargaining agreement effective at all times relevant to this grievance.

The incident that led to Grievant's discharge occurred on June 2, 2010. Elementary Food Service Director (“Director”) testified that Food Service Cashier called her to tell her that Grievant had "grabbed" some elementary school students during the lunch hour that day. Because Elementary Food Service Director works in another building over the lunch hour, she called elementary Principal to learn what he knew about the incident. Principal said that after Director's call, he interviewed the two students who were involved in the incident. He testified that the girls said that Grievant had gotten upset with them because they had entered the lunch room in socks during the sixth grade lunch. Principal said that the girls told him that Grievant had taken them by the arm and walked them out to find their teacher, which surprised and scared them a little. Principal testified that no staff member should ever touch a student and that if the students needed to be removed, Grievant should have called the lunch monitors to take away the girls.

Grievant testified that she told the girls to calm down because when they entered the lunch room, they were being very loud She said when she realized they weren't wearing shoes, she asked them where their shoes

were and they replied that their teacher had told them they could go to lunch in their socks. Grievant said that she told the girls they had to leave, but denied grabbing them by the arm. She said the lunch monitor thanked her for catching the girls, saying she hadn't noticed they weren't wearing shoes. Grievant said she went to find the girls' teacher after her shift was over and her work was done to see if the teacher had given the girls permission to come to the lunchroom in their socks.

After speaking to Principal, Director called her supervisor, Director of Finance and Operations ("Director 2"), to tell her that Grievant had escorted two students out of the lunchroom after they had tried to come in wearing only socks. Director 2 told Principal to set up a meeting with Grievant the next morning, so Director called Grievant to tell her of the meeting and to suggest that she bring union representation.

Director 2 also called Principal to learn what he knew and he related what the students had told him. Director 2 then spoke to Superintendent, telling him that unless Grievant had some explanation for what happened, she thought dismissal would be appropriate. Thereafter, she drafted a termination letter, which states, in relevant part:

> Attached is a summary of work issues that were discussed with you on May 11, 2010 and again addressing the issues of June 2, [2]010. There have been numerous occurrences over the past several years that we have had discussions about. Our expectations for food service employees are that they will meet the needs of the students by complying with State and school district guidelines. Students must be fed Type A lunches with all components, all State Safe Food guidelines must be met at all times and students must be treated with courtesy and respect. Unfortunately you have not met those expectations. We have had numerous complaints from teachers and parents regarding these issues.
>
> As we discussed in this meeting your last day or employment with Employer was June 2, 2010. I am sorry our discussions have not led to your success as a food service employee. (Joint Exhibit 2)

The "summary" of work issues referred to in the termination letter identifies the following issues that were alleged to have taken place on June 2, 2010:

> • Food ran out and [Grievant] did not have additional food prepared.
> • Students were allowed to take only breadsticks and milk which does not constitute the four components of a Type A meal
> • Two students came in without shoes, she yelled at the students and then grabbed them by the arm
> • She left her work station and went to confront the teacher about the students without shoes

In addition, the summary reiterated concerns that were raised in a prior memorandum given to Grievant on May 11, 2010. Director 2 testified that the June 2 incident standing alone would not have led to Grievant's discharge, but that Grievant had been given numerous opportunities over the past five years to improve her conduct, job performance and relationships with staff and students, stating, "I spent more time with [Grievant] than any other employee in the District."

Grievant arrived the next morning without union representation and met with Director 2, Principal and Director. Director recalled that Grievant declined union representation saying it wouldn't do her any good anyway. Grievant explained that she did not bring union representation because she had concluded that the union steward would not be of assistance to her, because Grievant was aware that the union steward "wanted her out." Union steward is the same coworker who had called Director to complain about Grievant.

Director 2 said that when she asked Grievant if she knew why she was there, Grievant said that she had "had a really bad day yesterday." Director 2 recalled asking Grievant if she had anything to say, and Grievant replying something to the effect of it wouldn't do any good anyway, and left. Principal testified that he did not recall Grievant responding in any way, neither explaining nor apologizing. Grievant recalled that at the meeting she had denied grabbing anyone's arm.

