

**IN RE ARBITRATION BETWEEN:**

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**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,  
AFSCME COUNCIL 5, LOCAL #3800 & 3801**

**and**

**UNIVERSITY OF MINNESOTA**

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**DECISION AND AWARD OF ARBITRATOR  
BMS CASE # 08-PA-0019**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**January 19, 2010**

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AFSCME Council 5, Local 3800 & 3801,

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University of Minnesota.

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DECISION AND AWARD OF ARBITRATOR

BMS Case # 08-PA-0019

Nicole Randle Grievance

**APPEARANCES:**

**FOR THE UNIVERSITY:**

Shelley Carthen Watson, Esq.  
Leslie Koidahl, Mgr. Accts. Payable,  
Disbursement Services  
Kathy Johnson, Controller's Office  
Valerie Watson, HR Director in Controller's Office  
Kimberly Swain Simon, Equal Opportunity and  
Affirmative Action Office  
Kevin Roberts, former co-worker in Disbursements

**FOR THE UNION:**

Jeff Fowler, Field Representative  
Nicole Randle, grievant  
Polly Jo Peterson, Union Steward  
Kelly Ahern, former Chief Steward #3800  
Todd Schierenbeck, WBOB Employee  
Maggie McFadden, former U of M employee  
Cherrene Horazuk, Chief Steward #3800

**PRELIMINARY STATEMENT**

The hearing in the above matter was held on October 1, 26 and 29, 2009 at the Office of the General Counsel, 360 McNamara Center on the Minneapolis Campus of the University of Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated December 21, 2009 at which point the record was closed.

**ISSUES PRESENTED**

Was there just cause for the termination of the grievant Nicole Randle? If not, what shall the remedy be?

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2005 through June 30, 2007. Article 21, section 3 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

## UNIVERSITY'S POSITION

The University's position was that there was just cause for the termination under these circumstances. In support of this position the University made the following contentions.

1. The crux of the University's case is that the grievant was terminated for making threatening statements to have her boyfriend come in to work and "take care of," or words to that effect, a co-worker with whom she was having a longstanding dispute. The grievant made this threat on several occasions despite being specifically warned not to say such things; that they were threats and could get her into trouble.

2. The Grievant worked in Disbursement Services along with another employee, Todd Schierenbeck. The supervisors characterized the grievant, and the co-worker too, as difficult and argumentative. The grievant and Mr. Schierenbeck frequently argued and sniped at each other and engaged in antagonistic and unprofessional behavior. They further both frequently complained to their respective manager about the other. In response to this, the manager moved the grievant's cubicle away from Mr. Schierenbeck.

3. The University characterized the whole scenario as a shocking tale of an employee who was obsessed with getting Mr. Schierenbeck fired. The University alleged that the grievant instigated this ongoing conflict and that she made fun of Mr. Schierenbeck's medical condition, exploited his anger and generally instigated a situation where she hoped he would explode into violence so she could get him fired. She tried to recruit other employees into her ongoing battle with Mr. Schierenbeck and when that failed she then tried to paint him in the worst possible light with managers and supervisors so they would discipline him instead of her.

4. The University issued an oral warning to the grievant for her conduct in September 2006 directed at Mr. Schierenbeck, See University Exhibit 8. This was later reduced to a letter of expectation. Nonetheless, the University argued that the grievant was on clear notice of the need to act more respectfully towards her co-workers.

5. The University pointed to its policies and procedures and specifically to the Handbook on Position Expectations in Disbursement Services as follows:

The University's Code of Conduct should serve as the standard by which all employees of Disbursement Services operate in their interactions throughout the University. In majority cases, employees are accountable to their direct manager if behavior falls out of these expectations/guidelines.

- The acceptable way to express disagreement in the workplace is in a conversational tone.
- Outbursts of anger/rage etc. have no place in the workplace.
- Show respect for all co-workers regardless of position.
- Take responsibility for your own behavior.
- Strive to create and maintain a respectful workplace.
- Observe personal boundaries of space, quiet and interruptions.
- Be a productive and positive member of the Disbursement Services team.
- Follow directions, procedures and work independently, accurately and efficiently.
- Listen with an open mind.
- Be proactive in your approach to all position responsibilities.
- If there is a question or an issue, challenge yourself to recommend a possible solution.
- Focus on your position responsibilities and the delivery of superior customer service...

These are but a few of the workplace expectations and the University asserted that it is well understood in this Department as well as the University system that making a physical threat to harm a co-worker is a clear violation of Rules and Policies and leads to severe discipline or termination.

6. In addition, the University is governed by set of Policies, which include a Code of Conduct. This Code sets forth definitions and standards of conduct for all University employees. This provides in relevant part as follows:

Subd. 1 - Fairness: Members of the University community have the obligation to respect, and to be fair to other members, ... .

Subd. 3 - Compliance: Members of the U community are expected to understand and comply with laws and regulations related to their duties. Members are responsible for adherence to University policies and procedures and are expected to comply with State and Federal laws....  
See, University Ex. 3

7. Moreover, making a threat of physical harm is hardly the sort of thing one needs to be specifically warned about yet the grievant did exactly that on multiple occasions during and immediately after the incident in question.

