

RELEVANT CONTRACT ARTICLE

ARTICLE 25 - Discipline

- A. The District and its supervisors are responsible for the maintenance of discipline.
- B. An employee has the right to ask to have an Association representative present at any stage of the discipline procedure.
- C. If, in the opinion of the employee's supervisor, the services of an employee are unsatisfactory, a supervisor shall:
 - 1. Conduct a conference with the employee and the supervisor, inform the employee of the deficiencies; suggest how improvements can be made; inform the employee that the necessary improvement must be made within a specified number of working days, or that a recommendation for disciplinary action, up to and including dismissal, may be made to the Superintendent.
 - 2. On the date specified to the employee at the initial meeting, the employee will be notified of the progress that has been made. If satisfactory improvement has not been achieved, a written recommendation for disciplinary action will be forwarded to the Superintendent.
 - 3. Prior to rendering a decision, the Superintendent will afford the employee and the employee's representative an informal hearing on the matter.
 - 4. If the Superintendent determines that disciplinary action is necessary, he/she will, in writing, inform the employee of the charge upon which disciplinary action has been based and the disciplinary action imposed. Included in this account will be a summary of the charges and a summary of the information relied upon in making the determination. The Association, upon demand, will be given access to the full file.
 - 5. In the event of a flagrant misconduct, the employee may be suspended immediately from employment with the District until the charges are investigated and a decision is made to continue or discontinue the employee's employment. If the employee is cleared of the charges, the employee will be fully reinstated as of the date of the suspension without loss of pay or accrued benefits. Such suspensions shall be limited to a maximum of ten (10) days. If the charges are sustained, the termination date shall be the date of written notice of dismissal.
 - a. Flagrant misconduct may include, but is not limited to: insubordination; neglect of duty; unauthorized absence; willful violation of rule, regulation, or policy; criminal act(s); or being under the influence of intoxicants while on duty.

6. Prior to the decision of the Superintendent, the employee will have the opportunity to meet with the Superintendent. The employee may be accompanied by a representative at such meeting with the Superintendent.

STATEMENT OF FACTS

David Morris worked as a custodian for the District from June 6, 2005, until January 30, 2007. From approximately September 2006, until January 5, 2007, Mr. Morris worked from 2:30 pm to 11:00 pm at the Myrtle Point High School. During that time, he worked with another custodian, Dean Noyes. Mr. Noyes retired in December 2006, and, as a result, Mr. Morris was placed on a split shift on January 5, 2007. On the split shift, Mr. Morris worked at the high school from 2:30 pm – 8:00 pm, and then worked at the Maple School from 8:00 pm – 11:00 pm. Mr. Morris worked on the split shift until his termination on January 30, 2007.

Superintendent Kent Klewitz provided Mr. Morris with a list of job duties for the split shift. (U-2). According to the list of job duties, Mr. Morris was instructed to lock all the doors to the high school except the front doors from 3:30 pm – 3:45 pm. (U-2). When he left for the Maple School at 8:00 pm, other custodians arrived at the high school to complete the remaining job duties at the high school. According to the list of job duties provided by Mr. Klewitz, these other custodians were responsible for locking the front doors to the high school and securing the building from 11:45 pm – 12:00 am. (U-2).

The list of job duties for Mr. Morris' split shift differed from the list he had worked under previously. Prior to working on the split shift, Mr. Morris worked under a list of job duties that instructed him to lock all the doors to the high school from 4:01 pm - 4:14 pm. (U-3). But, after he was moved to the split shift, this assignment changed. According to his new list of job duties, he was to lock all the doors *except for the front doors* to the high school. (U-2).

Mr. Morris never received any notice from the District that he was supposed to do something different than what his written job duties instructed. So, when he began working on the split shift on January 5, 2007, he began locking all the doors to the high school except the front doors.

