

In the Matter of

Arbitration between)	
)	AWARD
University of Minnesota,)	
(Employer),)	
and)	<u>O'Connor Termination</u>
)	
American Federation of State, County and)	
Municipal Employees, Council No. 5,)	
(Union).)	

BMS Case No. 06-PA-178

Appearances

For the Employer:
Shelley Carthen Watson
Associate General Counsel
University of Minnesota
360 McNamara Alumni Center
Minneapolis, MN 55455-2006
assisted by:
Elizabeth Anderson, Legal Asst.

For the Union:
Sandra J. Curtis
Business Representative
AFSCME Council 5
300 Hardman Ave. S., Ste. 2
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assisted by:
Joyce Carlson, Business Representative
Kelly Ahern, Chief Steward

Jurisdiction

On October 18, 2004, the American Federation of State, County and Municipal Employees, Council No. 5, (Union) presented to the University of Minnesota, (Employer) a grievance challenging the Employer's discharge of Mary Galen O'Connor (Grievant) effective October 1, 2004. The grievance was brought under the Collective Bargaining Agreement in effect between the Union and Employer from July 1, 2003 through June 30, 2005. The dispute was not resolved through the grievance process and the parties selected Arbitrator Sara D. Jay to arbitrate the dispute.

Hearing was held in Minneapolis, Minnesota, on January 30 and 31, 2007. The parties stipulated that the grievance was procedurally and substantively arbitrable. At the hearing, both parties were given a fair and equal opportunity to present their respective cases. The arbitrator accepted exhibits into the record. Witnesses were sequestered, and when testifying, were sworn or

affirmed. Testimony was subjected to cross-examination. Closing argument was made in the form of post-hearing briefs, which were timely received on March 6, 2007, on which date the record is deemed closed. The parties have waived service by certified mail, in writing.

Issues

The issues in this case are:

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

Relevant Contract Provisions

Article 22 – Discipline

....

Section 1. Discipline for Just Cause. Disciplinary action shall be taken only for just cause.... Disciplinary action, except discharge, shall have as its purpose the correction or elimination of incorrect work-related behavior by an employee.

....

Section 7. Discharge. ... The Employer shall have the right to discharge an employee who:

- B. Endangers in a willful or careless manner, the safety of ... other employees;
- C. Causes a liability for the Employer by willful ... violation of University procedures or policies;
- D. Is judged by the Employer to be guilty of generally accepted standards of employee conduct; ...
- F. Engages in behavior other than A-E above which in the Employer's judgment meets accepted just cause termination tests.

Other Relevant Provisions

University of Minnesota Board of Regents Policy, Campus Health and Safety

Adopted: April 8, 1994

Amended: December 9, 2005

Subd. 2. Commitment. The University is committed to providing a safe, secure and healthy environment for its ... staff

Subd. 3. Mutual Responsibility. The University expects ... staff to comply with internal and external health and safety policies and procedures

University of Minnesota Board of Regents Code of Conduct
July 12, 1996

...
Section III. Rights and Responsibilities

Subd. 1. Fairness. ... Members must not engage in ... harassment ... Members must not abuse the authority they have been given ...

Subd. 3. Compliance. ... Members are responsible for adherence to University policies and procedures and are expected to comply with State and Federal laws.

Disbursement Services Employee Handbook
August 6, 2004

Position Expectations in Disbursement Services

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2. The acceptable way to express disagreement in the workplace is in a conversational tone.
 3. Outbursts of anger/rage etc. have no place in the workplace....
 7. Observe personal boundaries of space, quiet and interruptions....

Factual Background

The Grievant in this case is a long-time employee of the University of Minnesota, having spent approximately 34 years with the Employer. She has spent many years in the Disbursement Services department, having initially transferred into the department as a supervisor. The Grievant's supervisory duties were removed in 1994 and the Grievant was reclassified. The Disbursement Services department, in broad terms, is responsible for paying the University's bills. It is housed in the West Bank Office Building, on the sixth floor. The Director of the Disbursement Services department is L, who came to the department in approximately 2000.