8. The University further asserted that the grievant was given several personal warnings about her behavior and was put on specific notice to stop her actions and inappropriate statements. In August 2006 the grievant was given an oral warning for making threatening and intimidating remarks towards Mr. Schierenbeck. The Union filed a grievance over that but it was not completed by the time of the January 2007 incident. Thus even though the arbitrator sustained the grievance on other grounds, it was clear that Ms. Randle was on notice that her actions would not be tolerated. Moreover, Arbitrator Imes determined that there was just cause for some discipline but that Mr. Schierenbeck should have been disciplined for his actions in August 2006 as well. It was solely due to the disparate treatment claim that the grievance was sustained. Here, as will be discussed below, Mr. Schierenbeck did not engage in any inappropriate behavior and there can be no reasonable allegation of disparate treatment. The University argued that the focus must be on the grievant's threatening statements and not some irrelevant argument about the ongoing set of battles between the grievant and her co-worker.

9. On January 25, 2007 the grievant and another co-worker, Tom Driscoll, were walking toward a set of glass doors when Mr. Schierenbeck was walking in the opposite direction also approaching those same doors. He got there first and proceeded through the doors without apparent incident. There were no words exchanged, no physical touching nor any acts by Mr. Schierenbeck to impede or block the grievant or the other coworker from proceeding through those doors. The grievant however apparently fabricated a story that Mr. Schierenbeck somehow blocked her way through the doors and went to her supervisor to complain.

10. The University asserted that the incident of January 25, 2007 was thoroughly investigated and it was determined that Mr. Schierenbeck did not block the door and engaged in no inappropriate actions directed at the grievant that day. He simply walked through the doors. The grievant however, completely overreacted to this and, as was her pattern, ran to her supervisors to complain about Mr. Schierenbeck's behavior that day. Mr. Driscoll backed up the University's version of the story and indicated during the investigation that he saw nothing unusual or threatening about what Mr. Schierenbeck did that day. (Mr. Driscoll did not testify at the hearing however.)

11. When the grievant got to Ms. Koidahl's office the two discussed the incident and during the conversation with Ms. Koidahl, the grievant stated that she would have to "get her boyfriend to come and take care of" Mr. Schierenbeck," or that she would "have her boyfriend come in and get things straightened out with Mr. Schierenbeck" or words to that effect. The grievant admitted making these statements and admitted making them several times even though she was told not to keep making threatening statements like this.

12. Ms. Koidahl regarded that as a threat to have another person come and do physical harm to an employee and immediately told the grievant not to make such statements. Even though there was no threat of immediate harm, Ms. Koidahl clearly felt that this was a threatening statement in violation of University policy. Ms. Koidahl refused to take any further action based on the door incident however since she determined that no "incident" in fact occurred.

13. Not satisfied with this, the grievant went to yet another worker, Kathy Johnson, who works in Mr. Mike Volna's office, with the same complaint the next day. The grievant asked if she could take this matter to Mr. Volna. Ms. Johnson has little if any contact with the grievant and does not work in the same office. They have exchanged only passing pleasantries in the hall but other than that the two have almost no contact with each other at all.

14. Apparently not heeding the clear warning from Ms. Koidahl made the day before, the grievant again made the statement to Ms. Johnson about getting her boyfriend to come and “straighten things out” with Mr. Schierenbeck, or words to that effect. Ms. Johnson viewed this as a threat of violence against Mr. Schierenbeck and the grievant was again admonished by Ms. Johnson not to make such a statement as it could be construed as a threat of physical harm.

15. As if that were not enough, according to the University, the grievant met with Ms. Watson and made a similar statement again. When Ms. Watson admonished her not to make such statements the grievant attempted to divert the focus of the statement by asserting that she did not mean it as a threat. At that point Ms. Watson told her that she understood exactly what the grievant meant since she was “from the hood too.” It was clear that the grievant knew her statements were inappropriate and was trying minimize her guilt.

16. The grievant then attempted to subvert the investigation by pushing her supervisor to taker action without a thorough investigation thus undermining the just cause process.

17. The University asserted that these statements were serious and demonstrated a clear disregard for University policy. It further showed that the grievant cannot be trusted since she was told multiple times not to make these statements yet she continued to do so even after her direct supervisor specifically told her to stop making those statements.

18. The University has a duty to maintain a safe workplace and does not have to wait until a tragedy happens before taking swift and certain action. While not a direct and immediate threat, it was clear that the grievant’s statements were clearly designed to threaten a co-worker. Further, she was not merely “venting” as the Union suggests. For one thing, the statements were made to different people at different times on different days.

19. The University further asserted that the grievant's words, "I will have my boyfriend come and take care of it," or words to that effect can only be taken as a threat of physical violence or intimidation in clear violation of Policy. It should not matter that it was not an immediate threat – a threat is a threat and it must be taken seriously. Given the grievant's long history and the fact that she was told multiple times not to make these statements it is clear that the University was reasonable in assuming that she intended to make good on this threat. It had an obligation to stop this before something awful happened.

