

BEFORE THE INDEPENDENT HEARING OFFICER

In the Matter of the
Grievance of

SANDRA RIVERA (MADISON TEACHERS INC.)

Under the Grievance Procedure of

WERC # A/P M-19-009
Sandra Rivera Suspension

MADISON METROPOLITAN SCHOOL DISTRICT

Appearances:

Attorneys Tamara B. Packard and Beauregard William Patterson, Pines Bach, LLP, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of Sandra Rivera.

Attorney Heidi S. Tepp, Director of Labor Relations, Human Resources, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703, appearing on behalf of the Madison Metropolitan School District.

DECISION OF THE INDEPENDENT HEARING OFFICER

By email dated June 13, 2019 the undersigned was informed that he had been selected as Independent Hearing Officer ("IHO") by the parties from a panel submitted by the Wisconsin Employment Relations Commission ("WERC").

A Step Three grievance hearing was conducted by the undersigned on September 16, 2019. There are no procedural issues. A stenographic transcript of the hearing was made. Thereafter, the parties filed briefs and reply briefs completing their briefing schedule on November 12, 2019. After consideration of the entire record and the arguments made by the parties, the Independent Hearing Officer issues the following Decision.

STIPULATED ISSUE

1. Did the District have just cause to discipline Sandra Rivera by issuing her a disciplinary suspension?
2. If not, what is the appropriate remedy?

FACTUAL BACKGROUND

General Background

This is a grievance under the Madison Metropolitan School District's ("District" or "MMSD") Employee Handbook concerning the disciplinary suspension of Sandra Rivera, a

social worker in the District. A grievance was timely filed by Sandra Rivera (“Grievant”) pursuant to the Handbook and the parties stipulated the matter is properly before the IHO for a decision on the merits. The District’s disciplinary suspension decision was based on the events of March 12, 2019 (“March 12”) where the Grievant said the entire N word in a School Based Leadership Team (“SBLT”) meeting.

The Grievant has been a social worker for the District for about twenty (20) years. She is currently assigned to Nuestro Mundo Community School (“Nuestro Mundo”) where she has worked since 2015. She also served as a Positive Behavior Intervention Support (“PBIS”) coach at the school. As a social worker, the Grievant supports students to make sure they are at school, ready to learn and succeeding academically and are able to overcome barriers to success. She assists students and families with many issues including transportation, housing, food, trauma due to domestic and community violence, divorce, and immigration, among others. She also teaches students social, emotion and learning behaviors. As a PBIS coach the Grievant supported universal systems within the school to create a safe and welcoming learning environment for all students and their families.

The Grievant also served on Nuestro Mundo’s SBLT. SBLT is a group of teachers and staff who develop a plan for school improvement, monitor the progress of that plan throughout the school year, monitor student data and engage in a cycle of continuous improvement and learning for the school while also planning evolution of improvement initiatives over time. She was a leader on the SBLT.

Nuestro Mundo is a dual language school for kindergarten through 5th grade students in the District. Staff comes from many different countries, cultural backgrounds and experiences. A majority of them do not speak English as their first language. Many of them come from cultures other than the white culture considered dominant in the United States.

Joshua Forehand is the Principal at Nuestro Mundo. He has been employed by the District for fifteen (15) years; seven (7) as Principal of Nuestro Mundo. He taught at the school for five (5) years before becoming its Principal. He also has experience as an instructional coach for the District and in the Office of Multi-Lingual Global Education at the central District office.

Jennifer P. Cheatham was Superintendent of the District at the time of this incident.

Deirdre Hargrove-Krieghoff is Chief of Human Resources for the District. She has been employed by the District since 2014.

Madison Teachers Inc. (“MTI” or the “Union”) is the Grievant’s representative in this proceeding.

District and Nuestro Mundo Communications

Prior to the March 12 SBLT meeting, the Grievant received two communications written by the Superintendent regarding use of racial slurs and an issue of the Nuestro Mundo Puma Press from Principal Forehand which addressed use of the N word.

On November 16, 2018 the Superintendent sent a District-wide email to staff as follows:

I want to address a serious issue that has come up recently that must be recognized by all of us in MMSD. It demands our attention, our reflection, and our insistence that we do better as a community.

As many of you may know, there was an incident that recently occurred in one of our schools in which a staff member used a racial slur directed toward a student. As troubling as that is, since that incident, two other incidents involving inappropriate racial language have been reported.

On January 11, 2019 Principal Forehand addressed use of the N word in the Puma Press:

In the past few weeks there have been two separate incidents of MMSD staff using the 'N' word in front of students, and in one case attempting to justify the use of the word. I feel confident that none of you would even consider something like this, but I need to make sure the expectation is expressed – there is no scenario in which the use of this word would be appropriate at our school, nor would it be tolerated.

On February 8, 2019 the Superintendent sent the following communication to all staff:

I am writing today to check back in with you about the incidents that were reported this year in which racial slurs were used by staff members in several of our schools.

. . .

First, I want to be fully transparent about our stance and response, since I have received several questions. No matter the context or circumstance, the use of racial slurs or hate language aimed at a person's protected class status is unacceptable in MMSD.

Facts Giving Rise to the Instant Dispute

On March 12 there was a meeting of the Nuestro Mundo SBLT. The purpose of this meeting was to establish areas of focus for the next school year around race and equity. The group was discussing the professional development they would create and provide to staff. During this meeting, staff was in a circle talking about black excellence and how to move that work forward in the school. The Grievant expressed her support for the importance of this work. She added that use of racial slurs was an issue at the school; that as a staff they needed to prepare themselves to better respond to situations when a student uses the N word to insult another student. The Grievant stated the word in its entirety.

A fellow member of the SBLT, teacher [REDACTED] expressed surprise that Nuestro Mundo students would use racial slurs against one another. In response, the Grievant offered an example, reporting a recent incident in which a Latino student called an African American student the N word; the Grievant said the word in its entirety.

When this occurred, some staff spoke up to challenge the Grievant. [REDACTED] stated, “[s]omething like ‘I don’t use that word. I don’t like that word. We shouldn’t use that word.’” Teacher [REDACTED] opined on why the word should not be used in a professional setting. Teacher [REDACTED] said she found the word offensive. In addition, Principal Forehand stated that the N word should not be used in any setting.

The Grievant felt flustered and confused. She apologized but she also noted that it was important for staff to talk about racial issues. After this interaction, the SBLT went on to finish identifying the areas of focus for the upcoming year.

There was still some tension in the room so the group sat down and engaged in further conversation regarding use of the N word. Some teachers talked about their experiences when confronted with use of the word. Others expressed confusion about who could use the word and who could not use the word.

Disciplinary Investigation

Subsequent to the SBLT meeting Principal Forehand contacted the District’s Human Resources Department regarding what had occurred. A meeting was set up with the Grievant for March 18, 2019. The meeting was attended by Chief of Human Resources Hargrove-Krieghoff, Director of Labor Relations Tepp, Principal Forehand, two MTI representatives and the Grievant. The Grievant was provided an opportunity to share her version of events. She acknowledged that during the SBLT meeting while sharing a story about a student’s use of the N word she said the word in its entirety. She explained that she did not understand that you could not use the N word in any context. She said that she was using it as an example to reinforce the importance of the racial equity work. She admitted making a mistake and apologized.

Letters of Support for the Grievant

On March 19, 2019 [REDACTED] a leader on the SBLT, sent the following email to Principal Forehand and Human Resources Chief Hargrove-Krieghoff:

At our last meeting, our team was discussing how to move forward our school’s work around black excellence and antiracism. Ms. Rivera was advocating for professional learning for staff, families, and students. . . .

I condemn racial slurs and teachers’ use of racial slurs in any capacity. However, there are important factors surrounding this situation that warrant a warning, and not disciplinary action, . . .

1) Ms. Rivera is a leader of equity work at our school. . . . a bold advocate for black youth and families.

2) Disciplinary action will impact staff willingness to engage in conversations around race. We are trying to create a culture where conversations can happen more often, where people can share openly, where we take risks with one another to talk about difficult, sensitive topics. This experience has taught us that we need professional learning around how to have these conversations. Let us do this productively as a school, not through discipline. Let us restore. Discipline will likely promote fear, discomfort, and silence among staff in conversations around race.

3) Disciplinary action will impact site based leadership team participation. . . .

The following message dated April 5, 2019, was sent by email to the Superintendent and the Chief of Human Resources:

We are writing this letter in support of our esteemed colleague, Sandra Rivera, with the intention of preventing any disciplinary action against her.

. . . .

We do not condone the use of racial slurs at our school. Also, we strongly encourage administration to consider the context in which the word was uttered.

