

special setups on November 16, as follows: 7:30 a.m. -- one pot coffee, cream, sugar, stirring sticks, one pot hot water, tea bags and one hundred cups; 9:30 a.m. -- coffee, sugar, creamers, stirrers, paper cups, spoons, napkins, large bowl, three ladles, three ice cream scoops, rags and one 6" deep pan for cleanup; and, 10:30 a.m. -1:00 p.m. -- six large tablespoons, one hundred fifty plastic forks and cleaning rags. Salzwedel also gave a copy of the notice to Guenther, although they disagree as to when he received the copy. Salzwedel said he received it in the morning on November 15. Guenther said he received it in the afternoon as he was getting ready to leave work.

At about 7:45 a.m. on November 16, Salzwedel checked to see if the setup was ready for the 7:45 a.m. event. The setup was not ready. Salzwedel said she then went to the kitchen and asked Guenther why the setup was not done, to which Guenther replied that he would take care of it right away. Guenther did not recall this conversation, but did recall that he was late in finishing the setup because he had to take coffee carts to the floors before he could finish.

About 9:45 a.m. Salzwedel saw that the setup for the 9:30 a.m. event had not been done and went to the kitchen where she asked Guenther why he had not done the setup. Salzwedel said that Guenther got very angry and said "it is not my job" and "I do not have to do this son-of-a-bitching job". Guenther said he said to Salzwedel "What should I do first, I have got this and this to do", "Who is going to do my job if I do this setup", "It is not my responsibility to make sure there is enough people to get this done", and, "I am sick of being treated like bullshit". Guenther said Salzwedel was angry and was yelling at him while he was making these comments and she then left without asking him to come to her office. Salzwedel said she did ask Guenther to come to her office before he went home. Guenther said that between 12:30 and 1:00 p.m., Salzwedel asked him to come to her office to talk about what had happened that morning, to which he replied that he was not coming unless he got a Union steward. Salzwedel did not recall Guenther requesting a Union steward to be with him. Later in the afternoon Salzwedel again asked Guenther to come to her office to discuss the matter. Guenther did not stop at Salzwedel's office on November 16.

On November 20 Guenther received the following written notice:

"On Thursday, November 15 your supervisor gave you written instructions for several duties you were to perform during the morning of Friday, November 16. The tasks involved supplying items needed by the Auxiliary members who were holding their Fall Bazaar on Friday. The tasks you were supposed to perform at 7:30 had not been done by 7:45, and you did them after your supervisor asked you to.

At 9:45 she asked you why you had not done the 9:30 setup in the OT room as you had been instructed. You then displayed anger at her saying that the assigned tasks were not your job, that you were not going to perform them and that you were going to grieve being assigned to do them. When she instructed you to come into her office, you did not do that either.

Shortly before the end of your shift she told you again to come to her office before you went home. Again, you did not do it.

This is clearly insubordination. This kind of behavior will not be tolerated. It is your supervisor's responsibility to assign tasks to the Food Service Workers to insure that the work that needs to be done is accomplished. It is your responsibility to perform

the work assigned to you.

Because of your insubordination you are suspended without pay for one work day, Tuesday, November 20, 1990. You are expected to report on time for your next scheduled shift. Any future incidents of this kind will bring further discipline, up to and including termination."

On November 26 Guenther filed a grievance contesting his suspension. Said grievance was processed through the contractual grievance procedure and is the basis of the instant proceeding.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE VI

DISCIPLINARY PROCEDURES

The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc. which are not consistent with the aims of the Employer's public function, and thereby to correct these deficiencies.

. . .

All employees represented by the bargaining unit shall be offered Union representation when any disciplinary action is taken. The Employer shall provide for such representation from among the representatives on a list provided by the Union. The employee involved and Union representative present shall be permitted to confer privately for a reasonable period of time before the disciplinary action is taken.

Any employee may be suspended, discharged, or otherwise disciplined for just cause. As a general rule, the sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, and discharge. Any written reprimand sustained in the grievance procedure or not contested within the first six (6) working days after the date of the reprimand shall be considered a valid warning. Except for patient care warnings, no valid warning shall be considered effective for longer than a twelve (12) month period.