20. The University pointed to other situations wherein employees were disciplined for making threatening statements and asserted that Ms. Randle has been treated the same as those employees for similar conduct. The University treats threats in the workplace very seriously and all employees know that, including Ms. Randle. Termination under these circumstances was the only appropriate response to this serious infraction.

The University seeks an award denying the grievance in its entirety.

#### **UNION'S POSITION:**

The Union's position is that there was not just cause for the termination of the grievant herein. In support of this position the Union made the following contentions:

1. The Union disagreed vehemently with the University's claim that the grievant had engaged in a devious ploy to get Mr. Schierenbeck fired. The Union asserted that Ms. Randle is a long time employee with the University and that she simply wants nothing more than to come to work and do her job without being harassed by her co-workers. She was approached by Mr. Schierenbeck years ago when he was complaining about what he termed disparate treatment against him. This was over how loud another worker was playing the radio. He wanted to enlist Ms. Randle's help in making out complaints against supervisory personnel. Prior to this time she had gotten along relatively well but when she refused to help Mr. Schierenbeck in his little scheme to create dissension in the Department all that changed.

2. The Union alleged that he then began a systematic pattern of harassing Ms. Randle. He would engage in harassing behavior by walking in slamming drawers and doors, throwing papers onto her desk, scowling at her, walking in the work area and simply staring at her without doing anything else and other intimidating and harassing behavior.

3. Mr. Schierenbeck had a history of intimidating the grievant and other employees as well and the University is well aware of his bullying and belligerent behavior. In one such instance he was waiting to ride in an elevator with Ms. Maggie McFadden when the two became engaged in a heated exchange in which Ms McFadden called Mr. Schierenbeck a “greasy psychopath.” He then threatened to escalate things far worse and scared her badly enough that she essentially left because of his aberrant and intimidating behavior. She also left because the University was not doing anything to deal with his threatening actions and simply felt unsafe and unprotected. No one was helping her and dealing with this situation despite the fact that McFadden reported these incidents and the intimidation by Schierenbeck to her supervisors.

4. Throughout all of this the University has never taken Ms. Randle’s complaints about Mr. Schierenbeck seriously and has treated him in a vastly different way. In August 2006, the University gave Mr. Schierenbeck a letter of understating even though he made what was a much more serious threat against Ms. Randle. During a somewhat heated conversation she became so afraid of him she asked to be escorted to her car. When she indicated she was leaving during this exchange and going to her car he made a comment to the effect of, “if you make it that far.” This could only be interpreted as a very real and immediate threat to assault her on the way back to her car yet the University gave him no discipline at all.

5. Ms. Randle was given an oral warning for her retort to him, “I know what to do to [or with] you,” or words to that effect, yet Mr. Schierenbeck received only a letter of understanding, which is not disciplinary. Arbitrator Imes sustained that grievance finding that the University engaged in disparate treatment. Thus, for the purposes of this matter, the grievant was not properly warned about her actions and a discharge is far too severe a penalty under these circumstances.

6. The Union claimed that disparate treatment, with Mr. Schierenbeck getting far less discipline or consequences than Ms. Randle, this has been Ms. Randle’s point for years. The Union acknowledged that Ms. Randle is not without some guilt in this whole scenario and that she has responded to Mr. Schierenbeck and has made some inappropriate comments over time. Those however were typically in response to his continued harassment and haranguing of her and his constant attempts to intimidate her over the course of years. It is also a result of the frustration she feels at having followed all the correct steps, i.e. reporting these transgressions to her supervisors, writing things up, yet being ignored minimized and even punished for doing it the right way. She has gone to management repeatedly and no doubt they are tired of this whole situation.

7. One of the Union’s main points throughout the case was that the University has treated her far more harshly all along here and is engaging in disparate treatment as a general pattern of responding to the multiple complaints she has made about Mr. Schierenbeck’s behavior. The Union pointed to the prior arbitration over the oral warning before Arbitrator Imes, in which the arbitrator ruled that the University had in fact treated Mr. Schierenbeck and Ms. Randle differently and overturned the discipline because of this disparate treatment.

8. The Union pointed to the way the University started its presentation in this matter as an example of how this has manifested itself. The University’s counsel in her opening statement indicated that the grievant threatened to have her boyfriend come and “beat up” Mr. Schierenbeck, yet at no point did anyone ever say that she used those words or anything like them.

9. Ms. Randle has at all points acknowledged that she made the statement about having her boyfriend come and “straighten things out” or to “take care of the situation.” She *never* used the words “beat up” or “assault” or anything like that yet the University sought to poison the well with the arbitrator in this matter by making up a statement about beating up Mr. Schierenbeck.

10. There were multiple instances of harassment by Mr. Schierenbeck over time. The Union pointed out what it terms just a few of them. There was the original incident where Mr. Schierenbeck tried to enlist the grievant into his scheme to “get” the supervisor over the radio being played by another worker. There were multiple instances where he would follow her around the office calling her names such as “rat” or “weasel” or worse. None of these resulted in any consequences for him even though Ms. Randle brought all of it to the attention of her supervisors.