We would now like to speak to Sandra's character. Sandra has demonstrated an unwavering commitment to social justice. She has repeatedly initiated difficult conversations about race, including challenging teachers on their practices and addressing system-wide issues. One issue she has advocated for is the careful consideration of using the EBD label for students of color in Special Education.

. . . .

We strongly advocate for restorative justice in this case, rather than punitive disciplinary action, in any form.

The communication was signed by over thirty (30) staff members at Nuestro Mundo.

Disciplinary Suspension

As a result of the Grievant's conduct, she was issued a disciplinary suspension on April 8, 2019. In his notice to the Grievant regarding same, Principal Forehand stated:

May this serve as notice of a disciplinary suspension for your use of the “N” word during a meeting with your colleagues. The actual time off without pay is waived.

On March 18, 2019 you met with Principal Josh Forehand, Chief of Human Resources Deirdre Hargrove-Krieghoff, Director of Labor Relations Heidi Tepp and your MTI representatives Jeff Knight and Shelle Michalak. During that meeting you acknowledged that at an SBLT meeting on March 12th while the group was discussing plans for promoting Black Excellence at Nuestro Mundo you provided an example of why this work was important. You relayed an incident where a student called another student “N” and you said the word in its entirety. A few staff reacted and challenged you saying “you cannot say that word” and “that word offends me.”

You explained that while you had read all of the communications I had sent out regarding the use of racial slurs, you did not understand that you cannot say that word out loud in any context. You apologized and admitted that you made a mistake.

The use of a racial slur is never appropriate in any context. The “N” word is *never* to be stated to anyone, for any reason. This is because the word is heavily steeped in oppression and historical violence against African-American people. To state this word in the presence of others normalizes a word that carries and causes deep emotional wounds for people who have this ancestry and identity.

In moving forward it will be important to work through a restorative process with your colleagues. We will be making arrangements for that to happen. As you know, I value your work as a social worker in our District. I appreciate that you took responsibility for your actions and trust that this will not occur again. However, you need to be advised that if you engage in similar conduct in the future, your employment with the District will be terminated.

Principal Forehand did not make the decision to discipline the Grievant. It was a decision made by District administration; it was his responsibility as Principal to administer it. He did not support a disciplinary suspension; instead he was supportive of a “restorative approach to this.”

Grievant’s Employment Record

The Grievant has an outstanding employment record and no prior discipline.

Further facts will be set forth in the **DISCUSSION** section below.

RELEVANT PROVISIONS OF THE EMPLOYEE HANDBOOK

4.04 Grievance Processing Procedure

Grievances shall be processed in accordance with the following procedure:

. . .

Step Three – Appeal to Impartial Hearing Officer

. . .

The IHO will convene a hearing in the manner the IHO determines necessary. The IHO is responsible for ensuring that he/she is creating and preserving a record of the proceedings that will enable Board of Education review. The IHO shall have the authority to administer oaths, issue subpoenas at the request of the parties, and decide if a transcript is necessary. The IHO may require the parties to submit grievance documents and witness lists in advance of the hearing to expedite the hearing. The IHO shall decide disputed facts based on “a preponderance of the evidence” standard. This process does not involve a hearing before a court of law; thus, the rules of evidence will not be followed. Upon completion of this review and hearing, the IHO shall render a written decision to the administration and the grievant and if applicable the grievant’s representative. The IHO may deny the grievance or conclude that the grievance should be sustained in whole or in part and recommend a remedy.

The IHO may only consider the matter presented in the initial grievance filed by the grievant. The IHO shall have no power to add to, subtract from, or modify the terms of the Board policy or rule that forms the basis for the grievance.

Step Four – School Board Review

Either party may appeal an adverse determination at Step Three to the Board of Education, by filing a written notice appealing the decision of the IHO in the District Office within ten (10) days of the decision of the IHO.

. . .

ADDENDUM A – TEACHERS

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**SECTION 8
DISCIPLINE, TERMINATION AND NONRENEWAL**

. . .

8.03 Standard for Discipline and Termination

. . .

2. Except as provided in paragraph one above, no teacher shall be disciplined or terminated without just cause.
3. The District has the discretion to determine the level of discipline imposed based on the seriousness of the offense, up to and including:
 - a. A verbal or written warning, which does not constitute discipline but is meant to provide clarification, guidance and feedback that future instances of a similar behavior will result in discipline
 - b. A written or verbal reprimand to be placed in the employee's personnel file
 - c. A suspension, with or without pay, for a specified number of days
 - d. Termination
4. Such discipline, suspension or termination shall be subject to the grievance procedure provisions of Section 4 of this Handbook.

POSITIONS OF THE PARTIES

The parties filed well-reasoned and thorough briefs and reply briefs. The parties' positions, arguments and cases cited are not reproduced in detail; instead the parties' positions are summarized below. The parties' main arguments are discussed below in the **DISCUSSION** section of the Decision.

Union's Position

The Union first argues the District standard for discharge in its Handbook is just cause which provides that teachers and social workers may be disciplined only for just cause.

The Union then proffers the traditional "seven steps" analytical framework for determining just cause devised by the late Carrol R. Daugherty, a Professor of Labor Economics and Labor Relations at Northwestern University and well-established arbitrator. The Union states these seven tests have been used to form the basis for arbitration decisions in discipline grievances under collective bargaining agreements between MTI and the District for many years. However, the Union acknowledges that some arbitrators, including this one, prefer to approach the just cause analysis through a two-question approach, "while still benefitting from consideration of relevant factors within the Daugherty 7-factor test."

The Union adds that where just cause is required for discipline, the burden falls on management to prove wrongdoing. "The Handbook provides that the preponderance of the evidence standard applies."

The Union next argues District expectations were not clearly stated prior to the Grievant's statement in the March 12 SBLT meeting. In this regard the Union submits that prior to the meeting the District did not communicate a clear expectation that the utterance of the N word would subject an employee to discipline regardless of context. The Union opines it is unfair to punish an employee for conduct the employee has no reason to know would be unacceptable and who has not been told what the consequences are for violating the rules.

The Union notes there is no formal MMSD policy which bans speaking the N word.

The Union next rejects the District's contention that common sense dictates that use of the N word in a professional setting is not acceptable "and this is sufficient for notice." Instead, according to the Union, "common sense is that context matters, as recognized in other just cause decisions involving employees stating racial slurs but not directing them at another." It is unreasonable for the District to abandon employees to their common sense and then punish them if they reach a different common sense conclusion that those in administration.

This is particularly true, the Union opines, because the administration's view that common sense concerning English-centric racial slurs are established norms is culturally discriminatory. This is because the N word is an English-language racial slur. However, the Grievant's first language is Spanish; she was not raised with the unwritten rules that surround the N word in the white culture considered dominant in the United States. Without training or notice from the District, the Union argues she had no reason to believe that fully stating the N word to describe a racist incident, while advocating for tools to prevent such incidents in the future, was considered a harmful act. The Union believes this is even truer because the Spanish-language equivalent to the N word, "Negro," is heavily context dependent. The Union concludes her statement was made with common sense in the absence of instruction or training to do otherwise.

In addition, the Union claims the District's informal communications did not communicate that staff should never state the N word fully for any reason. The Union adds the District did not provide guidance on how to navigate the verbal statement of racial slurs in complex situations, such as the presence of a racial slur in literature taught in the classroom or explaining a particular racial slur to other staff, some who are unaware of the slur's existence but are tasked with enforcing the ban on racial slurs.

The Union points out the only direct communications sent by the District regarding its expectations on the use of racial slurs came in the form of two emails sent on November 16, 2018 and February 8, 2019. It adds that Principal Forehand also sent a communication to his staff on January 11, 2019 through Puma Press. The Union asserts these communications lacked sufficient clarity to put staff on notice concerning the District's expectations. This is particularly true, according to the Union, based on the context of the communications, sentence structure and use of modifiers in the communications and because the Grievant and a majority of Nuestro Mundo's staff speak English as a second language. More specifically, the Union points out that in her suspension letter, the District told the Grievant that "[t]he 'N' word is *never* to be stated to anyone, for any reason." In its brief, the Union notes that the District offered several different variants of the zero tolerance formulation, including: "to state the word in the presence of others normalizes the word;" "it could not be said at all." The Union submits that prior to the

Grievant's disciplinary letter the District's communications did not provide this plain and unequivocal zero tolerance message. Moreover, the Union submits the District's position ignores both the reported concern that a "staff member used a racial slur directed toward a student," and qualifications included in those communications such as that "the use of slurs or hate language **aimed at a person's protected class status** is forbidden." The Union concludes the District's failure to provide clear expectations is unreasonable and unjust because it deprives employees of the ability to appreciate its import.