The incident on which the grievance here is based is the second part of a disagreement between the Grievant and another employee, D. As a result of that incident, which occurred on July 15, 2004, both employees were issued written warnings. D chose not to grieve his written warning.

The Grievant's challenge to her written warning has been denied through arbitration. Since that arbitration is final and binding, this arbitrator regard the facts as found by that arbitrator to be equally final and binding.¹ Thus, the following recitation of facts relies in pertinent part upon the facts as found by Arbitrator Bernice Fields in BMS Case No. 06-PA-177, in an award issued August 4, 2006 (Fields Award). Her findings on the incident were consistent with the credible testimony about the same events at the hearing in this matter, and are as follows:

On July 15, 2004, the Grievant was seated at her desk. D was delivering papers to her. As he entered her cubicle, he hit the back of the Grievant's chair with the papers, startling her. At that point,

Grievant then went to [D's] area and ordered him to sit down so she could hit the back of his chair in the same way. When [D] refused to comply despite repeated orders to do so from the Grievant, a loud, profane argument ensued. Only then did the Grievant go to [the Director's] office to report the incident. Although the Director was meeting with someone else, the Grievant was admitted, and started to demand action to redress the incident.

[D] passed the [Director's] office on his way home, saw the Grievant in the office, and came in to explain his side of the dispute. A loud argument, with name calling, disturbed the entire office. When [D] started to leave, the Grievant grabbed his arm, and ordered him to stay. The Director intervened between the two and ordered [D] to go home. The Grievant continued to demand that the Director resolve the incident.

Fields Award, pps. 5-6. The Grievant's direct supervisor, H, conducted an investigation of the July 14 incident.

On July 19, 2004, a request was sent to Disbursement Services employees to submit agenda items for the next department meeting by noon on July 27. The Grievant responded on July 28, before 9 a.m., that she wanted to add as agenda items: "1. Employee Handbook; 2. Job postings in Dept; 3. Layoffs in dept." The Director telephoned the Grievant to ask for further explanation of

¹ While prior contract interpretation awards may not always have binding precedential value in terms of reasoning, factual findings are customarily given full deference, as are disciplinary decisions. Arbitrator Fields was charged with deciding the issue of just cause for the written warning based on the facts presented to her. Once discipline has been found to be for just cause, a later arbitrator will not permit employees to re-litigate that question.

what the Grievant meant. As to the Employee Handbook, the Grievant said that she wanted to discuss the provisions on tardiness, and how management was going to enforce the provisions fairly. The Director said that the content had been approved by a committee of which the Grievant had been a member, and that the Director did not see that additional discussion was needed, and that a process was in place to resolve any concerns or appeals about unfair application.

The Grievant became angry and loud during the telephone conversation. She was unwilling to listen to the Director's explanations of how the policy would be applied, asking who would monitor D's hours and questioning the Director's hours. The Grievant was heard raising her voice in anger by several coworkers in the area. The Grievant felt that there should have been no reason to question why she wanted to discuss the employee handbook, testifying that it had only been distributed two weeks earlier. The Grievant admitted raising her voice during the conversation. She continued to speak angrily and loudly, and the Director was unable to speak through the Grievant's shouting. The Director said that she thought they could not have a productive and professional conversation, and that she would end the call, and did so.

Later that day, the Director called the Grievant and invited her to meet in the Director's office to discuss the earlier conversation, because she wanted to speak calmly with the Grievant before the end of the day. The Grievant went to the office. The Director told the Grievant that other employees had heard their telephone conversation, and asked the Grievant to be more respectful in her manners. The Grievant responded that D's behavior had been disrespectful, and began to demand to know what had been done about [D]. The Grievant testified that the Director refused to tell her anything. The Director believes that she told the Grievant that she did not know, and was not the person conducting the investigation. The Grievant knew that her direct supervisor, H, was conducting the investigation, as the Director had been directly involved in the July 14 incident. The Grievant testified that her supervisor had told her she would have an answer on July 28, and was frustrated because she had not been advised of any discipline given to D. She also testified that she was afraid of D, although she never told management of that fear. Because the Grievant thought the

investigation should have been completed, she persisted in asking the Director what was being done about D's behavior.