After the meeting, Director 2 mailed the termination letter to Grievant's home. The Union requested and was granted an extension on the time to file an initial grievance. Grievant and her Union Representative met with Director and Director 2 on July 8, 2010 to discuss the termination. The written grievance was filed that same day, alleging violation of Article VI, §§ 1 and 3, Article VII § § 1 and 2, and other relevant provisions of the collective bargaining agreement. The matter was processed through the steps of the grievance procedure. After the Step Two meeting, Director 2 sent an email to Grievant's union representative stating, in part,

> However, there is some information that you relayed at our previous meeting that was inaccurate… In short, there were four students who had difficulty with [Grievant] on June 2, 2010. Two students without shoes were yelled at and two different students were grabbed and removed from the lunch lines.
>
> Union representative responded by email,
>
> You did not bring up the issue of four students at the previous meeting. Why is that? It might have helped in our discussion and efforts to get a clear understanding,
>
> Director 2 replied,
>
> I didn't know. Director kept thinking about it and was trying to remember what Union Steward had told her. Union Steward wrote up a summary of incidences for us on July 15. Union Steward's statement was entered into the record as Employer's Exhibit 5 over the Union's objection.

The initial grievance sought reinstatement and a make whole remedy for Grievant. After the Step Three meeting, the Union amended the remedy sought to include removal of two documents that it learned had been placed in Grievant's personnel file. Thereafter, a demand for arbitration was made. Arbitrator was selected by the parties to hear the case through the Michigan Employment Relations Commission. A full evidentiary hearing was held on January 6, 2011, in City, Michigan. Both parties had full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses and to file post hearing briefs.

DISTRICT'S POSITION

The District contends that it has demonstrated that it had just cause to terminate Grievant's employment. The District contends that its witnesses testified credibly and consistently regarding the conduct that led to Grievant's discharge. The District contends that the events of June 2 were the "straw that broke the camel's back" because Grievant was advised, directed, and warned about her conduct "to no avail."

The District contends that it has shown that on June 2, Grievant failed to prepare ample food, causing the lunch serving process to fall behind and thereby leaving students insufficient food for a Type A meal. The District further contends that it demonstrated that Grievant left her work station and "grabbed" two girls under the arm, "yanking" and "screaming" at them while removing them from the cafeteria.

The District contends that Grievant's conduct on June 2 must be evaluated in light of her prior disciplinary record, none of which was grieved. The District contends that discharge is appropriate, because it previously imposed lesser discipline for similar misconduct. Further, the District contends that Grievant's supervisors documented their concerns in Grievant's evaluations.

The District contends that it has imposed reasonable work rules, and that Grievant has failed to comply with them. The District contends that Grievant was negligent in the performance of her assigned duties. The District contends that Grievant was insubordinate in that she failed to follow directives of her supervisors. The District contends that it has met all the criteria laid on in the often used "Seven Tests" of Just Cause.

The District contends that the arbitrator should not substitute her judgment for the good faith judgment exercised by the District in making a determination to discharge Grievant. It further contends that Grievant has failed to prove any of the other claims alleged in her grievance, namely that her rights under Article V or Article VII were violated. Finally, the District contends that Grievant has failed to mitigate her damages and is not entitled to back pay in the event her grievance is sustained.

UNION'S POSITION

The Union contends that the District has failed to prove that discharge was the appropriate response to Grievant's conduct on June 2. The Union contends that the District should have reassigned to Grievant back to dishwasher, the position she originally applied for and held until her supervisors transferred her to cook's helper. The Union contends that Grievant's medical conditions would be better served if she worked as a dishwasher, rather than as a cook's helper.

The Union contends that the District gave mixed signals to Grievant, telling her that her performance needed to improve, and then rating her as "average" in her performance evaluation. The Union contends that the only formal discipline Grievant received prior to her discharge was the oral reprimand she received on November 4, 2008. The Union contends that the May 11, 2010, memo given to Grievant was not discipline, as

it wasn't identified as disciplinary and it was given to Grievant without an investigation or opportunity for Grievant to tell her side of the story.

The Union contends that the District failed to provide Grievant with adequate instruction in food preparation, serving, and cleaning, because it waited until April and May of 2010 to provide her with formal training. Further, the Union contends, although the District was critical of Grievant's job performance, it made no effort to provide her with a specific plan of improvement or any performance-based training.

The Union contends that the District recognized that Grievant was able to perform better as a dishwasher than a cook's helper, and transferred her back to dishwasher in February 2009. Yet, the Union contends, the District again reassigned her to cook's helper, although Grievant did not request to be transferred.