The Union argues the Grievant did not create her own confusion as the District asserts. It opines this confusion is real and caused by the District's failure to enunciate clear expectations district-wide. As an example of this failure, the Union cites the scandal of firing an African American school employee at West High School for rebuking a student's use of the N word which gathered international attention, "ultimately resulting in a decision to revisit its zero-tolerance position."¹ As a result, the Union opines it is indisputable that the District's communication failure created the confusion over its expectations, not anything the Grievant did.

Moreover, the Union states that zero tolerance policies banning the full statement of the N word are a new phenomenon, not an accepted "common sense" norm. The Union notes that prominent linguists and academics are currently debating whether there are contexts in which it is acceptable to fully state the N word. The Union adds that this debate has particular relevance and complexity in schools where environments are littered with variants of the N word: from students proliferating use of the word, to students' music choices, to the teaching of Mark Twain and Toni Morrison novels in most high school English classes throughout the US – whose uncensored works use the N word liberally. The complexity of this issue, particularly in a school setting, requires that the District articulate clear expectations as well as provide guidance and resources to facilitate staff participation in anti-racism initiatives.

The Union also argues that the application of the District's intended ban here is counterproductive to the intent of the ban.

In this regard the Union submits that one of the most commonly recognized principles in arbitration is that rules must be reasonable, consistently enforced and widely disseminated. On the other hand, a rule is unreasonable when the application of the rule does not serve its purpose.

¹ "US black school aide fired for rebuking boy's use of n-word," *BBC News*, <https://www.bbc.com/news/world-us-canada-50090532>. Marlon Anderson was sacked for repeating the N word while scolding a black pupil who addressed him with the epithet. *Id.* Madison Metropolitan School District cited its zero-tolerance policy on derogatory slurs by staff members as a reason for the dismissal. *Id.* A union representing Anderson filed a grievance against the District on Thursday, calling for him to be reinstated and receive back-pay. *Id.* Anderson said, "I made a conscious decision to address the word, because it is an epidemic." *Id.* He added: "Our kids use it every day." *Id.* Scores of students staged a walkout . . . to demonstrate against the dismissal." *Id.* Thereafter, District school board president Gloria Reyes called for Mr. Anderson's request for reinstatement to be reviewed quickly." *Id.* Reyes stated, "This is an incredibly difficult situation, and we acknowledge the emotion, harm and complexity involved." *Id.* In a separate statement, Jane Belmore, the [Acting] District superintendent, said their policy "that racial slurs will not be tolerated when said by anyone in any school setting no matter what the circumstances" was created "in an effort to unequivocally protect students from harm, no matter the intent." *Id.* But she noted "that different viewpoints from many facets of our/ the community are surfacing." *Id.* Anderson was ultimately reinstated after his firing over use of the N word. *BBC News*, <https://www.bbc.com/news/world-us-canada-50137543>.

Furthermore, the Union asserts that discipline may be overturned when an employer applies a reasonable rule in a manner that undermines the purpose of the rule citing *Harnisch v. Wisconsin Department of Corrections*, *WERC Decision No. 37315 (Daley, March 9, 2018)*. In that case the hearing examiner ruled that a teacher could not have reasonably violated the Department of Correction's ("DOC") harassment and discrimination policies given the context of her use. *Id.* at 4-5. Her use of a word as a slur was to combat the proliferation of the slur. She "used a classroom setting for its intended purpose: to teach. When an opportunity presented itself to right an ignorance, the opportunity was correctly seized and as such lacks any sort of context that would be persuasive to support just cause for sustaining the discipline imposed." *Id.* at 5. The Union submits application of the "rule" here, to the extent there even was one, is counter to the rule's purpose and as such the District cannot carry its burden to prove just cause.

The Union also cites *Milwaukee Deputy Sheriffs' Association and Milwaukee County (Sheriff's Department)*, No. 69936, MA-14360 (*Burns, 2009*) in support of its position. There, an arbitrator found no just cause to suspend a sheriff's deputy who fully stated the N word when repeating an inmate's statement "for the purpose of preparing an accurate report." *Id.* at 7. According to the Union, the arbitrator held that given the context of the grievant's statement it was not misconduct in the absence of a "work directive that expressly prohibits all use of the 'N' word in the workplace." *Id.* at 6.

The Union further argues that the District's application of its intended ban has been inconsistent and discriminatory. In support thereof, the Union makes the following points: enforcement of rules and assessment of discipline must be exercised in a consistent manner; a rule inconsistently enforced without a reasonable basis is discriminatory and, therefore, unreasonable; the District has aggressively policed the spoken N word by staff while ignoring the enunciation of other racial slurs; as such, this behavior demonstrates inconsistent expectations and discipline; this inconsistency is demonstrated through the District's response (or rather non-response) to the enunciation of the Spanish language word "Negro;" the inconsistency in which the District has treated the "N word" and the aforesaid Spanish language word is unreasonable; therefore, the Grievant's discipline should be overturned as unjust.

Finally the Union argues the level of discipline is excessive. In support thereof, the Union asks the IHO to consider the following. One, a disciplinary suspension is the most severe form of discipline that can be imposed short of termination and too severe here. Two, absent a clear limitation, the IHO has the authority to reduce the penalty even in the absence of arbitrary, capricious or discriminatory behavior. Mitigating factors that often inform a hearing examiner's decision to reduce discipline include an evaluation of the employee's intent or state of mind as well as an examination of the employee's past record and length of service with the employer. All of these factors support reducing the penalty imposed by the District on the Grievant. They include: the Grievant has an exemplary record with no incidents of past discipline; her use of the word was not meant offensively, and her misstep was not taken as proliferating anti-black racism and the discipline should have been corrective not punitive. In order to accomplish an appropriate outcome under the just cause analysis, the Union opines the IHO may therefore choose to lessen the discipline or eliminate it entirely.

The Union emphasizes it is not asking the IHO to modify a Board policy or rule as neither forms the basis of this grievance. Therefore, the Union claims restrictions on the IHO's authority put forward by the District that he lacks "power to add to, subtract from, or modify the terms of the Board policy or rule that forms the basis for the grievance" is not relevant.

For the reasons discussed above, the Union asks that the IHO find there was no just cause to discipline the Grievant, sustain her grievance, order the District to reverse the discipline and remove all indicia from her records and otherwise make her whole.

District's Position

The District initially argues that consistent with the standard of proof utilized by many Wisconsin arbitrators, its grievance procedure directs the IHO to use preponderance of the evidence as the appropriate standard of proof in this case. Thus, the District opines, a preponderance of the evidence is sufficient to meet the District's burden of proof on the merits of this grievance.

The District agrees that Addendum A, Section 8.03 of the Handbook provides "no teacher shall be disciplined or terminated without just cause." The District submits that while no precise definition of this term has evolved, the general consensus of arbitral opinion is that there are two basic and fundamental questions in any case involving just cause. One is whether the employee is guilty of the actions complained of, and if the answer to the first question is affirmative, the second basic question is whether the punishment is appropriate given the offense. The District states it has not only shown by a preponderance of the evidence the stated reasons for the Grievant's suspension are legitimate, but the reasons are of such a serious nature that suspension is the appropriate penalty. In sum the District opines it had just cause to issue the Grievant a disciplinary suspension.

The District next asserts it has shown the discipline imposed reasonably reflects the seriousness of the Grievant's conduct. In this regard, the District first notes Addendum A, Section 8.03 of the Handbook reserves to the District the discretion to determine the level of discipline imposed based on the seriousness of the offense, including suspension. Moreover, the District points out, Step 3 of the Grievance Procedure limits the IHO's authority as follows: "The IHO shall have no power to add to, subtract from, or modify the terms of the Board policy or rule that forms the basis for the grievance." Here, the District opines, it has appropriately determined the discipline to be imposed – a suspension – based on the seriousness of the offense – using a horrible racial slur after being directed by the Superintendent and the school Principal not to. Thus, "the IHO should uphold the suspension and deny the grievance."

The District argues a hearing examiner should not second guess every disciplinary action taken by an employer. It submits discipline should stand unless it is clearly excessive, unreasonable or management has abused its discretion. Because the Grievant has not demonstrated this, the District submits the suspension must be upheld.

The District contends the Grievant had clear notice use of the N word was prohibited. In this regard the District first argues common sense dictates use of the N word in a professional

setting is not acceptable. The District notes the word is heavily steeped in oppression and historical violence against African American people. The District submits using this word in the presence of others normalizes a word that carries and causes deep emotional wounds to those who have this ancestry and identity. The District notes the Grievant herself has acknowledged the word is inappropriate and harmful but then states she didn't know she could never say it. The District believes such a contention defies common sense.