11. Further there were physical manifestations of his rage and anger issues. There were instances where he threw papers and generally stomped around the office in a not so subtle attempt to intimidate or bother her. He complained about the way she dressed. He made inappropriate statements about her children and the large family she had. He made racial comments, calling her “ghetto girl” and other extraordinarily inappropriate comments. No solid action was ever taken against him for these inflammatory remarks.

12. At one point Ms. Randle found a highly threatening valentine card on her desk that showed two dead people ensconced in a heart shaped figure with the caption, “I started loving you the moment you stopped breathing.” She felt threatened by this and suspected that Mr. Schierenbeck had put it there. The investigation of this was cursory at best and virtually no credence placed in the grievant understandable fear of her co-worker when this card was found.

13. With regard to the incident of January 25, 2007 at the doors, the Union asserted that Mr. Schierenbeck did attempt to tacitly intimidate the grievant. No one who was not intimately familiar with the interaction between these two would likely have recognized it and those that did would likely have wanted to simply stay out of it. Thus, it was not surprising that Mr. Driscoll, who was walking with the grievant toward the doors at the same time this incident occurred, either did not notice the subtle interaction or wanted nothing to do with it given the well-known ongoing vitriolic battle between the grievant and Mr. Schierenbeck.

14. The Union acknowledged that the grievant made the statements as alleged but argued that these were not seen as threats and that when the grievant was told by Ms. Watson not to repeat them she indicated that she would not, See University exhibit 6, wherein Ms. Watson writes that the grievant said that “she wouldn’t call him [her boyfriend] but would document the issue.” The grievant also indicated during her meeting with Ms. Watson that she did not mean the statements as a threat and that Ms. Watson testified that she did not take them as an immediate threat.

15. Moreover, the University allowed the grievant to continue working for more than a week after the incident involving the doors and the statements were made, even though the grievant wanted to get an answer on what the University was going to do. If the grievant’s statements were truly considered threatening the University would have at least suspended the grievant pending the completion of the investigation. Rather, the Union argued, the University supervisors had grown tired of her constant complaints about her co-worker and since they too were cowed by him they decided it was more convenient to terminate the grievant. This was a termination of convenience and another instance of disparate treatment against the grievant.

16. The Union noted that the other cases cited by the University were vastly different and involved not only far more egregious conduct than that which occurred here but also showed that the University gave other employees several chances. In the O’Connor matters, that employee made not only directly and immediately threatening statements but also physically threatened people as well.

There she was given several suspensions before being finally terminated. Here the University moved to terminate the grievant far too soon for conduct which, while not perfect did not rise to the level of termination.

17. The Union argued that while the grievant is far from perfect she tried to come to work and just do her job. She followed every directive given to her by her supervisors, never had any indication of threats in the past and never in fact threatened anyone.

The Union seeks an award reinstating the grievant to her former position with full back pay and all accrued contractual benefits.

### **DISCUSSION**

The scenario painted here was without doubt one of the most troubling, sordid and poisonous work environments imaginable. It was abundantly clear from the facts presented on this record that the grievant and her co-worker, Mr. Todd Schierenbeck were engaged in what can only be described as an elementary school level spat between two grown, articulate adults who should clearly both have known better. The kind of immature nonsense that was going on between them would land any 4-year old in a timeout chair, with the sole difference is that the 4-year old might well have taken a valuable and positive lesson from the experience. One can only imagine the deleterious effect this running tiff had on the morale of the rest of the employees in the department. There was ample evidence on the record that both Ms. Koidahl and Ms. Watson were frustrated almost to the breaking point over the sophomoric antics of these two as they tried to “one-up” each other in an ever-escalating contest of gamesmanship and harassment. Ms Koidahl testified very credibly that she was spending approximately half her time on the problems created by these two. That was without question true. It was apparent that the Union felt frustrated by this ongoing petty quarrel between two of its own members. They tried several times to de-escalate the conflict to no avail. It was frankly astonishing to learn that so much of their time was spent in this obsessive contest of wills as opposed to doing their actual jobs. It is, for better or worse, against this backdrop that the case unfolds.

The grievant worked in the West Bank Office Building, WBOB, in Disbursement Services. She was hired in July 2005 and worked there until her termination in February 2007.<sup>1</sup> At first the record showed that her relationship with her co-workers was generally good, including Mr. Schierenbeck. The record showed that this state of affairs continued until the so-called radio incident wherein Mr. Schierenbeck approached the grievant to enlist her help in setting up the supervisor, LaCretia Bell, to somehow get her into trouble by showing that she favored some workers over others. The incident apparently started when Mr. Schierenbeck grew angry over the volume of the radio being played in one employee's work area when he was not allowed to play his radio that loud, or so the story goes.

It was not entirely clear how he intended to accomplish this or what he intended to do to complain about the volume level of another co-worker's radio in that person's office but it was clear that he tried to line up people to aid him in this quest. The grievant testified credibly that she refused to join in his scheme, thinking that it was a silly undertaking, and that she reported his conversation to the supervisor. It was further clear that at that point the relationship soured quickly and went downhill from there.

The record showed that Mr. Schierenbeck does tend to engage in behaviors that can reasonably be perceived to be bizarre and polarizing. As will be discussed below, it is not the intention of this arbitrator to assign blame for "who started this" or who is more at fault for the state of affairs that occurred after this radio incident nor is it strictly necessary to do so; the question here is whether the grievant's termination was for just cause based on the statement she made. It is however necessary to understand the context of those statements in order to fully explore whether just cause exists.