With respect to the items identified in the June 3 termination letter, the Union contends that the testimony demonstrated that it was not the responsibility of the cook's helper to prepare food ahead of time for the day, and that no server can force a student to take food that constitutes a Type A lunch. Further, the Union contends that there were protein alternatives available to the students at all times.

The Union contends that the District failed to do a thorough and complete investigation before discharging Grievant, as evidenced by the changing allegations against Grievant. The Union contends that the District initially charged Grievant with grabbing two students by the arm, then saying that four students were involved, then reverting back to two students. Further, the Union contends that the District failed to demonstrate that Grievant left her work station to "confront" the girls' teacher, and that the evidence shows that she spoke to the teacher after her shift ended.

Finally, the Union contends that the District violated Grievant's due process rights, including the right under Article V, § 4 to be made aware of complaints from persons not employed by the District, by not sharing alleged complaints from parents with her. The Union contends that Grievant was deprived of an opportunity to review or respond to these alleged complaints. The Union charges the District with failing to provide Grievant with forewarning of the probable consequences of misconduct and with failing to use progressive discipline.

DISCUSSION AND FINDINGS

In disciplinary matters such as this, the employer bears the burden of proving that the grievant has engaged in the misconduct for which the grievant was disciplined and that the level of discipline is appropriate under all the circumstances, as well as any alleged aggravating factors. Thereafter, union on behalf of the grievant bears the burden of proving any affirmative defenses and mitigating factors. An arbitrator's review is typically two-fold; to determine first whether the misconduct charged has been proved and if so, to determine whether the penalty is appropriate after considering all the factors.

Here, Grievant was charged with failing to comply with State and federal guidelines regarding food service, and failing to treat students with courtesy and respect. Both of these charges arise out of events that occurred on June 2, 2010, but the District readily acknowledges that it would not have discharged Grievant for

this alleged misconduct but for her prior disciplinary record. Perhaps because of this, the District introduced a significant amount of evidence that was unrelated to the specific charges outlined in the June 3 termination letter and to the summary of work issues attached to the letter. For instance, the District's first witness did not work with Grievant after May 1, 2010.

In order to determine whether Grievant is guilty of the charged misconduct, my focus must remain solely on the two areas identified in the letter: failure to follow food service guidelines and failure to treat students with courtesy and respect. The specific behaviors identified to support these charges are that 1) Grievant allowed food to run out and did not have additional food prepared, 2) students were allowed to take only breadsticks and milk which does not constitute the four components of a Type A meal, 3) Grievant yelled at and then grabbed by the arm two students who came in without shoes and 4) Grievant left her work station and went to confront the teacher about the students without shoes. While several witnesses testified regarding Grievant's alleged misconduct, only Union Steward and Grievant offered firsthand accounts of what occurred on June 2. Each allegation will be discussed in turn.

With respect to the first and second charges, Grievant allowed that the food line ran out during the sixth grade lunch on June 2, but explained that it is Director's job, not hers, to determine how much food to prepare for each day. Director said that Grievant's duties included ensuring that students take the right size portions of food, bringing food to the correct temperature for serving, and keeping sufficient food ready in the lunch line. Grievant said that when she realized that they were running short of macaroni and cheese, she heated a pan of ravioli, but eventually both choices ran out. Grievant added that even then, there were protein and vegetable choices available to students, such as salads, vegetables, sandwiches, yogurt, string cheese and cereal. She said that although students went through the main line after only breadsticks and milk were left, a student can select just these options regardless of what other options are available. Other food service employees agreed that although the food service must offer the components of a Type A lunch, a student may choose anything for lunch, and the school is not required to ensure that the students takes the elements of a Type A lunch.

Union Steward Wolfe said that during the sixth grade lunch period, food ran out on the main food line, leaving only breadsticks and milk for the students to choose. She said that after Grievant returned from escorting the girls out of the lunchroom, Union Steward pointed out the food shortage. Union Steward Wolfe said that Grievant panicked but got additional food to be served. Union steward estimated that by leaving during the lunch service, Grievant caused it to fall behind by 15 to 20 minutes, when the students have only 15 to 20 minutes to eat, and then a 15 to 20 minute recess.