The District points out the Grievant asserts that because she was repeating what someone else said or was not directing the word at an individual, her use of the word was acceptable. However, the District states this argument ignores that the N word is arguably the most offensive racial slur in existence. The District opines: "[I]t is incomprehensible that anyone believes there can or should be a debate or discussion about any use of the 'N' word in the workplace, let alone attempting to define circumstances under which it would be acceptable."

Moreover, the District submits if general common sense was not enough, there was written communication from the Superintendent and the school Principal to staff regarding use of racial slurs. In this regard the District notes the Superintendent sent out two separate communications discussing use of racial slurs by staff and told staff "[n]o matter what the context or the circumstance, the use of racial slurs or hate language aimed at a person's protected class status is unacceptable in MMSD." The Principal told staff, "*there is no scenario where the use of this word would be appropriate at our school*, nor would it be tolerated." The District opines the aforesaid messages sent out to staff regarding use of racial slurs were clear and unambiguous. No means no. The District concludes these messages did not become unclear or confusing simply because assumptions were made by the Grievant and others.

The District adds not every type of misconduct needs to be specifically outlined in a Board policy or Handbook provision in order to warrant discipline. The District also adds there was "no need to provide guidance on nuances related to reporting a racial incident or the discussion of classroom materials because the directive was to NEVER use the slur."

The District rejects the Union's contention that the Superintendent's and Principal's communications were unclear and confusing. In this regard the District opines the message communicated by the Superintendent and the Principal was the same. "There was no circumstance under which the 'N' word could be used." According to the District, the Principal's choice of words and the sentence structure of the Superintendent's communications does not make these directives confusing. The Grievant was told use of racial slurs like the "N" word was not allowed in any context or circumstance.

Nor does their failure to delineate explicit consequences for violations of the directives make the directive itself unclear. The District points out that nowhere in the Handbook or Board policy does it ever state the specific consequence that will result from violation of any of those provisions. "That is because the consequences will necessarily be dependent on the facts of the given situation." The District is "free" to weigh the facts surrounding the misconduct to determine the appropriate consequence.

The District also contends the Union's assertion that the District's prohibition on the use of racial slurs in the workplace does not serve its intended purpose is without merit or proof.

Likewise, the District opines there is no merit or proof to the Union's claim the District has been inconsistent and discriminatory in its application of the directive.

Furthermore, the District argues that Harnisch v. Wisconsin Dept. of Corrections, WERC Decision No. 37315 (Daley, 3/9/18) cited by the Union in support of the Grievant's position is distinguishable from the instant dispute.

Additionally, the District argues the nature of the Grievant's conduct warrants severe discipline. In this regard the District opines there can be no question the Grievant's conduct did not meet the standards expected of a professional educator. The District notes one of its core values is racial equity and social justice. The District states it is committed to investing in staff with a focus on anti-racist, culturally responsive and inclusive practices. The District adds the use of racial slurs in the work place is never appropriate; "[t]here is no context or circumstance that would justify or excuse the use of the 'N' word." Damage caused by mere use of the "N" word is significant and cannot be ignored. Therefore, the District opines, progressive discipline is not an appropriate response. The District should not have to tolerate repeated use of the word in the workplace by starting progressive discipline at a lower level than suspension. And, notwithstanding that the Grievant is a hard-working, well-respected, valued employee, she made a serious mistake for which there must be serious consequences. However, unlike other staff members, who used the N word in front of students, the Grievant did not lose her job. She received a disciplinary suspension with no loss of pay or time off work. In essence, the District opines she got a letter in her file and a warning not to engage in such conduct in the future or her employment with the District would be terminated. The District submits the paper suspension was a fair, reasonable, measured and restorative response to the Grievant's misconduct. As such, the District concludes the IHO must uphold its discipline and deny the grievance.

DISCUSSION

At issue is whether the District had just cause to discipline the Grievant by issuing her a disciplinary suspension.

The District argues it had just cause for the discipline imposed while the Union takes the opposite position.

Just Cause Standard

The parties basically agree to a two-step standard to be applied herein in order to determine whether there was just cause to discharge the Grievant. Consequently, the IHO will apply the following standard.

There are two fundamental, but separate, questions in any case involving just cause.² The first is whether the employee is guilty of the actions complained of, which the Employer herein has the duty of so proving by a preponderance of the evidence.³ If the answer to the first question is affirmative, the second question is whether the punishment is contractually appropriate given the offense.

Basis for the Discipline

Applying the above standard to the facts of the instant case, the IHO first turns his attention to the question of whether just cause exists for disciplining the Grievant for her conduct.

The District argues that it has shown by a preponderance of the evidence that the Grievant has committed the act cited as the reason for imposing the disciplinary suspension.

The Grievant received a disciplinary suspension for using the N word during a SBLT meeting with her colleagues. The District states it is undisputed that this occurred and cites the Grievant's own testimony that during said meeting she described a situation where one student called another student the N word and she used the word in its entirety. (Tr. p. 111).

There are several issues with her alleged misconduct that need to be addressed in order to determine whether there was just cause to discipline the Grievant for her conduct.

The District first argues that the Grievant had clear notice use of the N word was prohibited. The Union disagrees.

In support thereof the District asserts there can be no question the Grievant knew her conduct was inappropriate. "Common sense dictates that use of the 'N' word in a professional setting is not acceptable." The District notes: "[T]his is a word that is heavily steeped in oppression and historical violence against African American people." The District adds the "Grievant herself has acknowledged that the word is inappropriate and harmful but then states that she didn't know that she could never say it." The District opines such a contention defies common sense. The District submits it is incomprehensible to assert that because the Grievant was simply repeating what someone else said, or was not directing the word at an individual, that makes use of the word acceptable.

Yet, the Grievant and many staff at Nuestro Mundo shared the common sense opinion that the N word should never be used as a racial slur directed at a student or anyone else but did not share the District's common sense understanding that it could never be used in any setting. For example, [REDACTED] a teacher with the District for about twenty-two (22) years who has been at Nuestro Mundo since it opened in 2006, testified that until the current incident involving

² Each disciplinary action involves two issues: whether there was just cause for the imposition of discipline for the particular wrongdoing, and whether there was just cause for the penalty – the quantum of discipline – imposed on the Grievant. Labor and Employment Arbitration, Volume I, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 14, Just Cause and Progressive Discipline by Arnold Zach, s. 14.03[1], 14-5 (1998).

³ See Grievance Procedure, Step Three, Joint Exhibit No. 1.

the Grievant she understood you couldn't use the word to attack someone but she did not understand you could not describe the word by using the word. (Tr. pp. 64, 78). [REDACTED] adds the idea that you couldn't speak the word "was just confusing." (Tr. p. 71). She "just didn't understand. I mean if it was in the book, could I say the word? So I was confused."

[REDACTED] has taught two (2) years at Nuestro Mundo and worked six (6) years in the Delavan-Darien and Beloit School Districts before her employment with the District. (Tr. pp. 80). In Beloit the N word was an issue as well as black excellence and equity because "A lot of students were African-American." (Tr. p. 83). She too had the common sense understanding that anyone she worked with "wouldn't ever use that term towards a student or around a student." (Tr. p. 84). She was surprised to learn "[y]ou could be fired from the District for using this word in any circumstance . . . that was surprising." (Tr. p. 86).

[REDACTED] has taught for twenty-three (23) years; eleven (11) of those years with the District, all at Nuestro Mundo. (Tr. pp. 134-135). She previously worked for the archdioceses of Chicago and Milwaukee and the Los Angeles Public School District. (Tr. p. 135). [REDACTED] was surprised and dismayed the Grievant was disciplined for what she said at the SBLT meeting. (Tr. p. 137, 144).

[REDACTED] has been a teacher for over twenty (20) years in California and the District. (Tr. p. 146). He also is a faculty representative for the Union at Nuestro Mundo. Id. [REDACTED] testified that he didn't think that the District policy around using the N word in full applied where faculty were speaking amongst themselves and used the word to report what a student had said. (Tr. p. 147). He also testified that at the April 5th meeting of Nuestro Mundo staff where the Grievant's event and the expectations around the N word were discussed "[P]eople were astonished" that it did. (Tr. p. 148). He added:

At that meeting, there were people in attendance who knew the whole situation, and there were people who arrived not knowing what it was. . . . people who didn't know what was going on asked their colleagues what was going on and were informed of what Sandra did and the fact that she was facing discipline for it. There was just astonishment around the room. I looked around and people's jaws were dropping. And there was just – people were amazed that that situation was one in which District-level discipline would apply. (Tr. pp. 148-149).