The Director attempted to calm the Grievant, who continued to escalate in her anger. The Grievant and the Director left the office to see if D was in his cubicle, and returned to the office upon finding that D was not there. The Grievant shut the Director's door and continued to yell at the Director. She was leaning over the Director's desk with her fists clenched. The Director felt that the Grievant was out of control, and began to call the police but dropped the phone due to nervousness. The Director left her office and the Grievant pursued her, continuing to yell at the Director and demand information about what was being done to D. The Director asked a nearby employee to witness what the Grievant was doing, again asking the Grievant to stop threatening her. The Grievant continued to back the Director into a corner. The Grievant was approximately 2 feet from the Director, and had her hand in the Director's face. The Director called to staff members to call the security staff and 911. One of the staff members present at that point was the Grievant's direct supervisor, who attempted to calm the Grievant and explain the status of the investigation. The Grievant made sarcastic comments, calling her immediate supervisor the Director's "lap dog," or similar words, and continuing to shout at the Director that the Director wasn't going anywhere until she told the Grievant what was being done to D. Disbursement Services staff and staff in other parts of the building heard the confrontation.

The police were called and responded, having heard the altercation on the phone. Two officers arrived. One escorted the Director back to her office, meeting with her while the other officer met with the Grievant. The Grievant was taken to the police car, and was issued a citation for disorderly conduct. The Grievant was told not to come to work for the next two days. Police instructed the Grievant to leave the building. The Grievant remained on suspension pending investigation. The Grievant ultimately pled no contest to the disorderly conduct charge, and received a conditional suspended sentence.

The July 28 incident was investigated by the Employer's audit department, because

supervisors of the Grievant's department had been directly involved in the July 28 incident. An experienced auditor conducted interviews of various staff members, including the Director and the Grievant. Results of the investigation were presented to the Grievant and her Union representative on September 16, 2004, by the Associate Vice President-Finance & Controller (VP). During the discussion, the Grievant raised concerns that the reason for the incident, her fear of D, was not accurately reflected in the investigation. The Grievant also said that the Director had a mocking smirk during the incident. In response to those concerns, the VP reviewed interviews of the Grievant, noting that she had not mentioned fear of D at any point. He also reviewed other interviews and re-interviewed six employees, none of whom said the Grievant had expressed fear of D. After finalizing the results of the investigation, the Employer decided that discharge was the appropriate discipline for the Grievant. A discharge letter was issued, effective October 1, 2004.

In the interim, on August 2, 2004, the Grievant and D each received a written warning for their behavior during the July 14, 2004 incident. D did not grieve his warning. The Grievant grieved the written warning. On August 4, 2006, Arbitrator Bernice Fields issued an Award denying the grievance. In her Award, Arbitrator Fields reviews the Grievant's prior disciplinary history, evidence of which was also presented at hearing in this case.

The Grievant has had several prior instances of discipline which proceeded to arbitration. In November 1998, the Grievant was in a discussion with a supervisor about a temporary need to return to using a manual form because of difficulties with a computerized version. The Grievant became very angry, loud and violent in complaining of alleged disrespect from her supervisor. She was issued a five-day suspension, upheld by Arbitrator Daniel Jacobowski, BMS 99-PA-1676, in an award issued November 30, 1999 (Jacobowski Award). In March 1999, the Grievant received a six-day suspension for a disagreement with her supervisor following receipt of a letter of expectation. The Grievant threw the letter on the floor, becoming physically and verbally abusive with both her supervisor and the head of her department. Arbitrator Jeffrey Jacobs upheld that discipline in an award issued on January 26, 2001, BMS 00-PA-1397 (Jacobs Award). In November