There is substantial evidence that food ran out during the sixth grade lunch period, but the cause of the shortage is not as clear. Grievant said that although her job is to bring food to the correct temperature and to keep the food line filled, it is Director's job to ensure that enough food has been prepared for the day. Grievant's testimony was that there were not enough pans of food ready to be placed on the line. However, from other testimony, it appears that Grievant's job was to anticipate when prepared food would run out; there

is sufficient evidence that she failed in this regard. The undisputed evidence demonstrates that while the sixth graders were selecting lunch, Grievant left the lunch line to deal with the two girls who were wearing only socks, and when she returned, the students had only breadsticks and milk to choose from on the main lunch line. The fact that students could select these items as their lunch choice does not excuse the failure to provide them with additional choices for a period of 15 to 20 minutes.

The third charge is the most serious. The District charges Grievant with physically grabbing two female students under the arm to remove them from the lunch room. Union Steward said that she saw Grievant escorting two girls who were wearing only socks out of lunch by holding each girl under the arm. She also heard Grievant "screaming" at the girls, telling them they could not enter the kitchen without shoes.

Grievant recalled the two girls who tried to come into the lunch room wearing only socks and conceded that she may have yelled at them, saying that she does raise her voice at times. Grievant said that she left her work station to talk to the girls because they were being quite loud, but denied grabbing anyone's arm and said that she told Director 2 that there was "no way" she would do something like that.

Although no other eye-witnesses testified, Principal related what the girls had described to him; his version conformed to Union Steward's account of what happened. Although hearsay testimony is generally insufficient standing alone to establish facts, it can be useful to corroborate other first-hand testimony. Here, the District has sufficiently demonstrated that Grievant yelled at the girls and grabbed each of them by the arm to escort them from the lunchroom.

The last charge is that Grievant left her work station and went to confront the teacher about the students without shoes. Grievant agreed that she went to speak to the teacher after her shift was over to find out whether she had actually given the students permission to go to lunch in their socks. Union Steward Wolfe testified that Grievant left the kitchen area to go to dining room "to track down the teacher of these students." However, Union Steward also said that she did not leave her post in the kitchen, so any determination as to where Grievant went after she entered the dining room would be purely speculative. Further, the teacher did not testify, so there is no evidence that Grievant "confronted" her. This charge has not been proven.

Having found that the District did demonstrate that Grievant allowed food to run out during the sixth grade lunch, leaving the students to only breadsticks and milk for awhile, and that Grievant grabbed two girls by the arm to escort them from the kitchen, I must determine whether discharge is the appropriate penalty under all the circumstances. The District recognizes that Grievant's conduct on June 2, standing alone, would not justify her discharge. It argues, instead, that when Grievant's entire work record is considered, it is clear that it had no choice but to terminate her employment, pointing out that District administrators spent more time with Grievant than any other employee. Even where an employee's behavior would not justify discharge on its own, the decision to discharge should be upheld where the employer sufficiently demonstrates that earnest attempts to rehabilitate the employee have failed. *See, e.g., VA Medical Center*, l20 LA 624, 634 (Betts, 2004)(employee's threats to co-workers while on a 90-day performance improvement plan " were simply the' last straw' in an on-going issue the Employer was attempting to correct involving the Grievant's interpersonal skills when dealing with others in the workplace.")

The District points out that Grievant had previously been disciplined for similar issues, pointing to Joint Exhibits 19 and 21. The first of these followed an incident between Grievant and another coworker that occurred on October 29, 2008. Director testified that Grievant and the coworker, who was working as the dishwasher then, had a "heated argument" regarding cheese baked onto a pan. Director said that after she arrived from the high school, both Grievant and the coworker calmed down, and that "was the extent of it." Director said that a few days later, Grievant came to work and was "very quiet" and didn't have much to say. After lunch, Grievant became upset and began crying, and then told Director that she had to leave. Director said she was worried about Grievant, and tried to contact her through her husband.

Grievant was off of work for a month to deal with anxiety. Principal testified that during this time, Grievant's son had been diagnosed with cancer and was undergoing treatment. During that period, Grievant and her husband met with Director 22 to explain her medical condition, and to inform the school that her doctor believed that she should be off of work. When she returned to work, Director 2 gave her the Verbal Reprimand dated November 4, 2008, which told Grievant that she needed "to have a positive and professional interaction with co-workers" and that "[l]eaving mid-shift without reason or approval is considered abandoning the position."

Thereafter, effective February 2, 2009, Grievant was moved back to dishwasher for an undisclosed period of time. At some point, she was returned to the position of cook's helper, although no one could recall when or why. Grievant testified without contradiction that she did not request the transfer, but the District had asked her to move.