[REDACTED] has been a District teacher for eleven (11) years, most of them at Nuestro Mundo. (Tr. pp. 156-157). She also testified that when people at the April 5th meeting learned the Grievant had been disciplined for saying the N word "a lot of people were surprised. This issue took us all by surprise." (Tr. p. 157).

Based on all of the above, and absent any persuasive evidence or testimony by the District to the contrary, the IHO finds that the record indicates common sense does not dictate that use of the N word in a professional setting is always unacceptable. Instead, the record supports a finding that while common sense dictates it is never acceptable to direct a racial slur like the N word at a student or anyone else it may be acceptable to utter the word in other circumstances depending on the situation.

The District argues, however, that when the Grievant used the N word during a meeting with her colleagues it served to normalize it as a word that could be spoken and to perpetuate its harm. The District submits that since this is completely contrary to the values and mission of the District, it cannot condone or ignore such behavior even if common sense did not tell the Grievant not to use the word when she did.

However, the District offered no persuasive evidence or testimony to support its contention that any use of the N word serves to normalize it and to perpetuate its harm as “arguably the most offensive racial slur in existence.” Moreover, the Grievant’s use of the N word in the SBLT meeting was to discourage its use; the exact opposite of what the District asserts is the result of using the word. In this regard the record indicates that Nuestro Mundo’s SBLT was tasked with creating a plan for school improvement and monitoring the progress of that plan throughout the school year. (Tr. p. 17). The purpose of the SBLT meeting was to determine how to advance work around race and equity, or black excellence, in the coming school year, particularly through professional development. (Tr. pp. 18, 109). Consistent with the Superintendent’s call for professional development to become anti-racist, culturally responsive and inclusive and for educators “to lift up Black lives” and “combat racism in all of its forms,” the Grievant spoke to her SBLT colleagues about the relevance of this work, encouraged them and expressed “support for advancing black excellence and why that was so important.” (District Exhibit No. 1; Tr. p. 29). She shared a story involving two students around use of the N word and said the word in its entirety. (Tr. p. 50). She was using that as an example to reinforce the importance of the racial equity work. *Id.* She told her colleagues that as a welcoming school “we do a really good job as a staff responding to situations where the word ‘gay’ is used in a derogatory way.” (Tr. p. 111). She challenged staff “to better prepare ourselves to respond to situations when a student uses the word to insult another student.” *Id.*

The Grievant’s words and actions at the SBLT meeting cannot be reasonably construed as normalizing the word and perpetuating its harm. Instead, the Grievant provided an example of the N word being used for the purpose of reinforcing the need to build staff capacity to respond to these issues. (Grievant Exhibit No. 9). She was a leader in the discussion to move Nuestro Mundo forward around black excellence and antiracism. (Grievant Exhibit No. 2). She was advocating for professional learning for staff, families and students. *Id.* She was doing what the Superintendent expected of staff: be “healers and protectors for the students and families we serve and ensure that our schools and classrooms are places that value, affirm and uplift our students.” (District Exhibit No. 1).

The IHO turns his attention to the question of whether the written communications to staff regarding the use of racial slurs provided clear notice as to the District’s expectations.

The District argues even if common sense was not enough, there were written communications from the Superintendent and the Principal to staff forbidding the use of racial slurs.⁴ In this regard the District submits it told staff that no matter *the context or the circumstance*, the use of racial slurs or hate language aimed at a person’s protected class status was unacceptable. In addition, Forehand told staff there was **no scenario** where the use of the N

⁴ There is no formal District policy banning utterance of the N word. (Tr. pp. 56-58).

word would be appropriate at Nuestro Mundo. The District opines the aforesaid communications about using racial slurs were clear and unambiguous; in other words, no means no regarding use of racial slurs.

Forehand testified the communications sent to staff by the Superintendent, particularly her second email, were very clear. (Tr. pp. 25, 30-32, 35). He interpreted them to mean “no matter the context or circumstance means you never say the word.” (Tr. p. 31). He added he thought his communication in the Puma Press was “equally as clear.” (Tr. p. 34). As such, the IHO agrees that one reasonable interpretation of the aforesaid communications is they included the admonition that the N word was not to be spoken under any circumstance.

However, these communications also were reasonably subject to another interpretation. In this regard, the record indicates that on November 16, 2018 the Superintendent emailed staff her first communication about staff members’ use of racial slurs. (District Exhibit No. 1, p. 1). This communication concerned a recent incident “in one of our schools in which a staff member used a racial slur **directed toward a student**. As troubling as that is, since that incident, two other incidents involving inappropriate racial language have been reported. In every case, we have acted swiftly and are taking appropriate action.” Id.

Many of the staff of Nuestro Mundo had a strong response to the incident referenced in the Superintendent’s November 16th email, as reported and perceived. (Tr. pp. 71, 82-84, 115, 136-137, 153-154). They had a mixture of disbelief and outrage that a fellow member of the District would call a student a racial slur. Id. The small amount of information the Grievant and other Nuestro Mundo staff were provided about the three incidents involving racial slurs was that the slurs were directed at a student; a staff member called a student that name as an insult. Id. As a result, the Union opines, the Grievant along with many others on Nuestro Mundo’s staff understood that the District’s communication concerned the use of racial slurs as a weapon to attack another. The record supports such a conclusion.

Forehand then sent a communication to Nuestro Mundo staff on January 11, 2019 through the Puma Press. (District Exhibit No. 2, p. 4). In his message, he discussed two instances where District staff used the N word in front of students stating, “I feel confident that none of you would even consider something like this, but I need to make sure the expectation is expressed – there is no scenario in which the use of this word would be appropriate at our school” (District Exhibit No. 2, pp. 4-5). Teachers at Nuestro Mundo testified that, based on his statement, they understood it to mean that using the N word to attack or harm someone or in front of students and families was prohibited at Nuestro Mundo. (Tr. pp. 78, 84, 96, 137, 143-144, 153-154). ██████ testified: “It did not occur to me that the phrasing would apply to a closed meeting of teachers where that word itself was the topic of discussion.” (Tr. p. 154).

On February 8, 2019, the Superintendent sent her second communication to staff regarding racial slurs. (District Exhibit No. 1, p. 2). The Superintendent wrote, “I am writing today to check back in with you about the incidents that were reported this year in which racial slurs were used by staff members in several of our schools.” Id. She added, “I want to be fully transparent about our stand and our response, since I have received several questions. No matter the context or circumstance, the use of racial slurs or hate language aimed at a person’s protected

class status is unacceptable in MMSD.” Id. She stated consequences, “[w]hen cases are found to be true, employment in our district is ended.” Id.

However, the Superintendent provided no additional examples of situations in which racial slurs were used in the schools. Consequently, staff at Nuestro Mundo were left with only the one specific example of staff directing a racial slur at a student which was referenced in her earlier communication. Based on prior District communications, Nuestro Mundo staff understood that racial slurs directed toward a student were wrong and prohibited conduct. They did not now understand that the N word was not to be uttered under any circumstances. That is because there was nothing new in the February 8th communication that expressly or clearly stated such an expectation. To the contrary, the Superintendent again communicated that racial slurs or hate language aimed at a person’s protected class status were unacceptable. In addition, she did not explain the two other incidents involving inappropriate racial language referenced in her earlier communication so that Nuestro Mundo staff including the Grievant might understand she was talking about a complete ban on using the N word that went beyond using racial slurs as a weapon to attack others. Instead, Nuestro Mundo staff and the Grievant were left to figure out on their own the extent of the District’s written expectations based on newspaper stories and word of mouth. (Tr. pp. 70, 84, 136).

Moreover, the Superintendent admitted that she had received several questions regarding her earlier communication. However, instead of taking this opportunity to more fully explain the District’s expectations regarding racial slurs and inappropriate racial language, she repeated her admonition that “[n]o matter the context or circumstance” racial slurs or hate language aimed at a person’s protected class is unacceptable. (District Exhibit No. 1, p. 2). This was basically the same message as in her earlier communication (District Exhibit No. 1, p. 1); that is, don’t use racial slurs offensively toward a student or anyone else.