On January 5, 2007, the first day of his new split shift, Mr. Morris was unsure of where he was supposed to be at 7:30 pm. He knew that he was scheduled to receive training for his new duties at the Maple School, but he wasn't sure if he was supposed to wait at the high school for someone to meet him, or if he was supposed to drive to the Maple School to receive his training there. Mr. Morris was anxious. He wanted to do a good job on the new shift. When no one showed up at the high school, he decided to drive to the Maple School. He got in his car, and just as he was leaving the high school parking lot, he saw Superintendent Klewitz drive up. Mr. Morris decided to ask the Superintendent where he was supposed to receive his training. Mr. Morris followed Mr. Klewitz to the front doors of the high school, where Mr. Klewitz and Mr. Morris had a discussion. Mr. Klewitz asked Mr. Morris whether he planned to leave the building unsecured. Mr. Morris responded that he had trained a new custodian named Edward how to lock the front doors, and that Edward, who was still working in the building at the time, would be locking the front doors and securing the building when he (Edward) left that night.

Mr. Morris kept a journal of his work days, and his journal entry on this day reflects that Edward was trained around 4:30 pm and was still working in the building when this conversation took place. The Superintendent accused Mr. Morris of leaving the building empty and unlocked, but there was a basketball game going on that evening, so students, parents, and others were still going in and out of the building. (U-6).¹

¹ Although the Superintendent testified that students and parents "always" used the side door for basketball games, Debbie Bushnell, a Library Assistant at the high school, testified that the front doors are often used by

During this conversation, Mr. Morris explained to the Superintendent that he had a headache and, with the Superintendent's permission, Mr. Morris left early that evening. At no time during this conversation did the Superintendent tell Mr. Morris that he was supposed to lock the front doors to the high school from 3:30 pm – 4:45 pm. The Superintendent's main concern during this conversation was whether the building was left unsecured and unattended to. But, as Mr. Morris explained, Edward, the new custodian, was inside the building and was the individual responsible for securing the building when he left.

The Superintendent never provided Mr. Morris with anything in writing after this conversation took place that instructed Mr. Morris to lock the front doors to the high school. Mr. Morris never received any sort of discipline for not locking the front doors on January 5.

On January 18, 2007, Mr. Morris was working at the high school on his split shift. The high school Principal, Greg Tippett, told Mr. Morris that he had been finding the front doors to the high school unlocked. Mr. Morris explained to Mr. Tippett that, according to his new list of job duties, Mr. Morris was not supposed to lock the front doors to the high school; the other night custodians who arrived at 8:00 pm were responsible for making sure the front doors were locked. At the time of this conversation, Mr. Tippett did not know that Mr. Morris had been placed on a new split shift. He believed that Mr. Morris was still working a full night shift at the high school, and therefore believed that Mr. Morris was still working under his former list of job duties. (See U-3). Mr. Tippett asked Mr. Morris to lock the front doors, and Mr. Morris did. Mr. Tippett then told Mr. Morris that he would have to check with the Superintendent on who was supposed to lock the front doors to the high school. Mr. Morris watched Mr. Tippett try to call the Superintendent on his cell phone, but he didn't get through. Mr. Tippett then told Mr. Morris he would "get back to him" about the issue of locking the front doors. At that point, Mr.

individuals attending a basketball game, and are often propped open or unlocked by individuals other than custodians.

Tippett left. Mr. Morris finished his shift at the high school and left for the Maple School at 8:00 pm. Mr. Tippett never got back to Mr. Morris.²

On January 25, 2007, Mr. Morris met with the Superintendent to discuss workload issues. Mr. Morris scheduled this meeting with the Superintendent because he felt that he did not have enough time to complete all the tasks on his split shift. Superintendent Klewitz never provided with Mr. Morris with any notice that the Superintendent wanted to use the meeting to discuss work performance issues. Debbie Bushnell, the Chapter President, attended the meeting with Mr. Morris. Ms. Bushnell testified that she called the OSEA field representative, Ross Lorenzo, the day before the meeting to determine who should attend the meeting. Mr. Lorenzo is the union representative who attends meetings with employees that could lead to discipline. Mr. Lorenzo and Ms. Bushnell decided that, since the meeting with Mr. Morris and the Superintendent was only for the purpose of discussing Mr. Morris's workload concerns, and not a meeting that could lead to discipline, Ms. Bushnell would attend the meeting.