On May 11, 2010, Director 2 shared a Summary of Work Issues with Grievant. The memorandum states that Director had talked with Grievant several times over the past several weeks. Director 2 wrote that Grievant had not been meeting expectations in numerous areas, and made the following observations of issues that had occurred over several weeks:

> • Food temps are not being taken as required by State Food Service Regulations
> • Gloves are not being worn when working with food (touching students, then food, stuck finger in chicken to test the temp, made sandwiches without gloves, does not have gloves on while assisting students in the food line)
> • Asking other food service people for guidance, (even though she didn't feel they had done the job correctly; repeatedly asked Employee how to do something when she had been doing that position for several months)
> • Running out of food and not having more ready for students
> • Yelling at students in kitchen and cafeteria

The District characterizes this memorandum as discipline, pointing to the last sentence which reads, "[Grievant] must make significant improvements or further disciplinary action will be required up to and including dismissal. This will be the final action and if unable to meet the requirements [Grievant] will need to be replaced." The Union disputes the District's claim that this memorandum is disciplinary in nature, arguing that the document is not titled discipline, unlike the 2008 Verbal Reprimand. It further argues that even if the District intended for it to be discipline, Grievant did not, and could not, have understood it to be discipline.

The Union further argues that at most, the District could have intended it only as a reprimand, as Grievant was not suspended from work.

The District asserts that the Union may not challenge the propriety of these prior disciplines, as no grievances were ever filed. However, as the Union points out, the parties' agreement specifically excludes from the grievance procedure "oral reprimands" and "verbal warnings." Where the parties' agreement forecloses grievances complaining of lower level discipline, an employee may properly challenge that discipline where the employer seeks to use it as a justification for later discipline.

The Union also argues that even if this later Memorandum was discipline, the District sent Grievant confusing and mixed messages, because just two weeks later on May 26, 2010, Grievant received her Employee Evaluation Form in which her overall evaluation was rated "Doing an average job," although there were two categories lower than this rating on the form, the lower categories were "Definitely unsatisfactory," and "Substandard but making progress." and she was not rated at the lowest level in any category. Director *said* that when she talked to Grievant about her performance issues, Grievant would agree to try to do better, and that her performance would improve for awhile, but eventually she would go back to her old habits.

Whether one uses the framework of the Seven Tests of Just Cause, as the parties have here, or the more general understanding of the principle of just cause, arbitrators generally agree that employees are entitled to know what is expected of them, and what consequences will follow from failure to meet those expectations. The Union quotes Arbitrator Marlatt:

> When just cause for discipline is involved and particularly when the discipline takes the form of discharge, there is a clear burden on the Company to see to it that the employees fully understand the rules and procedures which they must follow and more important, that they also understand what will happen to them if they do not follow the rules and procedures.

Texas Mills Supply & Mfg. Co, Inc., 74-2 ARB ~8703, 5671 (1975).

Additionally, a basic principle of just cause is that employers must impose discipline for all but the most serious cases in gradually increasing levels. By imposing increasingly severe penalties, employers provide trained and experienced employees the opportunity to conform to their employer's reasonable expectations. In such cases, the employee understands that another similar *misstep will* lead to more serious discipline, up to discharge. The goal of *imposing* such progressive discipline is the rehabilitation of an employee to a successful member of the employer's work force. Discharge should only be resorted to when *it* is clear that the employee cannot be rehabilitated. "In other words, discharge is designed to abolish the employment relationship; disciplinary suspension is designed to improve it."

Grievant's conduct on June 2, while troubling, was not so serious as to justify discharge standing alone. Grievant was verbally reprimanded in November 2008 and was told that her behavior needed to improve in May 2010. She was then discharged on June 3, 2010, for failure to perform her job adequately, despite receiving an intervening "average" employee rating. In light of Director's opinion that Grievant's conduct had shown improvement in the past, the record does not support the assumption made by the District that Grievant

could not have been rehabilitated had she been made to realize that her job was on the line. The Union's point is well-taken that the May 2010 memorandum does not appear to be discipline, as it is title only "Summary of Work Issues." If it was not discipline, Grievant's last discipline occurred 11 months earlier, and was at the lowest possible level. Even assuming the May 11 memo was discipline, at most Grievant had been twice verbally reprimanded for behavior that the District argues was ongoing and persistent for years. The District utterly failed in its obligation to inform Grievant that her explosive behavior and failure to follow food guidelines were unacceptable and would result in her discharge if it did not improve. In light of this conclusion, I find it unnecessary to render an opinion on the other issues raised by the parties, save those discussed below.