Based on the above, the IHO finds it reasonable to conclude that the District’s communications in English regarding its expectations about use of the N word were not clearly communicated. That is because, as discussed above, two different interpretations of the communications reasonably could be, and were, drawn about what was expected from staff regarding use of the N word. Such a conclusion is reinforced by a review of the barriers faced by Nuestro Mundo staff in understanding the District’s communications. These barriers may be more pronounced at Nuestro Mundo than at other schools in the District because Nuestro Mundo is a very multi-cultural school, perhaps more multi-cultural than any other school in the District. (Tr. p. 25). It is a building where the majority of the staff do not speak English as their first language. Id. Staff is comprised of people from many different countries. (Tr. pp. 25-26). Many come from cultures other than the white culture considered dominant in the United States. (Tr. p. 26). As such, it is likely that many, including the Grievant, did not understand all of the District’s expectations contained in their communications notwithstanding the fact that they were not clearly communicated in English in the first place.

The IHO reaches the above conclusion for the following reasons.

One, as already noted, Principal Forehand believed the District’s expectations over the rule that the N word was “not to be spoken under any circumstances had been clearly

articulated.” (Tr. p. 25). However, even he admitted “in a building where the majority of the staff speak another language than English as their first language, in retrospect I look at my own handling of this and believe that I should have provided communication in Spanish, and I should have provided communication face-to-face.” Id. He added, “[s]ince this incident occurred I have made sure to communicate things of this level of seriousness in both English and Spanish as well as face-to-face.” Id. He agrees there may have been some staff who did not understand the District’s message as of March 12, 2019. (Tr. p. 32). He also agreed the Grievant did not understand the District’s expectations: “I think . . . it’s clear that she did not because she used the word.” Id. It was simple for him to reach this conclusion because the Grievant is “committed to black excellence for Madison School District students.” (Tr. p. 28). And at the March 12 meeting itself “she was encouraging her colleagues and expressing the support for advancing black excellence and why that was so important.” (Tr. p. 29). “She didn’t report what one student said to another in order to endorse that insult.” Id. She articulated that in response to someone else in the room saying, “I’m shocked to hear that students were using racial slurs.” Id.

Two, the Grievant herself recognized the importance of communicating the District’s expectations in Spanish regarding use of racial slurs prior to the aforesaid meeting. (Tr. p. 116). When she read the Superintendent’s February 8th communication she thought “this work is important and we shouldn’t be using this word to hurt people.” Id. She called the Superintendent’s office to find out if they had this communication in Spanish because she “wanted to make sure that this letter was out to the Spanish community – to the Latino community in Spanish.” Id. Why? “I wanted them to hear and to understand that we were taking a stand on not using this word to hurt people.” Id.

The Grievant testified: “the secretary that answered told me, she didn’t know if it was in Spanish, if it had been translated. But she was going to look into it and find out.” (Tr. pp. 116-117). The Grievant never heard anything. (Tr. p. 117).

The Grievant explained why the District’s and Principal’s communications were problematic, the breadth of expectations contained therein difficult to understand for people in the school whose first language was Spanish. (Tr. p. 129). She testified:

because there were people in my school that – I talked to one staff who didn’t know what the “N word” was. I was trying to explain to her what had happened and why I was in the position I was in. And I kept referring to the “N word,” and she didn’t know what I was referring to. And I was really afraid to tell her what the word was at work. (Tr. p. 130).

The Grievant also testified, “not only does everyone not know that word, they also don’t necessarily know the rules around that word.” Id. She added, “[A]nd it’s not just that word. There’s a lot of racial slurs out there that people don’t know are racial slurs.” Id.

The District, while acknowledging that Principal Forehand stated he thought he should have provided his communication in Spanish as well as English, opines this “has no impact on the clarity of the message as it pertains to Grievant.” In this regard the District states that the Principal regularly communicated with the Grievant in English and she had no problem

understanding the expectations given. (Tr. p. 46). The District added, the “Grievant also stated that while Spanish may be her first language, her English is good.”

The record, however, more specifically indicates that Principal Forehand had no “recollection” of the Grievant not understanding what his communications or expectations were in English. (Tr. p. 46). That is not exactly the same as “she had no problem understanding the expectations given.” Moreover, while the Grievant admitted that Spanish is her first language and her English is good that is not the same as being excellent in English proficiency or as having the same knowledge or awareness of the nuances, rules around and/or different meanings of English language words as someone who grew up in the white culture considered dominant in the United States. In addition, the Grievant testified that her “brain thinks in Spanish most of the time. I know English pretty well. I get stuck at times, you know.” (Tr. p. 105). Particularly, “[I]f I don’t understand something.” Id. She added, “My Spanish is in my heart.” Id.

In addition, Principal Forehand agreed some staff did not understand that “you should not use the word in any context or circumstance” following the Superintendent’s February 8th email. (Tr. p. 32). He included the Grievant in that category. Id.

Furthermore, the record is clear that regardless of what language is relied upon here the Grievant, like other Nuestro Mundo staff, did not understand that the aforesaid communications contained the expectation that District staff should never state the N word for any reason. The Grievant testified clearly and unequivocally that, based on what had occurred with other staff earlier in the school year and the District’s message in response to those issues, her “understanding was that that word was being used to insult people. And so I understood that they were telling us ‘don’t use that word to insult people.’” (Tr. p. 115). She read the communications and thought “[O]f course don’t use that word to insult people. Anybody that uses that word to insult people should not be an educator, should not be working at school.” Id.

The District, however, blames the Grievant for any “alleged confusion” that would justify her conduct. In this regard the District asserts the Grievant’s contention she was aware the word could not be used or directed toward students but she did not understand it could not be said at all is perplexing in light of the very clear communications that were given. The District opines “[N]o scenario” means **NO** scenario. “There was no caveat that this directive referred only to students. It was a blanket prohibition.” The District adds, the Superintendent’s communication “clearly stated there was **no** context or circumstance in which a racial slur could be used.” No means no.

However, as discussed above, there is more than one interpretation that reasonably can be drawn from District communications as to the prohibited use of racial slurs. That is particularly true because Nuestro Mundo staff faced barriers to understanding the District’s expectation that others possibly did not. In addition, the record is clear that the Grievant and others were largely left to their own devices to discern the District’s expectations based on unclear communications, newspaper stories and school word of mouth. As such, it is unfair to blame the Grievant for any confusion created. The problem originated with the District. It provided only one example of an incident where a racial slur was directed toward a student. It provided no other context or explanation. Therefore, the Grievant and others drew the only conclusion that made sense to

them based on all the information available to them – the District’s communications prohibited the use of racial slurs and inappropriate racial language aimed at students and others. It was not to be used offensively. They did not conclude there were other prohibited uses, such as using it in an explanatory or descriptive manner.

The District also rejects the Union’s contentions it did not advise employees to never fully state a racial slur when reporting a racist incident and it did not provide guidance on how to navigate the verbal statement of racial slurs in other situations. The District opines such an assertion is untrue. “Staff were advised to never use a racial slur, *at all, in any context.*” The District adds, “[T]here is no need to provide guidance on nuances related to reporting a racial incident or the discussion of classroom materials because the directive was NEVER use the slur.”

In essence the District takes the position that its communications expressed an all-out ban on the use of the N word. Put another way, the District had articulated zero tolerance for the use of racial slurs and inappropriate racial language. Therefore, there was no need to provide further explanation or guidance.

However, the District has a “Zero Tolerance for Workplace Violence” policy which prohibits threats or acts of violence, including intimidation, harassment, or coercion against members of the school community. (District website, Human Resource Policies and Procedures, Policy # 4.10). This District policy provides two pages of narrative as to its purpose, detailed examples of prohibited acts, applicable definitions, an explanation of the consequences for its violation and reporting procedures. The District offers no good reason for failing to provide the same type of narrative and explanation as to the District’s expectations regarding zero tolerance for use of racial slurs and inappropriate racial language especially as the District has done this in other zero tolerance situations. Based on same, the District’s explanation that it is not necessary because “no means no” is not satisfactory.

Based on all of the above, the IHO finds it reasonable to conclude that the District’s expectations regarding the use of racial slurs and inappropriate racial language were not clearly established or communicated prior to the Grievant’s statement of the N word in the SBLT meeting. As such, the disciplinary suspension imposed on the Grievant is without just cause and should be overturned. As noted by the Union:

The essence of the just cause principle is the requirement that an employer must have some demonstrable reason for imposing discipline. . . . It is unfair to punish an employee for conduct the employee has no reason to know would be unacceptable. *Madison Metropolitan School District, A/P M 05-102 (Augsburger suspension) (Grenig, 12/9/2005) (citing The Common Law of the Workplace: The View of Arbitrators, Section 6.5 and Comment (Theodore J. St. Antoine ed., 2d ed. 2005.)*

This IHO has observed: “The requirement that an employee be given notice of the rules – and what consequences are possible for violation of the rules – is considered to be a

fundamental component of just cause.” *Sauk County (Health Care Center), Case 112, No. 50192, MA-8181 (McGilligan, 10/7/1994)*.