At the meeting on January 25, 2007, the Superintendent wanted to discuss issues related to Mr. Morris' work performance. Both Mr. Morris and Ms. Bushnell testified that they felt the discussion of these work performance issues could lead to discipline. Mr. Morris asked that he be allowed to have Ross Lorenzo present for the discussion regarding work performance issues. The Superintendent knew that Mr. Lorenzo was the union representative who typically attended such discussions. The Superintendent responded that Mr. Morris did not need *any* union representation at the meeting because no discipline could result from the work performance issues he wanted to discuss. Mr. Morris continued to ask that Mr. Lorenzo be allowed to attend

² Tippett testified that he called the Superintendent, spoke with him, and immediately reported back to Mr. Morris. He then changed his testimony, saying that he really didn't speak with the Superintendent on the phone, but that he saw the Superintendent later that evening at a basketball game, after which point he reported back to Mr. Morris. Tippett's testimony on the subject was contradictory and inconclusive. Even assuming that he did speak with the Superintendent at a basketball game later that evening, Mr. Morris would have left for the Maple School for the second half of his split shift when Tippett alleges he reported back to Mr. Morris.

the discussion. The Superintendent refused to call Mr. Lorenzo to the meeting, even though Mr. Lorenzo frequently dropped whatever he was doing to attend such meetings on short notice. The Superintendent refused to reschedule the meeting so that Mr. Lorenzo could attend, and then abruptly ended the meeting. Mr. Morris never got up and walked out of the meeting, nor did he refuse to discuss his workload concerns, which was the intended purpose of the meeting. Mr. Morris simply wanted Ross Lorenzo, the union representative who attended work performance meetings, to attend any discussion of his work performance issues.

Mr. Morris reported the events of the January 25, 2007, meeting to Ross Lorenzo. Mr. Lorenzo met with the Superintendent on January 29, 2007. At this meeting, the Superintendent told Mr. Lorenzo that he was going to terminate Mr. Morris' employment. When Mr. Lorenzo inquired as to the reasons for termination, the Superintendent responded that he was going to terminate Mr. Morris' employment for work performance issues. It was later discovered that these were the same work performance issues that the Superintendent wanted to discuss with Mr. Morris at the meeting on January 25, when the Superintendent reassured Mr. Morris he did not need *any* union representation because no discipline could result from the work performance issues.

At the meeting on January 29, 2007, the Superintendent told Mr. Lorenzo that he was planning on terminating Mr. Morris's employment, even though Mr. Morris had not received any notice of charges and had not been given a chance to respond to the charges.

On January 30, 2007, the Superintendent terminated Mr. Morris's employment. Mr. Morris learned of the reasons for his termination on the same day that he was terminated, and was never provided with an opportunity to respond to the charges prior to his termination. His employment was terminated for "repeated acts of flagrant misconduct." (J-2). Flagrant misconduct is defined under the collective bargaining agreement as including: insubordination;

neglect of duty; unauthorized absence; willful violation of rule, regulation, or policy; criminal act(s); or being under the influence of intoxicants while on duty. (J-3, p.34).

The notice of termination cites four incidents, all occurring in January 2007, which support the District's finding that Mr. Morris engaged in "repeated acts of flagrant misconduct."

The four incidents, as alleged by the District in the letter of termination, include:

- On January 5, 2007, while Mr. Morris was working as a night custodian, he left the high school building and campus in his vehicle without locking the doors and securing the building.
- On January 18, 2007, Mr. Morris was insubordinate to Principal Greg Tippett by telling Mr. Tippett that locking the front doors to the high school was not a duty on his new job duty list.
- On January 24, 2007, Mr. Morris was out of his assigned area at the Maple School and was helping at the high school, even though he hadn't completed his assigned duties at Maple School.
- On January 26, 2007, during a meeting that was scheduled by Mr. Morris to review work load issues, Mr. Morris stated that he would not discuss work performance issues with the Superintendent without his union representative present.

(J-2).

The Union subsequently filed a grievance, citing a violation of Article 25, Section C(5)(a), and requesting that Mr. Morris be reinstated to his position and made whole for any loss in wages and benefits.