The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge.

. . .

ARTICLE XXVIX

MANAGEMENT RIGHTS

Except as specifically restricted or limited by this Agreement, the management of Park View Rehabilitation Pavilion and Pleasant Acres and the direction of the working forces is vested exclusively

in the Employer, which rights will not be used to discriminate against any employee covered by this Agreement.

POSITION OF THE UNION:

The Union asserts that the County did not have just cause to suspend, or otherwise discipline, Guenther. His actions on November 16 did not constitute insubordination. He received virtually no advance notice of the extra setups, so he was unable to begin making setup preparations prior to November 16. Thus, on November 16 he was faced with completing his regular time-specific tasks and the setup duties. He did not refuse to perform any tasks, but did perform all of his regularly assigned duties and two of the extra setups. He fully intended to complete the third setup. Salzwedel offered no assistance to Guenther, despite his call for help. Since his normal work assignment was an integral part of the food service operation and the work of other employees depended on his timely completion of his regular work, he logically decided to make that his priority. There is no evidence that either his tardy performance of the 7:30 setup or his failure to perform the 9:30 setup caused any problems.

The allegation that Guenther swore at Salzwedel is untimely and untrue. Said allegation was not cited in the letter of discipline. Further, Guenther did not swear at Salzwedel, even though she was yelling at him.

Guenther did not refuse to meet with Salzwedel. He reasonably believed that the meeting was related to discipline and requested Union representation at the meeting. Salzwedel did not offer to arrange for such Union representation, even though it has been the practice for the County to arrange for a Union representative to be released from work to attend such meetings. Guenther can not be found to have been insubordinate for seeking to invoke his contractual and legal rights.

The Union asks that the discipline be rescinded and that Guenther be paid for his lost compensation.

POSITION OF THE COUNTY:

Guenther admitted that he was late in doing the 7:30 setup and that he failed to do the other two setups, although he received notice of those setups on November 15. He attempted to rationalize his non-performance on the basis that he simply had too many duties to perform on November 16. Despite any meaningful presentation of evidence to show that Guenther was overburdened with work, even assuming such to be the case, he did not notify Salzwedel that he needed assistance to complete his duties, as he had been directed to do on the duty assignment list which had been posted with regard to his position. Moreover, when confronted with his failure to perform the setups, Guenther became involved in an argument with Salzwedel.

Article VI of the contract specifically provides that management is to use the disciplinary procedure as a device to inform employes of work habits which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies. Guenther's actions were insubordinate and warranted discipline, since he not only ignored the problem, but failed to cooperate in solving the problem. A suspension was the proper form of discipline, since he failed to either perform the duties, request assistance, or inform Salzwedel of his inability to perform the duties. Further, when confronted with the situation on a second occasion on November 16, he was openly vulgar in the language which he directed to Salzwedel and was insubordinate to her in the presence of other employes.

Discipline has never been imposed in the past for an employe's failure to complete an additional task, as long as management was advised in advance of the problem and additional help was requested. Guenther's testimony, that he

has never been criticized for not getting his normal duties done, ignores the fact that for the previous five years he had received unsatisfactory performance evaluations with regard to both quality and quantity of work performed.

The County requests that the grievance be denied.

DISCUSSION:

There is no dispute that on November 15, Salzwedel notified Guenther of three party setups for the following day. While the setups may not have been posted in the usual location, Guenther did see the list of setups before he left work on November 15. It is also clear that Guenther did not have the 7:30 a.m. setup completed when Salzwedel checked on the setup at 7:45 a.m. Salzwedel went and talked to Guenther. Guenther did not offer any reason to Salzwedel as to why he had not completed the setup, but rather he told her that he would take care of it and he then did complete the setup. Guenther did not do the 9:30 and 10:30 setups. When Salzwedel went to talk to Guenther in the kitchen about his failure to do the 9:30 setup, they began shouting at each other. Although Guenther complained to her about not being able to do his regular duties and the setups, his testimony revealed that he did not request her to provide him with some assistance, so that both jobs could be completed. Thus, it appears that Guenther had decided to perform his regular duties at the expense of the setups, without advising his supervisor of that decision.