The District's decision-making toward Grievant is troubling in a number of ways, not the least of which is the transfer of Grievant from a dishwasher's position, which she applied for, to a cook's helper position, not once, but twice. The District does not explain why it moved Grievant despite her supervisor's opinion that she did not deal well with the pressures of working in the food service line and that she frequently failed to follow state and federal guidelines regarding food preparation. There is a plethora of evidence that Grievant was unsuited for the position of cook's helper, yet the District twice moved her into the position and only provided formal training a few weeks before discharging her. Grievant testified that she preferred the dishwashing area, stating that she worked better when she worked by herself. Grievant's assessment appears well-founded; she was only disciplined when in the cook's helper position. Further Director said that there were no problems with Grievant's cleaning, and that she did a good job of that. There is evidence that Grievant's tenure in the dishwashing position was not trouble-free either, but she should have been allowed to stay in the position she originally sought and was more successful in, rather than moved to one for which her supervisors thought she was unsuited.

The District argues that in the event that this arbitrator finds that Grievant committed the misconduct with which she was charged, the decision of management to discharge must be upheld. The District quotes from *Libby, McNeill & Libby,* 53 LA 188, 190 (Larkin, 1969), wherein the arbitrator stated:

> Most arbitrators agree that, where there is no clear showing that the Company acted arbitraily, [sic] discriminatorily, prejudicially, or with bias, management's position should be sustained in matters of discipline. (internal citations omitted).

However, the current majority view holds that "[i]n the absence of a contractually specified penalty or a clear limitation on arbitral discretion, both arbitrators and courts agree that the arbitrator may reduce the penalty imposed by management. Here, the parties have not pointed to any contractual limitation on the arbitrator's authority to modify a penalty that does not, in the arbitrator's view, conform to just cause.

Given all the circumstances of the case, discharge was too severe a penalty for the misconduct proved. There is no doubt that Grievant failed to fulfill the reasonable expectations of her employer when serving in the position of cook's helper, but there is evidence that she could have successfully served as a dishwasher, with proper guidance. However, the District failed to assist her, instead setting her up for failure by returning her to a position that she had previously had difficulties in, failed to provide her with adequate training, and

failed to utilize progressive discipline designed to help her improve her performance. The record does not support the conclusion that Grievant was beyond rehabilitation when the District made to decision to sever the employment relationship. A two-day disciplinary suspension is a more reasonable penalty for the misconduct proved.

The District asked that in the event Grievant is returned to work, she be denied back pay due to what the District argues is a lack of effort to mitigate her damages. While in some cases, a reduction of a back pay award based on failure to mitigate damages may be appropriate, here the parties have negotiated the terms to be applied in the event that an employee has been unjustly discharged. Article VII, § I provides, in part:

> If it is decided under the grievance procedure that the employee has been unjustly discharged, the Employer shall reinstate the employee according to the terms of the grievance resolution. If back pay is awarded, the back pay will be reduced by an amount equal to the employee's earnings during the period of discharge from any employer in excess of the earnings level prior to the discharge and the amount of any disability or unemployment compensation received by the employee during the discharge period.

The parties have agreed upon the deductions that should be taken from a back pay award. This arbitrator would exceed the authority given to me by the parties were I to add to their agreement that the District was entitled to a deduction for an alleged failure to mitigate damages.

AWARD

For all the foregoing reasons, the grievance is GRANTED in part. The District had just cause to discipline Grievant for failure to follow federal and state regulations, and for failure to treat students with courtesy and respect, but not to terminate her employment. The discharge shall be reduced to a two-day disciplinary suspension, and Grievant shall immediately be offered reinstatement to her former position of dishwasher. With the exception of the period of suspension, the District shall make Grievant whole for all loss of wages, benefits, seniority, and other benefits of employment which she would have received but for her discharge. In accord with the terms of the negotiated agreement, the back pay will be reduced by an amount equal to Grievant's earnings during the period of discharge from any employer in excess of the earnings level prior to the discharge and the amount of any disability or unemployment compensation received by Grievant during the discharge period. Grievant's records are to be expunged of all references to the discharge, and appropriate entry of the suspension be noted.

The arbitrator shall retain jurisdiction for the sole purpose of implementing this Award and resolving any questions that may arise under it.

March 23, 2011
Date

Kathryn A. VanDagens, Arbitrator