ARGUMENT

I. The District has not met its burden of proof.

The District has the burden of proof in this case. In order to prevail, the District must

prove, by clear and convincing evidence, that Mr. Morris committed the acts alleged in the notice of termination. See Elkouri and Elkouri, *How Arbitration Works*, (ABA, 6th Ed. 2003) 949-53 (in discharge cases, the employer has the burden to establish, with clear and convincing evidence, that the grievant is guilty of the charges alleged in the notice of termination). In order to meet this burden, the District must show, by clear and convincing evidence, that: (1) Mr. Morris engaged in each of the acts alleged in the notice of termination; and (2) that each of those acts constitute an act of “flagrant misconduct,” as that term is defined by the labor agreement. For the reasons discussed below, the District has not met its burden.

A. The January 24 incident

The District cannot show, by clear and convincing evidence, that Mr. Morris engaged in all the acts alleged in the notice of termination. The District alleges that on January 24, 2007, Mr. Morris was out of his assigned area at the Maple School and was helping at the high school, even though he hadn’t completed his assigned duties at the Maple School. The District provided no evidence to support this assertion. The Superintendent’s testimony regarding this incident was based entirely on inadmissible hearsay evidence; he had no first-hand knowledge of this event. The Superintendent never explained who saw Mr. Morris out of his assigned work area; what Mr. Morris was doing to help at the high school; what duties were left unfinished at the Maple School; and what evidence he relied on in reaching this conclusion. The District cannot sustain the termination on hearsay evidence alone. See Elkouri and Elkouri, *How Arbitration Works*, at 349 (“An employer’s decision to rely solely on hearsay evidence in a case where it has the burden of proof has been deemed insufficient to sustain its case.”).

Mr. Morris provided evidence that he was not even working on January 24, 2007, and, consequently, he could not have engaged in the alleged misconduct. Mr. Morris kept an ongoing journal of his work days. His journal indicates that he took the day off on January 24 to

meet with his personal attorney. (U-4, p.4). The District never provided any evidence to rebut the accuracy of Mr. Morris' journal entries.

The District has not proven, by clear and convincing evidence, that Mr. Morris engaged in the acts alleged on January 24. The District has failed to meet its burden of proof.

B. The January 5 incident.

The District has failed to prove, by clear and convincing evidence, that the remaining acts alleged in the notice of termination constitute "flagrant misconduct," as that term is defined by the labor agreement.

The notice of termination alleges that on January 5, 2007, Mr. Morris left the high school building without locking the front doors and securing the building. (J-2). In order for this to act to constitute "flagrant misconduct," the District must show that the act constitutes either insubordination or neglect of duty. (J-3, p.34); *see also* Response to Grievance (J-5) (citing insubordination and neglect of duty as the grounds for Mr. Morris' flagrant misconduct).

Mr. Morris was not insubordinate on January 5, nor did he engage in "neglect of duty." January 5 was the very first day of his new split shift. According to his new job duty list, Mr. Morris was instructed not to lock the front doors to the high school. (U-2). By not locking the front doors, Mr. Morris was simply following his written instructions. In fact, had he locked the front doors on January 5, he would have been insubordinate.

The new job duty list indicated that the high school building was to be secured from 11:45 pm – 12:00 am. (U-2). This responsibility could not have applied to Mr. Morris, as Mr. Morris was instructed to leave the high school at 8:00 pm for his second shift at the Maple School. (U-2). Because securing the building was not Mr. Morris's job duty, he could not have been insubordinate by failing to secure the building.

By not locking the front doors and not securing the building on January 5, Mr. Morris

was simply following his written job instructions. Mr. Morris could not have been insubordinate or neglected his job duties if he was following his written instructions.

The District has failed to prove, by clear and convincing evidence, that Mr. Morris engaged in “flagrant misconduct” on January 5.

C. The January 18 incident

The District also failed to prove that Mr. Morris engaged in “flagrant misconduct” on January 18, 2007. The notice of termination states that Mr. Morris was insubordinate to Principal Greg Tippett by telling Mr. Tippett that locking the front doors to the high school was not a duty on his new job duty list. (J-2). This act does not constitute insubordination or neglect of duty. Notably, the termination notice does not allege that Mr. Morris *refused* to lock the front doors. That is because Mr. Morris did lock the front doors when asked to do so by Mr. Tippett. Rather, the notice of termination alleges that Mr. Morris was insubordinate by “stating that [Mr. Morris was] not to lock the doors as that was not on [his] work list.” (J-2).