The undersigned is not persuaded that Guenther's comments to Salzwedel, even assuming his version of those comments to be accurate, can be construed as a request for help as the Union contends. Both Guenther and Salzwedel were angry and upset when the comments were made. It was not reasonable for Guenther to assume that Salzwedel would interpret his comments to be a request for help, in view of the context and content of the conversation.

It is arguable as to whether Guenther's failure to timely complete the setups constituted insubordination, rather than a less severe form of misconduct, such as unsatisfactory performance or disobedience. Regardless, Guenther was assigned to perform the setups. The assignment was given by his supervisor and was related to his job. Guenther failed to perform the assignment, thereby giving the County cause to discipline him. The Union argues that one of the extenuating circumstances in this matter is that Guenther did not have enough time to perform both his regular duties and the setups. At no time did Guenther contact Salzwedel to inform her that he was too busy to complete the setups. Another food service worker, who had performed Guenther's job, testified that on those occasions when she knew she would be unable to do the setups she had asked Salzwedel for help and Salzwedel always had provided her with the help. Said employe said that she always requested help before she got behind and that she was never disciplined for requesting help. By failing to request help and instead either doing the setups late or not doing the setups at all, Guenther engaged in a form of self-help, which was not reasonable conduct.

In its reply brief, the County asserts that Guenther was not disciplined for failing to meet with Salzwedel, but rather, he was disciplined solely because he failed to perform those job tasks which had been assigned to him and failed to make any efforts to perform such tasks at all even after having been confronted by a Supervisor with regard to this problem. However, the letter of suspension, dated November 20, 1990, discusses both Guenther's failure to perform the setups and his failure to report to Salzwedel's office as instructed, and then, continues by describing his behavior as insubordination for which he was being suspended without pay for one day. If the letter was intended to limit Guenther's insubordination to only his failure to perform the setups and did not intend to characterize his failure to report to Salzwedel's office as insubordination, such an intent is not apparent from the structure of

the letter.

Based on the letter's implied inclusion of Guenther's refusal to meet with Salzwedel as part of his insubordination, the Union argues that the disciplinary action is flawed by virtue of the County's failure to provide Guenther with Union representation for the meeting, as is required by both the contract and legal precedent.

Article 6 of the contract requires the County to offer Union representation to an employe when disciplinary action is taken. Said language does not contain such a requirement concerning an investigatory interview. There is no evidence in the record to support a finding that Salzwedel asked Guenther to come to her office so that she could administer discipline to him at that time. Therefore, her failure to offer Union representation to him did not violate Article 6.

There is a credibility issue as to whether Guenther requested Salzwedel to have a Union representative present at any meeting with her. Although the undersigned is not persuaded that Guenther made such a request, or alternatively, that Salzwedel heard the request, if made, due to the noisy conditions in the kitchen, a resolution of that issue is not critical. Assuming for the sake of argument that Guenther did request to have a Union representative present when he met with Salzwedel, such a request would appear to fall within the limits expressed by the U.S. Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). Based on Guenther's knowledge, that Salzwedel was angry over his failure to perform all of the setups, it was not unreasonable for him to believe that the meeting requested by Salzwedel could lead to disciplinary action against him. Such a belief is supported by Salzwedel's testimony that she wanted to talk to Guenther about why he did not perform all the setups and, further, that his conduct might result in discipline. Even so, Guenther should have met with Salzwedel to determine the subject of the meeting. If he had reported and requested a Union representative, and if his request was refused and Salzwedel then conducted an investigatory interview which resulted in discipline, then a Weingarten violation would have occurred. Since Guenther did not meet with her, Salzwedel then proceeded on the basis of her personal knowledge concerning Guenther's failure to complete the setups. As discussed earlier, such conduct by Guenther was deserving of discipline and a one day suspension was not unreasonable. The record does not demonstrate that Guenther's ability to defend his conduct was prejudiced by Salzwedel's failure to provide him with a Union representative for a meeting which he did not attend.

Based on the foregoing, the undersigned enters the following

AWARD

That the County did not violate the contract when it suspended the grievant, Steven Guenther, from work without pay for one day; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 10th day of March, 1992.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