1999, prior to issuance of the Jacobowski or Jacobs Awards, the Grievant was discharged by the Employer for her conduct as a member of the Board of Directors of the Financial System User Network. The University based its discharge on allegations that the Grievant had been confrontational, aggressive, loud and threatening during Board meetings. On July 8, 2001, Arbitrator Charlotte Neigh issued an Award reinstating the Grievant, finding that the Grievant's conduct was not inappropriate for "a deliberative body debating disparate views" and was not a failure to correct inappropriate workplace conduct. On the Grievant's return, she was given a document entitled "Position Expectations," which was withdrawn and later distributed to the entire department with two changes. The unchanged portions include the following directives:

2. The only acceptable way to express disagreement in the workplace is in a conversational tone.
3. Outbursts of anger/rage, etc., have no place in the workplace....
7. Observe personal boundaries of space, quiet and interruption.

Those statements have since been incorporated into the Disbursement Services Employee Handbook, distributed to all employees including the Grievant.

Other employees in Disbursement Services have received discipline for incidents involving disagreement between employees. On August 30, 2006, a Disbursement Services employee (N) received a verbal warning for making threatening and loud remarks to a coworker (T) in response to a sarcastic remark made by T. That verbal warning was under discussion with the Union at the time of the hearing in this case. On September 8, T received a verbal warning for repeatedly interrupting N during a discussion with their supervisor of recent conflicts between them. T received another verbal warning on November 29, 2006, for again intruding on N as well as arguing with and intimidating another employee. That verbal warning was reduced to a Letter of Expectation after intervention from the Union. N received a second verbal warning on September 7, 2006, for N's conduct during the investigatory meeting with T, for which T received the September 8, 2006 warning. It is noted that all of these disciplinary actions took place after the Grievant was discharged.

Positions of the Parties

Position of the Employer

The Employer takes the position that the discharge was for just cause. According to the Employer, the Grievant had actual and constructive knowledge that her behavior was inappropriate and would lead to discipline. The Employer asserts that the Grievant was aware of specific rules prohibiting her conduct, *i.e.*, the Disbursement Services policies on workplace behavior and the University's Code of Conduct. The Employer further notes that the Grievant has received prior discipline for similar conduct, putting her on notice of the Employer's expectations. In support of this contention, the Employer cites the Jacobowski Award.

The Employer contends that a thorough and fair investigation was made into the July 28 incident before any disciplinary decision was made. The Employer describes the activities of the audit department investigator in asserting that the investigation was thorough. The Grievant's behavior is not in question, the Employer says, and that behavior violated workplace standards. The Employer states that the Grievant's behavior was wrong, and denies the Grievant's assertions that her behavior was provoked by coworkers or her supervisor. The Employer suggests that, in this instance and past instances, the Union and the Grievant have consistently attempted to portray her behavior as a reaction to unfair or provocative behavior by her supervisors or others. Arbitrators have found the Grievant's behavior to be unreasonable, the Employer states, and in particular have already found the Grievant not to have been in fear of D.

Termination was appropriate, the Employer states, because the July 28 incident was part of a string of increasingly unacceptable incidents. The Employer contends that termination was justified under the collective bargaining agreement, because the Grievant's behavior violated the collective bargaining agreement itself as well as violating the Employer's Code of conduct and Disbursement Services policies. The Employer further contends that the Grievant failed to mitigate her damages, and she should not be awarded back pay even if reinstatement is awarded. In support of its position, the Employer cites various court cases and arbitration awards.

Position of the Union

The Union takes the position that the discharge was not for just cause. The Grievant is a thirty-nine year employee, the Union notes, and her recent performance evaluations showed that she met expectations. According to the Union, D accosted the Grievant, leading to a further confrontation in the Director's office. The Union asserts that the Employer did not provide a safe environment for the Grievant. The Employer knew that the Grievant would be irritated by being ignored, as acknowledged in the Neigh Award. This knowledge suggests that the Employer incited the Grievant in the July 28 incident, the Union asserts. The Union suggests that the previous discipline upheld in the Jacobs and Jacobowski Awards constituted discipline to the Grievant for her reaction to inconsistency and unreasonableness by supervisors and others, which acted as provocation to the Grievant.