This is not insubordination. Insubordination is a refusal to follow a direct order. Black’s Law Dictionary, 802 (7th ed. 1999); *IAFF Local 890 v. Klamath County Fire District 1*, (Downing, 2004). The District does not allege that Mr. Morris refused to follow a direct order. The District alleges that Mr. Morris told Mr. Tippett that his new work list did not instruct him to lock the front doors. This was not insubordinate.

The District has not met its burden because the District has not proven, by clear and convincing evidence, that Mr. Morris engaged in “flagrant misconduct” on January 18.

D. The January 26 incident.

Finally, the District has not met its burden of proof with respect to the incident alleged to

have occurred on January 26, 2007.³ (J-2). In the letter of termination, the Superintendent states:

[D]uring a meeting on January 26, 2007, that you scheduled to review your job requirements with your local association president present, you stated that you were not going to discuss or talk about the performance issues I expressed concern about without your union representative with you.

(J-2).

The District has not proven, by clear and convincing evidence, that Mr. Morris, by asking to have his union representative present to discuss work performance issues, engaged in insubordination or neglect of duty.

Oregon's Public Employee Collective Bargaining Act (PECBA) confers Weingarten rights upon represented public employees. *Washington County Police v. Washington County Police Officers Assoc.*, 12 PECBR 693 (1991) (citing *AFSCME Local 328 v. OHSU*, 10 PECBR 922 (1988)). Oregon's Employment Relations Board has described that an employee exercises his or her Weingarten rights, as codified by PECBA, by "requesting union representation at an investigatory interview *which might reasonably result in disciplinary action.*" *Washington County Police*, 12 PECBR at 693. (Emphasis added, internal quotes omitted).

Additionally, the Board has found:

The PECBA right to representation, in this context, arises only when an employee reasonably believes that a purpose of an interview is to obtain information from the employee which could provide a basis for imposing discipline upon the employee or for justifying already-determined discipline. When an employee has such a reasonable belief, he or she may request the assistance of a representative.

³ According to Mr. Morris's journal and the testimony of Mr. Morris and Ms. Bushnell, this meeting actually took place on January 25, 2007. The District never presented any evidence to rebut the accuracy of Mr. Morris's journal entries. For purposes of clarity, the brief will refer to the meeting as taking place on January 26.

If an employee appropriately requests representation, an employer lawfully may (1) accede to the request and defer the interview until a representative is present, (2) decline to interview the employee with a representative present and continue its investigation without the interview, or (3) give the employee the choice of having the interview without representation or having no interview at all.

An employer violates ORS 243.672 (1)(a) if it (1) refuses the employee's request and continues questioning of the employee or (2) allows a representative to be present but unlawfully restricts the representative's participation in the interview or (3) disciplines the employee because of the request for assistance or because of the employee's refusal to participate in the interview without representation.

Id. (Emphasis added).

When an *employee reasonably believes* that discussion of an issue could lead to discipline, the employee is entitled to union representation. On review, the Board examines whether the employee's belief that discipline could result from the conversation was an objectively reasonable belief. *AFSCME v. State of Oregon*, UP-9-01 (2002). In determining whether the employee's belief was "reasonable," the Board looks at the totality of the circumstances, including: (1) the subject matter of the interview; (2) evidence of employee wrongdoing; (3) the authority of the employer representative conducting the interview to impose discipline; (4) the knowledge of the employee as to whether the questioning could lead to discipline; and (5) any other attending circumstances. *Id.*

Here, the subject matter of the interview was Mr. Morris' performance issues. Poor performance by an employee is a common disciplinary matter. Mr. Klewitz was attempting to confront Mr. Morris with alleged wrongdoing and Mr. Klewitz has the authority to discipline Mr. Morris for any misconduct. In fact, Mr. Klewitz had begun acting as Mr. Morris's direct supervisor and had recently given Mr. Morris a poor performance evaluation. (J-1). Mr. Morris knew that the questioning could lead to discipline, as evidenced by his request to have Ross Lorenzo present. Mr. Lorenzo is the union representative who attends employee meetings

where discipline may result.