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<sup>1</sup> It was never made clear why it took so long to bring this matter to arbitration. As noted above, the matter was heard over the course of 3 separate days in October 2009 with the Brief filed in late December 2009.

There were a number of incidents described by the grievant after she and Mr. Schierenbeck had a falling out that she claimed led to her frustration and the stress of going to work. The details of these are not strictly germane and even though considerable time was spent describing them at the hearing they will be summarized here.

There were a vast number of minor incidents which the grievant brought to the attention of her supervisor's. Some of these seem at first blush to be petty at best. Some were. Some were not. There was some disturbing evidence that Mr. Schierenbeck was somewhat the aggressor in all of this and that his actions were in many ways at least as serious if not more so than the grievants in terms of their threatening and intimidating posture. He would follow her around calling her names and disparaging her, he would occasionally glare at the grievant whenever he found himself alone in a room with her and would escalate things by throwing papers around and physically touching her or her chair.

There was some evidence to suggest that Mr. Schierenbeck is a difficult person to work with and that he has frequent battles with other co-workers as well. Ms. McFadden described an incident in which he and she both exchanged words but that he so frightened her she eventually left the Department. This evidence was credible and troubling. Moreover, the evidence showed that while the grievant also seemed a bit obsessed with Mr. Schierenbeck, she did not seem to have trouble with anyone else in the Department. Further, her testimony was convincing that her desire was to get him to leave her alone whereas Mr. Schierenbeck seemed comfortable fighting with multiple antagonists.

It was clear that supervisory personnel felt overwhelmed by the sheer number of complaints made by both of these individuals and had no plan in place for dealing with them other than to admonish both to stay away from each other as much as possible.

The Union alleged that the grievant's supervisors did nothing to support her or to make Mr. Schierenbeck stop his constant haranguing of her. This was not completely true. The grievant's work station was eventually moved but the evidence showed that the two kept picking at each other frequently. Management met with both employees and told them to essentially shape up or ship out, as the old adage goes, and that further behavior of this nature would get them both in trouble.

Further, the Union met with both of them and told them the same thing. One Union representative characterized the meeting as "tough love." Nothing seemed to be working here and the two continued on a collision course.

There was the interaction for which the grievant was given an oral warning for her comments made during a somewhat heated exchange on August 23, 2006. This was the subject of the arbitration before Arbitrator Sharon Imes referenced above. The facts of that incident showed that only a few weeks after the radio incident discussed above when the grievant refused to participate in Mr. Schierenbeck's plan to get a supervisor in trouble for arbitrarily enforcing a policy on radios the two became involved in a war of words. This took place on August 23, 2006 when the grievant's daughter became ill and the grievant made several phone calls to check on her condition.

Mr. Schierenbeck made a somewhat pointed remark about the number of personal phone calls the grievant had made that day. When she announced she was going home to tend to her sick daughter and that she was going to go to her car, Mr. Schierenbeck quipped, "if you make it that far." Things went downhill from there apparently and eventually the grievant said that she "knew what to do with you," or something to that effect. After this was investigated the grievant was issued an oral warning. Mr. Schierenbeck was given a letter of expectations, which is apparently considered non-disciplinary.

Obviously this case is not about those facts directly but part of the University's case was based on the grievant's record. Arbitrator Imes, overturned this discipline on disparate treatment grounds. She indicated that there "was just cause to issue the grievant an oral warning for her behavior on August 23, 2006," but that the grievance would be sustained. This was based on the finding that there was disparate treatment and that Mr. Schierenbeck did not receive discipline as the result of his inappropriate comments.

Two things become apparent based on this arbitration award. First, it was clear that for the purposes of this arbitration, the grievant's record did not contain the oral warning the University thought it would when it took the action to terminate the grievant. It was apparent that the University's action here was based on its assumption that the discipline was going to be sustained.

Second, it bolstered the claim that the grievant felt as though she was the victim of disparate treatment on an ongoing basis and while her actions on January 25, 2007 must stand alone and be judged on their own, this was a factor in the overall record of this case and on that was considered as a part of this decision.

It is also significant to note that Arbitrator Imes found that these two have acted unprofessionally and inappropriately in the workplace over a long period. That is completely consistent with the record developed here as well. This record showed too that both employees have acted unprofessionally toward each other and that both share responsibility for the ongoing feud here. It should be noted that the University introduced testimony from another co-worker Kevin Roberts who testified that he thought that Ms. Randle was more obsessed with getting Mr. Schierenbeck fired than the other way around, even though he acknowledged that Mr. Schierenbeck is a difficult person to work with.