Further, the Union asserts that the Employer's investigation was not impartial, as the Grievant's departmental VP took part in the investigation. He spoke to the Grievant's direct supervisor and conducted follow-up interviews. The Union objects that witnesses did not express fear of the Grievant until they were solicited by the VP, and that the only evidence of such fear is solely based on hearsay evidence. The Union alleges that witnesses' recollections which were considered during the investigation were based on one-sided or stale unrelated incidents. The Grievant has not been treated fairly, her Union states, having been denied a prompt investigation of D's actions against her.

The Grievant was targeted by management for discharge, the Union states, independent of her behavior but because of her commitment to pointing out inequities and institutional problems. The Union suggests that the Director intentionally upset the Grievant and then led her out of the office to get a witness to the incident. The Union further suggests that inconsistencies in the statements of witnesses have been ignored by the Employer. The Union points to specific contradictions among employees' testimony, and denies that the Grievant was violent on July 28, 2004. The Union concludes that the Employer has failed to provide a safe work environment in

Disbursement Services. According to the Union, the Employer has failed to carry its burden of proof. Having the Grievant arrested does not add to the strength of the Employer's case, the Union states.

The Union additionally alleges that the Grievant was treated disparately, in that the Employer issued a Letter of Expectation to her individually, which through Union intervention was instead revised and distributed department-wide. The Union further contends that progressive discipline was not used, that the Employer discounted mitigating circumstances. Other employees were given only written warnings for arguing. Those instances should be considered for purposes of noting disparate treatment, the Union contends, even though the instances took place after the Grievant's discharge. In support of its position, the Union cites Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., page 411, ed. Ruben (BNA 2003).

The Union requests that the Grievant be reinstated with full back pay and benefits.

Discussion

This case, like most disciplinary cases, involves two major issues. The first is whether the Grievant engaged in conduct which violated the Employer's legitimate expectations. If so, and discipline was merited, the second question is whether the level of discipline is appropriate, taking into account any mitigating factors.

Conduct Incurring Discipline

The events which took place on July 28, 2004, are not significantly in question. The Director and the Grievant, as well as the bystanders, agree on the basic sequence of events as well as many of the details. Any inconsistencies are minor, and do not affect the broad consensus on the incident as it occurred. Most aspects of the incident have been admitted by the Grievant, in her testimony at the hearing in this case.

The Grievant admits she was angry and upset at having her proposed agenda items questioned by the Director. She admits responding to the Director's request that the Grievant be respectful by objecting to D's behavior and repeatedly demanding that the Director tell her what was being done to D. The Grievant admits raising her voice, on the phone and in the office. She agrees that the Director was essentially trapped in her office, needing to pass by Grievant in order to leave the office. Who closed the door is in dispute, but it is most credible that Grievant did so. The Grievant stated that she started to close the door and then thought it was a bad idea to do so. The Grievant followed the Director out of the office, according to the Grievant's testimony. The Grievant's description of the physical situation was in accord with the other witnesses' descriptions. As to her proximity to the Director, the Grievant said, "well, I think my fingers might have gotten pretty close to her, but I don't think I touched her." The Grievant's direct supervisor, in the path between cubicles, told the Grievant that it was his responsibility, not Director's, to complete the investigation, in an attempt to calm her and explain the situation. The Grievant testified that she did not agree with his assessment, stating that the Director "saw me being assaulted and she can't relinquish that responsibility." The Grievant knew that the police were being called, and apparently only quieted down with that knowledge.

The Employer has rules and policies against such behavior, which the Grievant received. The Employee Handbook states, "The only acceptable way to express disagreement in the workplace is in a conversational tone," and that "[o]utbursts of anger/rage, etc., have no place in the workplace." The Grievant admits to conduct which violated both rules.