Under the totality of the circumstances, Mr. Morris' belief that he could be subjected to discipline was reasonable. The reasonableness of his belief is supported by the fact that Mr. Morris was later discharged for the performance issues, even though the Superintendent assured Mr. Morris that no discipline could result from the discussion of the issues.

In this case, both Mr. Morris and the Chapter President, Debbie Bushnell, testified that they felt the discussion of performance issues with the Superintendent on January 26 could lead to discipline. Mr. Morris rightfully requested that his union representative, Ross Lorenzo, be present for the discussion. Although Ms. Bushnell was present, it was undisputed that Mr. Lorenzo is the union representative who typically attends such discussions. The Superintendent was aware that Mr. Lorenzo was the union representative who handled such situations because Mr. Lorenzo had attended similar meetings between employees and the Superintendent in the past. In fact, Ms. Bushnell testified that, had she known that the Superintendent wished to discuss performance issues, she would not have attended the meeting without Mr. Lorenzo.

Under the Board's decision in *Washington County Police, supra*, the District had three options: (1) wait until Mr. Lorenzo could attend the interview; (2) continue the investigation without the interview; or (3) give Mr. Morris the choice of having an interview without representation. However, as the Board makes clear, the District was *not* authorized to discipline Mr. Morris because he requested union representation or because he refused to continue the interview in the absence of his union representative. That is exactly what the District did here. As the notice of termination indicates, Mr. Morris was disciplined because he refused to discuss work performance issues without his union representative. (See J-2). The District, by disciplining Mr. Morris for refusing to discuss work performance issues in the absence of his union representative, violated Mr. Morris's Weingarten rights, as codified by PECBA.

Because Mr. Morris had the right to ask that Mr. Lorenzo be present and the right to refuse to answer questions in the absence of Mr. Lorenzo, Mr. Morris could not have engaged in any misconduct on January 26.

The District is likely to assert that Debbie Bushnell, the Chapter President, adequately fulfilled Mr. Morris' right to have a union representative. However, it was uncontested that Mr. Lorenzo was the union representative who attended discussions with employees when the employee reasonably believed the discussion could lead to discipline – not Ms. Bushnell. Ms. Bushnell testified that she felt uncomfortable filling this role and, had she known the discussion would involve work performance issues, she would not have attended the meeting. Mr. Morris testified that he felt Mr. Lorenzo was the union representative who was able to ask questions and defend him in such circumstances. As the Board explained in *Washington County Police, supra*, an employee has the right to a “knowledgeable” union representative:

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated or too ignorant to raise extenuating factors. A *knowledgeable* union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

Id.

Furthermore, Mr. Lorenzo testified that it was not unusual for him to receive calls asking him to appear at a meeting at the last minute – he has done this before and had done so on at least one prior occasion with this District. The Superintendent needed only to call Mr. Lorenzo to the meeting. Any prejudice suffered by the District as a result of waiting for Mr. Lorenzo to arrive at the meeting would have been de minimus.

Even assuming, for the sake of argument, that Mr. Morris was not entitled to have Mr. Lorenzo present at the January 26 meeting, Mr. Morris still should not have been discharged for

requesting Mr. Lorenzo's presence because this does not amount to "flagrant misconduct," as that term is defined by the contract. Mr. Morris scheduled the meeting to discuss his workload concerns. Mr. Morris was willing to discuss all issues related to his workload concerns. When the Superintendent wanted to discuss issues related to Mr. Morris's job performance, Mr. Morris did not refuse to discuss those issues. Rather, he asked that the meeting be rescheduled so that Mr. Lorenzo could be present. Had the Superintendent rescheduled the meeting so that Mr. Lorenzo could attend, Mr. Morris would have discussed those issues with the Superintendent. Mr. Morris's conduct does not constitute insubordination. He never refused a direct order from the Superintendent. He simply wanted to reschedule the meeting in order to have his union representative present. Therefore, even in the absence of the Weingarten violation, the District still has not proven that Mr. Morris' conduct constitutes "flagrant misconduct," as that term is defined under the contract.