His testimony was given little weight on this record since he was not even interviewed prior to the decision to discharge the grievant. While he was called as a rebuttal witness it was apparent that his testimony was more to support the employer's case in chief than it was to rebut what the grievant and Union witnesses said. More importantly, his testimony, while credible, was of little value in deciding the ultimate question here.<sup>2</sup>

The incident that gave rise to this matter occurred on January 25, 2007. There was considerable dispute about the facts of this but the evidence showed that the grievant was walking toward a set of glass doors in the WBOB along with a co-worker, Tom Driscoll. Mr. Schierenbeck approached from the other side. The evidence showed that the grievant and Mr. Schierenbeck could therefore see each other as they neared the door. It was apparent that they would get to the doors at about the same time. No words were exchanged nor was there any physical contact during the glass door incident. From there, the stories about what happened diverged greatly.

The grievant claimed that Mr. Schierenbeck reached the door first and eventually went through it. The grievant claimed that he made a deliberate effort to block the door and described a scenario whereby he made her move out of the way while he walked through the door. She further claimed that this was another of his ongoing efforts to nag and harass her sometimes in a very subtle way.

Mr. Schierenbeck denied that he intended to confront or harass the grievant. He claimed that he simply waked through the door and continued on his way. He further claimed that he had no intention of bothering the grievant and that he was essentially minding his own business. He indicated that he went through his side of the glass doors and allowed the grievant and Mr. Driscoll to proceed through the other side.

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<sup>2</sup> It was also of some note that Mr. Roberts indicated that he was aware of who placed the now infamous Valentine Card referenced above, with the inscription, "I started loving you the moment you stopped breathing." The grievant felt that Mr. Schierenbeck had put that card there but it turned out he did not. The fact that the University had no trouble finding Mr. Roberts for this hearing but seemingly had no idea who put the Valentine Card on the grievant's desk undercut the claim that the University thoroughly investigated the grievant's complaint about who placed that card there. While this is not a major piece of evidence on this record it did tend to support the Union's claim that the University has not taken the grievant's complaints as seriously as they claim.

The evidence as a whole did not support that version of the facts however. It was clear that he blocked the doorway somewhat even though there was no physical bumping or touching. While this fact does not govern the result one way or the other. The grievant was not terminated for claiming that Mr. Schierenbeck blocked the door but rather for her statements made later during the investigation about having her boyfriend come to work and “take care” of the grievant. What it does do however is to support the grievant’s credibility. As the Union acknowledged, she shares responsibility for the ongoing dispute but it was clear that her version of the door incident found more support on the evidence.

Mr. Driscoll did not testify at the hearing so the best evidence as to what he saw is from the notes and testimony of others. According to the notes in Ms. Koidahl’s e-mail he indicated that he “didn’t see anything.” This is certainly understandable since he was not involved in the ongoing quarrel with either of the two protagonists in this saga so he would likely not have noticed the subtleties of any eye contact or body language that the grievant or Mr. Schierenbeck would have noticed. Significantly though, Mr. Driscoll did indicate that he saw them make eye contact which frankly may have been exactly what the grievant was talking about here. He further indicated to Ms. Koidahl according to her notes that it seemed to Mr. Driscoll that Todd [Mr. Schierenbeck] wanted to prolong a previous argument they may have had. Despite the fact that he did not testify and that University witnesses indicated that Mr. Driscoll indicated that he noticed nothing, Ms. Koidahl’s notes indicated that he noticed plenty.

Given his history, the evidence supported the Union’s claim that eye contact from Mr. Schierenbeck was enough to strike some trepidation or at least create a sense of angst or anger in the grievant. While it is only indirectly relevant in this setting, it was frankly clear that something happened at those doors and that Mr. Schierenbeck instigated it.

As noted above, what he did was certainly subtle indeed but appeared to have been akin to two squabbling siblings sitting in the back seat during a long car ride complaining about the other's egregious and outrageous behavior in looking out the wrong window or breathing the other's air.

What was clear was that the grievant apparently took umbrage over something Mr. Schierenbeck did that day even though no words or contact occurred during the immediate glass door incident. She went to her supervisor to again complain about what had happened, as she had many times before. The grievant expressed great frustration and indicated that she "has had it" with Mr. Schierenbeck's conduct. She related what had happened from her perspective and that he had blocked the door and that she felt this was another deliberate attempt to tweak her.

It was into this vortex that Ms. Koidahl was once again unwillingly thrown in an effort to bring industrial peace between two people whose main complaint appeared to be akin to negotiating a truce between two adolescents who claimed that "this all started when he/she hit me back." The grievant testified credibly that when she approached Ms. Koidahl with the doorway incident she minimized it and asked, "is that all" or something to that effect. Despite that initial response, Ms. Koidahl commenced an investigation to determine what happened and what to do about it. The University alleged that the grievant misrepresented the incident to Ms. Koidahl and had intentionally misrepresented the facts of the incident to make it look as though Mr. Schierenbeck was again harassing her. The evidence did not support this allegation at all.

It was clear that she represented the doorway incident quite accurately from her perspective and that she never misrepresented any of the facts of the incident. Indeed, most of the facts were corroborated by Mr. Driscoll, at least from the indication from Ms. Koidahl's e-mail message. While perceptions of the incident may have been different, the factual representations were particularly accurate. Thus, contrary to the University's strenuous assertions, the grievant never misrepresented the facts or attempted to taint the investigation in any way.