Even without a specific rule, angry outbursts while following a supervisor down the hall and shouting at the supervisor are unacceptable in the workplace. The Employer characterizes this as "misconduct" as defined in *Tilseth v. Midwest Lumber Co.*, 295 Minn. 372, 374-5 (1973). *Tilseth* involved the definition of "misconduct" as used in the unemployment (now "reemployment") compensation statute at that time. The current statute contains a definition which does not incorporate the *Tilseth* language. Whatever the status of the *Tilseth* standard after legislative

changes,² “just cause” under a collective bargaining agreement has its own standards, amongst which is that an employer can set reasonable expectations for employee behavior. There is no question that the Employer’s policy prohibiting angry outbursts and requiring disagreements to be expressed calmly are reasonable expectations.

Other cases and laws aside, the Grievant knew her behavior was unacceptable to this Employer. She had been suspended twice for similar behavior, with a five-day suspension upheld in the Jacobowski Award, and the next six-day suspension upheld in the Jacobs Award. Arbitrator Neigh reinstated the Grievant because of the context in which the Grievant’s loud and argumentative behavior occurred, *i.e.*, in a meeting where disagreement is inevitable to an open discussion on potentially contentious issues. The circumstances in the Neigh Award stand in contrast to the situation here, which took place in the workplace and was again directed to a supervisor. The Grievant engaged not only in verbal attacks but also in physically aggressive and threatening behavior, admitting being very close to touching the Director’s face. Any employee should know that it does not meet ordinary workplace expectations to physically pursue her supervisor, shouting and waving her hand in the supervisor’s face. This is conduct which the Grievant admits, and is conduct which warrants discipline.

Level of Discipline

Having determined that actions occurred which warranted serious discipline, the question remains whether the level of discipline was appropriate in light of any mitigating factors. The discipline here is the most severe level, discharge, so all mitigating factors are seriously considered.

In explanation of her conduct, the Grievant claims a commonly accepted factor in mitigation,

² See, *Houston v. International Data Transfer Corp.*, C1-00-2151 (Minn. S. Ct., June 13, 2002) interpreting Minn. Stat. § 268.095, subd. 6(a)(1) (2000). Misconduct under the Reemployment Compensation purposes is not necessarily the equivalent of just cause. However, misconduct or incompetence under the Veteran's Preference Act, Minn. Stat. §197.46, is substantially the same as a determination of just cause for discipline. *Gibson v. Civil Service Board*, 171 N.W.2d 712 (Minn. 1969); *Hagen v. Civil Service Board*, 164 N.W.2d 629 (Minn. 1969).

provocation. The Grievant claims she was provoked by the Director's request to discuss the Grievant's proposed agenda items, followed by the Director's refusal to tell the Grievant what discipline was being given to D.

The facts here do not support the Grievant's allegation of provocation. The Grievant refused to discuss the agenda items in any detail, jumping into her demands regarding discipline of D. The Grievant's actions and words did not indicate any fear of D, but rather a continuing anger toward him, and toward management. The Director, according to all credible testimony, did not raise her voice or display any rudeness toward the Grievant. Rather, she attempted to calm the Grievant, without success, and then attempted to retreat. The Grievant refused to allow the Director to retreat, and refused to accept the efforts of her own direct supervisor to explain that he had responsibility for the investigation. The Grievant has attempted to suggest that she was promised she would have results of the investigation that day. Even if that were true, the day had not ended. Furthermore, there was no reason for her to believe that discipline of D would precede her receipt of the results of the investigation. There was no credible evidence that either the Director or the supervisor in any way mocked or sneered at the Grievant; credible testimony established that the reverse was true. Thus, the Grievant's behavior cannot be excused to any degree as having been provoked by supervisory action.

A second mitigating factor is disparate treatment. The Grievant has claimed that other employees have been treated more leniently for the same or similar behavior, and that she is being singled out for disparate treatment. If so, the Grievant should not be more harshly punished than similarly situated employees. However, the only evidence of disparate treatment produced by the Grievant took place years after her discharge, in 2006.