The District has failed to meet its burden of proof. The District has not proven, by clear and convincing evidence, that Mr. Morris was insubordinate or engaged in "neglect of duty" when he asked to have Ross Lorenzo present during the January 26 meeting.

Because the District has not met its burden of proof on any of the charges alleged in the notice of termination, the grievance must be sustained.

II. The District, by failing to provide Mr. Morris with notice of charges and a chance to respond prior to his termination, violated Mr. Morris's right to procedural due process.

Public employees have a property interest in their jobs and cannot be deprived of that property interest without due process. *Cleveland Board of Education v Loudermill*, 470 U.S. 632 (1985). Arbitrators have long held that an employee's right to procedural due process in the context of labor arbitration includes an opportunity to present his or her side of the case before the discipline decision has been made. *City of Elgin*, 100 LA 1214, 1217 (Salkovitz Kohn,

1993) (citing *Great Midwest Mining Corp.*, 82 LA 52 (Mikrut, 1984)). This is typically referred to as a “predisciplinary hearing.” The essence of an employee’s right to a predisciplinary hearing is the opportunity to present evidence and arguments to the decisionmaker *before* the decision is made. *Id.* at 1218. “Procedural fairness requires ... a full and fair investigation of the circumstances surrounding an employee’s conduct to provide an opportunity for him to offer denials, explanations, or justifications that are relevant before the employer makes its final decision.” *Shafer's Ambulance Service*, 104 LA 487, 487 (Calhoun 1995).

In this case, the District failed to provide Mr. Morris with notice of charges and a chance to respond to the charges prior to his termination. When Mr. Lorenzo met with the Superintendent on January 29, 2007, the Superintendent told Mr. Lorenzo that he had already made the decision to terminate Mr. Morris’ employment. At that time, Mr. Morris had not received any charges, nor had he been interviewed about the charges. And though the Superintendent did meet with Mr. Morris and Mr. Lorenzo briefly when the notice of termination was provided, Mr. Morris and Mr. Lorenzo both testified that Mr. Morris was not given an opportunity to respond to the charges at that time.

Mr. Morris was denied the opportunity to review the evidence against him and rebut the charges prior to the District’s decision to impose discipline. Had the Superintendent provided Mr. Morris with such an opportunity, he would have learned, for example, that Mr. Morris was not even at work on January 24 – a day that he allegedly engaged in misconduct. Thus, the District’s failure to conduct a predisciplinary hearing not only violated Mr. Morris’s procedural due process rights – it also hindered the District’s own investigation.

The District, by failing to provide Mr. Morris with notice of charges and a chance to respond to those charges prior to termination, violated Mr. Morris’ right to procedural due process. This violation provides an independent basis to sustain the grievance:

A public employee who has a property interest in his or her job cannot be terminated without the opportunity to respond to the employer's reasons for dismissal and to rebut the charges on which the dismissal is based. If due process is not accorded, an arbitrator's determination and analysis of other factors is irrelevant and the discharge cannot be upheld.

Elkouri & Elkouri, *How Arbitration Works*, at pp. 1254-58.

Because the District failed to provide Mr. Morris with notice of charges and a chance to respond to the charges prior to making the decision to terminate his employment, the District has violated Mr. Morris' right to procedural due process. On this basis alone, Mr. Morris' termination cannot be upheld.

III. Termination is an inappropriate penalty in light of the nature of the alleged offenses and the lack of any prior discipline.

The degree of penalty imposed by an employer is appropriately measured by the nature of the offense committed by the employee. Elkouri & Elkouri, *How Arbitration Works* at 964. Discharge in lieu of corrective discipline is deemed appropriate for very serious offenses; however, less serious infractions do not call for discharge for the first offense, but for some milder penalty aimed at correction. *Id.* (citations omitted).