Significantly too, her notes from the initial meeting indicated that Ms. Randle had said that she might have to call her boyfriend in and take care of Todd. First, it was clear that the grievant made this statement or something to that effect. She admitted making the statement all along. Second, perhaps more significantly, Ms. Koidahl likely did admonish her to not make such statements but did not place that admonition in the e-mail to Ms. Watson, See University exhibit 4, even though there is mention of the statement in that message.

This fact, coupled with her testimony at the hearing that she did not see that statement as an immediate threat, indicates that it was not taken as a direct threat at the time and was not taken as a serious threat to actually bring the boyfriend in but rather as an ill advised statement made in the heat of the moment. There was further some evidence to suggest that the grievant felt continually frustrated by what she felt was a continuing failure to deal with Mr. Schierenbeck. As the old saying goes, perception equals reality and it was clear that the grievant perceived that she was the victim here. Significantly, her supervisors all knew that she felt that way. The evidence showed a constant stream of communications from the grievant to her supervisors about this and further showed that these messages were replete with references to her frustration about this whole situation.

Later that day the grievant went to see Ms. Watson to complain about the door incident and to vent her continuing frustration that nothing was being done to stop what she perceived to be the ongoing harassment against her. The evidence showed that she was still quite angry over the doorway incident and felt as though the University was again ignoring the seriousness of her complaints and that she would again be told that there was nothing that could be done.

The evidence showed that the grievant had followed all proper procedures in the past and felt frustrated that she was following the rules and the directives laid out for her by her supervisors yet the harassment was not stopping. It was at this meeting she again made reference to having her boyfriend come to “take care of” or “talk to” Mr. Schierenbeck. Ms. Watson told her not to make these statements. There was some discussion about being from the “hood” by both women although it was not entirely clear what that meant or in what context it arose.

What was clear was that Ms. Watson told her not to make potentially threatening statements but, and this was significant, that she did not feel the grievant’s statements were an immediate threat at the time. There was no evidence to suggest that Ms. Watson felt that the grievant would actually act on these statements nor was there any indication from prior conduct or statements that she would. It must be remembered that this ongoing battle had been going on for months at this point and that threats had been made by Mr. Schierenbeck as well, in the August 2006 incident, yet he had not been disciplined. This was largely the basis of the Imes Award noted above. Significantly, there was no evidence to suggest that the grievant made any such threat directly to Mr. Schierenbeck.

The grievant indicated to Ms. Watson in their meeting that she in fact would not call him, i.e., the boyfriend, but would continue to document the issue. This statement comes from both the testimony at the hearing as well as Ms. Watson’s notes at University exhibit 6. This demonstrated a level of contrition and an appropriate response to the admonition not to make any statement that could be construed as a threat.

The grievant also approached Ms. Kathy Johnson to see if she could get a meeting with the Department director. Ms. Johnson was his administrative assistant. The grievant and Ms. Johnson had known each other prior to this but did not work together and were not close. The grievant again expressed what had happened the prior day and again her frustration that nothing was done. She denied making any sort of threatening statements to Ms. Johnson and was apparently somewhat emotional during this meeting.

She did not say that she would have her boyfriend "take care of" anybody but asked "what am I supposed to do to get help?" Ms. Jonson testified though that the grievant had indicated that she felt as though she might have to have her boyfriend come and get things straightened out with Todd. The grievant indicated that she did not make any threat during this conversation but indicated that Ms. Johnson had said that she should not make threats toward people. Again the grievant indicated to Ms. Johnson that she would not but felt that no one was listening to her and that nothing was being done.

This scenario paints a somewhat sad picture of a person who felt, rightly or wrongly, that she was the victim of ongoing harassment and that she felt powerless to stop it. She had discussed a restraining order to no avail. There had been meetings with both employees also to no avail. Work locations had been moved again to no avail.

The question here is whether these statements taken in context and with the almost immediate retraction of them is a serious enough violation of University policy to warrant the grievant's termination. On this record they are not.

The University argued with some cogency that it must maintain a workplace free of harassment or hostile behavior and that it has a responsibility to make sure people can come to work free from harassment of any kind. This is certainly true.

The University further argued that it need not wait until a tragedy happens or is about to happen before taking appropriate action to maintain that safe workplace. This is certainly true as well.

The University pointed to other situations involving workplace violence and harassment wherein the employees were eventually terminated as support for their position. There was the situation involving an employee in the Disbursements Department named O'Connor. She engaged in workplace threats and harassment of other employees and was eventually fired. His case however is vastly different from the O'Connor scenario and ironically worked to support the Union's assertions here.

First, Ms. O'Connor engaged in far more egregious actions. She was quite clearly the aggressor in her cases, there were three matters all of which ended up in arbitration, and in some cases was totally out of control emotionally and professionally. She also made very real physical threats directly to employees in her Department.

Second, despite her outrageous behavior, Ms. O'Connor was given a written warning, a separate 10-day suspension, for which the undersigned was the arbitrator, and eventually was terminated. The grievant here was afforded no such progressive discipline and engaged in nowhere near the level of behavior for which Ms. O'Connor was given three separate chances over the course of many months to correct her behavior. It was apparent that she was quite unable to control her anger and that her frequent loud and abusive outbursts were the source of the same sort of consternation for her supervisors as were the antics of the grievant and Mr. Schierenbeck in this saga.