The above conclusions are consistent with the opinions of arbitral authorities. For example, one of the two most commonly recognized principles in the arbitration of discipline cases is that there must be reasonable rules or standards, consistently applied and widely disseminated. Elkouri and Elkouri, How Arbitration Works, (Bloomberg BNA Books, 8th Ed., 2016), Ch. 15.3.F.x., 15-77. Concerning notice/knowledge of rules, one arbitrator stated that “[a]n employee can hardly be expected to abide by the ‘rules of the game’ if the employer has not communicated those rules and it is unrealistic to think that, after the fact, an arbitrator will uphold a penalty for conduct that an employee did not know was prohibited.” *Id.* Additionally, another arbitrator stated that “[j]ust cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless conduct is so clearly wrong that specific reference is not necessary.” *Id.*

Likewise, in reviewing the reasonableness of a rule (and its application), arbitrators generally consider the notice given to employees, as well as the clarity and scope of the rule. Discipline and Discharge in Arbitration, Norman Brand and Melissa H. Biren, Editors in Chief, (Bloomberg BNA Books, 3rd Edition, 2015), Ch. 2.IV.A.1., 2-64. Even if the arbitrator finds that a rule is for a lawful objective, the arbitrator may find that the employees or the union were not adequately notified of the rule or the consequences of a violation. Discipline and Discharge in Arbitration, *supra*, Ch. 2.IV.A.3., 2-71. The employer must provide sufficient notice to employees. *Id.* If a rule has not been adequately disseminated, disciplinary action may be set aside. *Id.*

The IHO next turns his attention to the Union’s assertion that application of the District’s intended ban here is counterproductive to the intent of the ban.

As noted above, a commonly recognized principle in the arbitration of discipline cases is that rules must be reasonable. How Arbitration Works, *supra*, 15-77. A rule is unreasonable when the application of the rule does not serve the purpose of the rule. Adolph M. Koven & Susan L. Smith, Just Cause, the Seven Tests, (2d ed., 1992), p. 131.

The District, however, opines the Union’s assertion that the District’s prohibition on the use of racial slurs in the workplace does not serve its intended purpose is without merit. More specifically, the District rejects the Union’s claim that the “Grievant’s discipline has undermined the District’s anti-racism efforts” because “[T]here is no proof to support this claim.”

To the contrary, the record indicates that application of the ban on the use of the N word here is counter to its purpose, and as such, the District cannot carry its burden to prove just cause for imposition of discipline. The severe discipline dealt to the Grievant⁵ has dramatically undermined MMSD’s anti-racism efforts at Nuestro Mundo. The record is replete with

⁵ The Grievant received a disciplinary suspension, warning that if the conduct occurs again she will be terminated. She suffered no loss in pay and no time off from work. However, a suspension is the most severe form of discipline short of termination for teachers and related staff. (Joint Exhibit No. 1). As noted above, any future misconduct subjects her to termination. And this threat of possible termination lasts “into perpetuity.” (Tr. p. 63).

persuasive evidence the Grievant is strongly committed to black excellence, anti-racism efforts and was a leader in that area on the SBLT. (Tr. pp. 18, 26-27, 29, 67, 76, 92, 142-143, 152-153). Yet the SBLT lost one of its leaders when the Grievant voluntarily resigned from the SBLT from shame (Tr. pp. 118-120) potentially reducing the school's capacity to advance this important work which the District considers a core value of its mission.

The District's action had a chilling effect on other staff's commitment to work on black excellence as well. Nuestro Mundo's school community was very sad, shocked, and angry over the discipline leveled at the Grievant. (Tr. p. 93). Others were surprised and dismayed over the possibility she could get into trouble over what she said at the SBLT meeting. (Tr. p. 137). Once they understood what was happening with the Grievant, "a lot of people did not want to proceed with our professional developments around black excellence because there was a lot of fear around it now." (Tr. p. 94). A lot of people felt that we couldn't continue to discuss work around black excellence "when there is an amorphous understanding of what language is appropriate and the consequence of saying the wrong word is so severe." (Tr. p. 152). People felt worried and unsafe about having discussions around black excellence and thought they should be avoided. (Tr. pp. 152-153). Also, that would show "how strongly we felt that Sandra shouldn't be facing discipline for this." (Tr. p. 153).

The Grievant testified that she resigned from the SBLT team "because the work that that team does is really important and they needed to talk about how to move our school forward without me being there." (Tr. p. 119). However, she also resigned "because I just felt like where is there a safe place to make mistakes then if not in a place like that when you're among leaders, professionals in your building? Like where is there a safe place to makes mistakes?" *Id.*

Trepidation is still present. [REDACTED] testified about the lingering negative effects of the District's action against the Grievant: "if there was even more clarity from the District, people would be much more willing to open up. I'm hoping . . . that people open up more in our affinity groups. But there's still some timid areas, and especially around the word in Spanish. We want to be sure about that too." (Tr. p. 95). [REDACTED] added that additional guidelines on how to respond to student use of the N word would be helpful: "I think anything from the District, just knowing that they're asking us to do this, it's important. We all know it's important. How do we proceed? Not assuming we know how to proceed." *Id.*

Other neutral decision-makers have overturned discipline when an employer applies a reasonable rule in a manner that undermines the purpose of the rule. For example, in a state employee's recent appeal to the WERC of discipline (a three day suspension) pursuant to Sec. 230.44(1)(c), Stats., *Harnisch v. State of Wisconsin Department of Corrections, Decision No. 37315 (Daley, 3/9/2018)*, even though a teacher consciously used the word "wetbacks" in her classroom which violated the DOC's expectation that teachers use appropriate language in the classroom, the Commission overturned the discipline against the teacher, finding it not supported by just cause. *Harnisch v. State of Wisconsin Department of Corrections, supra*, p. 5. The teacher's statement of the word "wetbacks" was in response to its use by a student as a slur. *Harnisch v. State of Wisconsin Department of Corrections, supra*, p. 2. In response, she stopped her lesson to state "the term was inappropriate and began a discussion in class relating to why the term was inappropriate and shouldn't be used." *Harnisch v. State of Wisconsin Department of*

Corrections, supra, p. 3. In the context of this discussion, she stated the term. *Id.* Although the DOC argued, much like the District here, “using a racial slur is never appropriate,” the Commission ruled that the teacher did not violate the DOC’s harassment and discrimination policies given the context of her use. *Harnisch v. State of Wisconsin Department of Corrections, supra, pp. 4-5.* Her use of the word “wetbacks” was to combat the use of the slur. *Harnisch v. State of Wisconsin Department of Corrections, supra, p. 5.* In this instance, the grievant used a classroom setting for its intended purpose: to teach. *Id.* “When an opportunity presented itself to right an ignorance, the opportunity was correctly seized and as such lacks any sort of context that would be persuasive to support just cause for sustaining the discipline imposed.” *Id.*

Similar to the DOC, the District here contends “[U]sing the ‘N word’ in any context is harmful and normalizes the word. The District is committed to maintaining an environment free from racial slurs and hate speech.” (Tr. p. 10). However, the Grievant’s expression of the word was in the context of pushing for the District’s black excellence and anti-racism efforts and specifically to initiate a discussion among educators about what professional development could be offered to move that work forward in their school. (Tr. p. 109). The Grievant stated the school had done a really good job as a welcoming school of responding to situations where the word “gay” is used in a derogatory way. (Tr. p. 111). She asked what could be done as a staff “to better prepare ourselves to respond to situations when a student uses the word to insult another student.” *Id.* She quoted an example of hate speech used by a student (stating the N word in its entirety) to demonstrate the need to address hate speech in *Nuestro Mundo*; a need that was not being addressed sufficiently.⁶

Moreover, one of the District’s core values is racial equity and social justice. (District Exhibit No. 3). In addition, the District is committed to investing in staff with a focus on anti-racist, culturally responsive and inclusive practices. (Tr. p. 49). The Grievant was actively trying to live the District’s core values and fulfill the purpose of the District’s anti-racism policies when she used the N word. Contrary to District assertions, there is no evidence or persuasive argument her use of the word normalized the word. There is also no evidence or persuasive argument her use of the N word harmed anyone.⁷ There were no students, parents, family members or other members of the public present. Furthermore, when she was later told she should have said “N word” instead of saying the word in its entirety, she was very apologetic, worked on reconciliation and further enhanced her efforts to eliminate the usage of racial slurs and hate language within *Nuestro Mundo* while at the same time rejecting a suggestion of concerted action by staff to refuse to do work around black excellence in light of her severe discipline and unclear District expectations over use of racial slurs and hate language. (Tr. pp. 152-153). The Grievant instead highlighted the importance of continuing the school’s work in support of black excellence and against racial slurs and hate language notwithstanding what happened to her. (Tr. p. 152).