"[A]rbitrators rarely consider post-discharge evidence, unless it reflects back on pre-discharge conduct." *T.J. Maxx*, 107 LA 78, 83 (Richman, 1996), cited in Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., at page 412. Arbitrator Richman nonetheless considered post-discharge evidence of treatment of other employees and concluded that the other instances were dissimilar from the case before him in upholding a discharge for making threats. The value of post-discharge

evidence of disparate treatment has been held to be “diminished sharply,” *Eagle-Picher Industries Inc.*, 101 LA 473, 476 (Staudohar, 1993)(one of several incidents occurred 2 weeks after discharge of grievant, reinstated without back pay), cited in *How Arbitration Works, supra*. One arbitrator adopted Title VII standards in a grievance alleging discriminatory treatment based on race, in allowing evidence of discipline taking place six months after a grievant’s discharge as one of the bases for reinstating the grievant. *Henkel Corp.*, 104 LA 494, 498-99 (Hooper, 1995), cited in *How Arbitration Works, supra*, at 411.³

In this case, evidence of post-discharge discipline here is remote in time, and involved arguments between employees, not employees following their senior supervisors through the building, escalating a confrontation initiated by the employee. “It is a commonly accepted principle that supervisors must be protected from abusive, threatening, and insubordinate acts by employees.” *Discipline & Discharge in Arbitration*, ed. N. Brand, (BNA, 1998) at p. 275. Conduct may be treated more severely when addressed to supervisors than when it occurs between employees. *Id.* The Grievant’s behavior was not so similar to behavior which occurred much later, between coworkers, that disparate treatment has been shown. Moreover, disparate treatment claims must be shown to be between similarly-situated employees. The other employees were not shown to have the same kind of disciplinary record as the Grievant, which is an accepted basis for treating employees differently.

The Grievant does have long tenure, which mitigates against the severe penalty. She has also been a conscientious worker, and there is no question about the quality of her work, as agreed by witnesses and reflected in her performance evaluations. However, the Grievant’s tenure and work performance are marred by her poor disciplinary history. Two suspensions have been upheld, for

³ This point was debated at hearing and the Union was encouraged to cover the issue in its brief, because the general understanding has been as noted by Arbitrator Richman, that in ordinary cases an arbitrator will not consider post-discharge conduct unless it relates to pre-discharge matters, *e.g.*, an employee discharged for coming to work under the influence who voluntarily and at the employee’s own expense successfully completed treatment for alcoholism, post-discharge conduct which clearly relates to the objectionable pre-discharge conduct.

conduct which closely parallels the conduct at issue here. Most recently, a written warning was grieved and upheld.

This record raises the last concern, which is striking here. The underlying rationale for reinstatement is that progressive discipline has not been given a sufficient chance to improve a grievant's behavior. Here, additional progressive discipline is not likely to contribute to improvement. The Grievant still fails to recognize that she has done anything wrong. Even at hearing in this case, she interjected explanations as to why D was wrong and why her supervisors were wrong in disciplining her, although her written warning has been upheld. She gave no sign of having accepted or even understood the decisions in the Jacobs or Jacobowski Awards upholding her prior suspensions. The Union's conscientious efforts to justify the Grievant's behavior are undermined by the Grievant's own testimony and attitude. Given the Grievant's inability or unwillingness to accept progressive discipline, to acknowledge or to change her behavior, there is little point in returning her to the workplace in the hope that lesser discipline will give the Grievant an opportunity to conform her behavior to legitimate workplace expectations.

Award

The Grievant was discharged due to her shouting and engaging in physically aggressive conduct directed at her department director. The confrontation was not provoked by the director or other actions of management, but was instigated by the Grievant. The Grievant's conduct violated rules and policies, as well as accepted norms of workplace conduct, warranting discharge. Mitigating factors including the Grievant's tenure are not sufficient to alter that conclusion.

Therefore, the grievance is denied.

Date: April 5, 2007

Sara D. Jay, Arbitrator