That being said, it was clear that the grievant's statements were not seen as immediate threats but were "future threat," whatever that means. Despite that, the grievant was allowed to continue working for another week until she was finally discharged. This seems an odd response if indeed the University truly felt these were threats of physical violence.

Moreover, there was no evidence in all of this that the grievant had any present or future intent to act on these statements. While it is certainly true no one can predict the future and an employer does not have to wait and see if a threat really materializes before taking action, some evidence of intent to act is required before someone can be fired. Here there was no such evidence and the grievant almost immediately indicated in these sometimes tearful meetings with her supervisors that she would not in fact have her boyfriend do anything but would rather follow the ordained procedure even though she felt that was fast becoming a waste of time.

The University terminated the grievant for the statements she made to have her boyfriend come to “take care of” Mr. Schierenbeck. See University exhibit 10. The Union focused on the history of the ongoing dispute and the effect it had on the grievant. Here both factors must be taken into account in determining whether just cause existed. As noted above, there was a significant history between the two and the supervisors were more than well aware of it. The most reasonable inference to be drawn from these facts is that the grievant likely overreacted to the perceived transgression at the doors. Further, she felt minimized and ignored even though she went to the supervisor rather than trying to resort to self-help or to descend into yet another confrontation with Mr. Schierenbeck.

Clearly the statements she made were ill-advised and inappropriate. Had they been made directly to Mr. Schierenbeck the result here may well have been quite different. Clearly too, the supervisory personnel overreacted to the statements she made and somehow determined them to be a future threat based on an apparent assumption that the grievant would follow through on this even though she said she would not.

Finally, it was clear that no one who heard these statements believed at the time that they constituted an actual immediate threat. The Union argued that the University had simply grown tired of dealing with these two and felt that perhaps the best way to deal with the situation was to fire one of them at the first opportunity that presented itself. There was no direct evidence of that even though it was abundantly clear that the grievant’s supervisors had devoted an inordinate amount of time to this situation and that they too had had enough of it.

On this record there was simply an insufficient basis to determine that an actual threat occurred here. Having said that however it was quite troubling that the grievant made the statements even after she was told not to. She should clearly have know that making such a statement was inappropriate and could be perceived as a possible threat in a different time and place.

Here though those who made the decision knew her and new the situation and apparently believed that there was no immediate danger. Under these unique circumstances the statements, while stupid, were not so threatening that they should result in discharge. The fact that the grievant worked the whole next week without apparent problem or additional statements or actions of this nature were compelling as well.

The University alleged that the grievant attempted to sabotage the investigation by asking about the status of it. That was not shown to have been the case. She was entitled to know what her status was and there was nothing wrong in her asking. Further, there was no harm shown to have been done as the result of it. Her supervisors told her they were investigating and would get back to her with a decision regarding her status.

The question now is the remedy to be applied here. Clearly termination is not appropriate even though the grievant certainly shares some responsibility for the ongoing situation. The termination was not based on the ongoing troubles between the two employees. If it had been the admonition against disparate treatment set forth by Arbitrator Imes would have been equally applicable here as well. It was not however; the action here was based on the statements made by the grievant so a disparate treatment argument did not apply.

Some consideration was given to the large amount of potential back pay here since the grievant was terminated in February 2007. The hearing in his matter did not occur until late 2009. The arbitrator was mindful of that but a just cause analysis should not be governed by the length of time between discipline and the arbitration. Some consideration was given to reinstating the grievant without back pay or benefits. This was rejected though because such a remedy would frankly be an unjustifiably long suspension on these facts.

Some consideration was given to reinstatement with full back pay and benefits as well. This held some appeal since the Imes Award overturned the discipline on disparate treatment grounds thus leaving the grievant's record clean of discipline. Here though it would be to ignore the obvious to assume that the grievant was not on clear notice of the need to not make inflammatory statements to and about the grievant.

Some guidance was taken from the O'Connor cases as discussed above. In her case there was both a written warning imposed first followed by a 10-day suspension followed ultimately by a termination when she continued to act irrationally and frankly dangerously.

Here the most reasonable award even though there has been a very lengthy period between the termination and the date of this Award is to impose a similar 10-day suspension on the grievant for her actions on January 25 and 26, 2007. Accordingly the Award is to reinstate the grievant with full back pay and accrued contractual benefits less a 10-day disciplinary suspension which is to be deducted from back pay and benefits. Further, the back pay is subject to mitigation of damages so that the amount ordered is to be reduced by any government unemployment, disability or other benefits paid to her as well as any wages or salary or other earnings the grievant has received between her date of termination and the date of reinstatement hereunder. The Union and the grievant are ordered to provide any and all appropriate documentation, authorizations and/or tax returns necessary to determine the amount of the back pay award ordered hereunder.

### **AWARD**

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievant shall be reinstated to her former position with the employer within 10 business days of this Award with full back pay and accrued contractual benefits less the 10-day suspension subject to mitigation and provision of appropriate documentation as set forth above.

Dated: January 19, 2010

U of M and AFSCME #5 – Randle award

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Jeffrey W. Jacobs, arbitrator