Arbitrators have consistently found that discipline should be used to correct mistakes and not to punish employees. *See e.g., Licking County*, 105 LA 824, 829 (Pialucci 1996). Progressive discipline requires informing employees when their conduct is inappropriate and implementing progressively more severe disciplinary steps in an attempt to correct employee behavior. Lee Polk and Dwight Pancottine, *Progressive Discipline*, Human Resources, Policies and Practices (WGL 1996) Para. 11,151 *et seq.* Progressive discipline is also frequently referred to as "corrective discipline" because the underlying premise is that these steps will allow employees to improve their behavior and become successful workers. *Id.*

Arbitrators often modify disciplinary penalties when the employer lacks, or has failed to

follow, progressive discipline procedures. *Clow Water Sys. Co.*, 102 LA 377, 380 (Dorkwin, 1994). Arbitrators will set aside or reduce penalties if the employee has not previously been reprimanded and warned that his conduct would trigger discipline. *Id.*

Assuming, for the sake of argument, that Mr. Morris did engage in all of the acts alleged in the notice of termination, and that those acts can be construed as “misconduct,” termination is still an inappropriate penalty in light of the nature of the alleged offenses and the lack of any progressive discipline. The conduct at issue in this case concerns locking the front doors to the high school and asking to have a union representative present at a meeting. This is not conduct that is deserving of termination for the first offense. Some lesser penalty aimed at correction would have been more appropriate. In fact, had the District simply followed the plan of assistance procedures provided in the contract under Article 25, the issue of locking the doors could have been adequately addressed. (See J-3, p. 34).

Mr. Morris did not receive any progressive discipline prior to his termination. The District provided Mr. Morris with a performance evaluation, but the performance evaluation is not a form of discipline. Moreover, the performance evaluation did not mention any of the deficiencies alleged in the notice of termination. (See J-1). The areas of concern mentioned in the performance evaluation were staff relations. But any issues concerning staff relations were resolved on January 5, 2007, when Mr. Morris was put on the split shift. After that date, Mr. Morris never worked with any other custodians.

The District also provided Mr. Morris with a letter regarding job performance concerns in December. (D-1). It is questionable whether this letter was a form of discipline, and, even assuming that it is disciplinary, the letter does not mention any of the deficiencies alleged in the notice of termination. The letter mentions incidents that occurred months prior to Mr. Morris’ termination, and for which Mr. Morris did not receive any discipline. Mr. Morris provided a

rebuttal letter, in which he disputed many of the letter's allegations. (See U-7). The letter discussed the fact that Mr. Morris had a weapons permit. Mr. Morris was placed on administrative leave for two weeks while the District "investigated" his weapons permit, even though there was no evidence of any wrongdoing. The investigation revealed no misconduct or violation of policy.

The letter dated in December is not relevant to the reasons for termination, and it cannot be considered progressive discipline because it does not address the alleged misconduct at issue in this case. Had the District provided Mr. Morris with a letter of reprimand, notifying him that he needed to lock the front doors to the high school and warning him that a failure to do so may result in discipline, such a letter would provide evidence of progressive discipline. But the District did not do this, and it cannot rely on the December letter as evidence of progressive discipline.

Termination is inappropriate in light of the nature of the conduct alleged and the lack of any progressive discipline.

IV. The District is disciplining Mr. Morris more severely than similarly situated employees.

It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner. Elkouri & Elkouri, *How Arbitration Works* at 995. Many arbitrators find that cause is lacking for discipline where the employer has failed to uniformly enforce the work rules. Norman Brand, *Discipline and Discharge in Arbitration*, p. 81 (1998).

In this case, the District is disciplining Mr. Morris more severely than similarly situated employees. Debbie Bushnell testified that keeping the front doors to the high school locked is a historic problem that has been around longer than Mr. Morris. Ms. Bushnell testified that even after Mr. Morris was discharged, problems with locking the front doors to the high school have

continued. She testified that another custodian, Edward, was recently disciplined for failing to lock the front doors to the high school, but that he was not discharged.

According to the District, Mr. Morris' failure to lock the front doors was an act of "flagrant misconduct" that justified his termination. However, Edward was not discharged for engaging in the same conduct. The District is not applying its rules and penalties evenhandedly.

Mr. Morris has been singled out for conduct that does not constitute "flagrant misconduct" and that is not deserving of termination.

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CONCLUSION

For the forgoing reasons, the grievance should be sustained. Mr. Morris should be reinstated to his former position and made whole for any loss of pay and/or benefits.

Dated this 7th day of September, 2007.

/s/ Sarah K. Drescher _____
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