⁶ As of last spring, the District had provided no curricular tools or any kind of guidance to teachers and staff on how to address students insulting others with the N word or other racial slurs. (Tr. pp. 59, 67-68, 83, 140).

⁷ For example, a SBLT member who was offended by her use of the word, [REDACTED] wrote a letter of strong support for the Grievant asking District Human Resources not to discipline her for using the word but to use a restorative approach. (Grievant Exhibit No. 2). She also described the harmful effects of the District’s enforcement of its zero tolerance policy on use of the N word. *Id.*

As argued by the Union, the application of the “rule” here is counter to the purpose of the rule. Like the grievant in the above State case, the Grievant used the setting, a SBLT meeting, for its intended purpose – discussion of professional development around black excellence. Also like the grievant in the State case, the Grievant righted an ignorance when a teacher expressed surprise that students at Nuestro Mundo were using the N word and used the example to argue for more training and understanding so teachers could respond to those situations appropriately. The Commission expressly found that context matters when it concluded DOC did not have just cause for disciplining the teacher. For the same reasons, the IHO finds that the instant situation lacks any context that would be persuasive to support just cause for sustaining the District’s disciplinary suspension of the Grievant.

The District rejects the Union’s reliance on *Harnisch v. Wisconsin Department of Corrections*, *supra*, because “that case is distinguishable from the current situation” for the following reasons. In that case the teacher was disciplined for violation of an executive directive which, among other things, prohibited discriminating, harassing or bullying conduct. The Commission determined the teacher’s conduct did not meet the definition of discrimination or harassment set forth in the directive. In this case, according to the District, the discipline was not based on the Grievant engaging in discriminating or harassing conduct. “Rather, the directive was simple: no use of racial slurs in the workplace. There is no dispute that the “N” word is a racial slur. Grievant said the “N” word; she therefore, violated the directive prohibiting the use of racial slurs in the workplace.”

This argument by the District does not hold up to close scrutiny. In both cases the grievant allegedly violated a directive from management not to do or say something improper in the workplace. In the State case, the Commission found that the employer failed to prove that the teacher’s use of “wetbacks” was done in a way which conformed to the Department’s definitions for either harassment or discrimination. *Harnisch v. Wisconsin Department of Corrections*, *supra*, p. 4. More specifically, the Commission found that the DOC “failed to establish the behavior alleged.” *Id.* Here, the District also failed to prove that the Grievant’s use of the N word was done in a manner that violated an unclear directive not to use racial slurs or inappropriate racial language defined or described as “directed toward a student.” Like the State case, the District failed to prove the Grievant engaged in the conduct complained of.

The District adds that while the DOC argued using a racial slur is never appropriate, the Commission found such a statement did not conform to the DOC’s own internal definitions which implied context. The District opines that is the exact opposite of this case. The District believes it has been very clear. “No matter the context or circumstance” the use of racial slurs is unacceptable. (District Exhibit No. 1, p. 1). In other words the District clearly communicated that there is no context where use of the word is permissible. Thus, it would be inappropriate for the IHO to consider context and he must reject the Union’s argument that the context in which the Grievant used the N word makes its use acceptable.

Likewise, the IHO rejects this argument of the District. First, the District’s communications have not been clear as discussed above. Second, the Superintendent did provide limited context in her first communication – “there was an incident that recently occurred in one of our schools in which a staff member used a racial slur directed toward a student.” *Id.*

Unfortunately, there was little other explanation or description of prohibited behavior, despite the fact that “two other incidents involving inappropriate racial language have been reported.” *Id.* Staff, therefore, was left to their own devices to fill in the gaps (i.e. the context) in the District’s communications which they did by reference to media and other accounts. (Tr. pp. 70-72, 84, 115, 136-137, 153-154). They concluded not unreasonably that the District’s prohibition involved verbally attacking or calling students or others the N word. (Tr. pp. 71, 115, 136-137, 153-154). Such a conclusion was consistent with the District’s only explanation of the problem and provided the only context for what they considered to be prohibited conduct.

In addition, the Superintendent’s second communication referenced what would happen when an incident is reported. She stated “we immediately and thoroughly investigate.” (District Exhibit No. 1, p. 2). The Superintendent did not say the investigation would be limited to a determination whether the employee said the N word. As such her reference to an investigation implies that context and other factors may be uncovered as part of an investigation which could mitigate, explain and/or excuse use of the N word. Certainly, no staff member who testified thought the District’s prohibition on use of racial slurs extended to never speaking the N word, period, prior to the Grievant’s situation. (Tr. pp. 69, 86, 113-114, 137, 154).

Finally, as noted above, the Grievant did not direct the N word toward a student or anyone. She did not use “racial slurs or hate language aimed at a person’s protected class status.” (District Exhibit 1, p. 2). She didn’t report what one student said to another in order to endorse that insult. (Tr. p. 29). She said the word in response to someone else in the room saying, “I’m shocked to hear that students are using racial slurs.” *Id.* And she did so in the context of the meeting to encourage her colleagues and expressing support for advancing black excellence and why that was so important. *Id.* That context is what makes the District’s discipline of her unjust. The District offers no persuasive evidence or argument to the contrary.

Likewise, *Milwaukee County (Sheriff’s Department), Case 684, No. 68836, MA-14360 (Burns, 10/13/2009)* provides support for a conclusion that context matters in just cause decisions involving employees stating words used as racial slurs but not directing them at another. In that case the arbitrator found there was no just cause to suspend a sheriff’s deputy, who fully stated the “N word” when repeating an inmate’s statement “for the purpose of preparing an accurate report.” *Milwaukee County (Sheriff’s Department), supra, pp. 6-7.* The arbitrator held that given the context of the grievant’s statement it was not misconduct in the absence of a “work directive that expressly prohibits all use of the ‘N’ word in the workplace.” *Milwaukee County (Sheriff’s Department), supra, p. 6.* She added:

Within context, the Grievant’s statement to Inmate (E), including the Grievant’s use of the “N” word, was not profane, discourteous or insolent; was not a failure to serve the community, safeguard lives and property, protect the innocent, keep the peace or ensure the rights of all to liberty, equality and just; and was not substandard or careless job performance. *Milwaukee County (Sheriff’s Department), supra, p. 7.*

Similarly, none of the District's directives (the Superintendent's two emails and Principal Forehand's Puma Press article) expressly communicated zero tolerance for use of the N word in the work place. In addition, the record is clear that the Grievant's employment record with MMSD demonstrates her impressive "work to advance improved understanding of the harms of racism and to reduce expressions of it." That is what she was doing before, during and after the SBLT meeting in which she stated the N word. As such, there is no context supporting the District's allegation that there is just cause to discipline her for her conduct.

Based on all of the above, the IHO finds the District does not have just cause to discipline Sandra Rivera for the particular wrong doing complained of.

Obviously, where there is no just cause for the imposition of discipline for the specific wrongdoing alleged there is no just cause for the penalty (disciplinary suspension) imposed.

Remedy

The Union requests that the IHO sustain the Grievant's grievance, order the District to reverse the discipline and remove all indicia from her records, and otherwise make her whole.

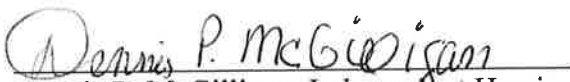
Step Three of the Grievance Processing Procedure states that upon completion of review and hearing, "the IHO shall render a written decision to the administration and the grievant and if applicable the grievant's representative. The IHO may deny the grievance or conclude that the grievance should be sustained in whole or in part and recommend a remedy." Accordingly, based on all of the above, and absent any persuasive evidence or argument to the contrary, the IHO concludes that Sandra Rivera's grievance should be sustained in whole. He further recommends that the disciplinary suspension given the Grievant should be rescinded and all indicia of this discipline should be removed from all her records.

Based on all of the above, and the record as a whole, it is my

DECISION

I sustain the Sandra Rivera grievance in its entirety for the reasons discussed above. There is no just cause for imposition of a disciplinary suspension for the Grievant's conduct. I recommend that the District rescind the disciplinary suspension given the Grievant and remove all indicia of this discipline from her record.

Dated at Madison, Wisconsin, this 17th day of December, 2019.


Dennis P. McGilligan, Independent Hearing Officer