

**FEDERAL MEDIATION AND CONCILIATION SERVICE
BARBARA C. HOLMES, ARBITRATOR**

In the Matter of the Arbitration of:

**Service Employees International Union,
Local Union 26,**

AWARD

and

FMCS Case No. 091209-52050-3

**ABM Janitorial Services, Inc.,
the Employer .**

Re: Jorge Lopez Discharge

Date of Hearing	February 18, 2009
Date post-hearing briefs due:	March 18, 2009
Date of Award:	March 29, 2009

Appearances:

For the Union:	Javier Morillo-Alicea President, SEIU Local 26 Minneapolis, MN
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For the Employer:	Richard A. Ross FREDRIKSON & BYRON, P.A. Minneapolis, MN
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INTRODUCTION

Service Employees International Union (herein the Union), as the exclusive representative, has appealed two separate disciplinary occurrences imposed on its member Jorge Lopez (herein the Grievant): 1) a three-day suspension given on September 29, 2008, and 2) the termination of the Grievant on October 15, 2008. An arbitration hearing was held at which both parties had a full opportunity to present evidence through the testimony of witnesses, the introduction of exhibits, and the filing of written briefs containing their closing arguments.

ISSUES

1. Did ABM Janitorial Services, Inc. (herein the Employer), have just cause to suspend the Grievant for 3 days for an incident that occurred on September 26, 2008? If not, what should be the remedy?
2. Did the Employer have just cause to discharge the Grievant from employment for an incident that occurred on October 9, 2008? If not, what should be the remedy?

FACTUAL BACKGROUND

The Union is an unincorporated labor organization within the meaning of section 2(5) of the National Labor Relations Act, 29 U.S.C. Sec. 152(5). The Union represents property services workers – janitors, security officers, and window cleaners – in the seven-county metropolitan area of the Twin Cities. The Grievant, Jorge López, has worked for the Employer for approximately six years. For most of that time he worked as a janitor at an office building in Bloomington. In October 2007, he began working at a office building in downtown Minneapolis.

On September 29, 2008, the Grievant was given a three-day disciplinary suspension for violating the Employer’s policy on how employees are to obtain supplies. Mr. López grieved that suspension and returned to work on October 2, 2008.

The next incident that resulted in the Grievant being terminated occurred on or about October 9, 2008. The janitorial employees who work a shift that starts at 5:00 p.m. typically arrive at a locker room in the office building prior to their shift to change clothes and store their personal items. The Employer alleges that on or about October 9, 2008, the Grievant walked into the men’s locker room and made an obscene and sexually suggestive gesture to a co-worker, Raul Zegarra. Specifically, the Employer asserts that the Grievant grabbed his (the Grievant’s) genital area, moved his hips back and forth and said Zegarra, “Do you want it?” The Employer claims that in response Zegarra stated to the Grievant at the time: “despite you given a warning, despite that you given warnings, you still not learning,” to which the Grievant responded with a grunt. Several co-workers witnessed the incident.

Zegarra complained about the Grievant’s behavior to another co-worker, who reported the incident to his supervisor, who reported it to the human resources department. Under the

Employer's normal practice, the Grievant was immediately suspended for three days to allow the Employer to investigate the allegations. Based upon its investigation and review of the Grievant's disciplinary history, the Employer terminated the Grievant's employment on October 15, 2008.

POSITIONS OF THE PARTIES

Union: The Union alleges that the Employer failed in its duty to conduct a fair and unbiased investigation. It faults the Employer for failing to interview the Grievant before he was terminated thereby depriving him of sufficient due process. It also claims that the Employer did not ask for written statements from the witnesses it interviewed unless the statements would corroborate Zegarra's accusation.

The Union also believes that the Employer failed to prove that the grievant actually engaged in the inappropriate behavior of which he was accused. It cites the Employer's inability to prove the date that the alleged harassment incident took place.

The Union alleges that the discharge of the Grievant was discriminatory because the Employer tolerated similar "locker room behavior" from other employees with no disciplinary consequences.

Lastly, the Union is stunned by the Employer's position announced at the arbitration hearing that the parties' collective bargaining contract does not require "just cause" for the imposition of discipline.

Employer: The Employer argues that the parties' collective bargaining agreement does not contain a "just cause" provision applicable to terminations. It also claims that one of its work rules clearly establishes that all employees remain "at-will" despite the existence of disciplinary provisions. It contends that this Arbitrator is precluded from applying a "just cause" standard because of the lack of a contractual provision or stipulation of the parties. Ultimately, the Employer argues that it has no burden to prove or produce anything in this matter.

Nonetheless, the Employer argues that two employees, in addition to Zegarra, confirmed that the Grievant had engaged in the inappropriate, obscene and sexually suggestive behavior. The Employer also points out that the harassment incident reported by Zegarra was actually the third time in a two-week period that the Grievant engaged in such behavior toward him.

The Employer argues that the three alleged witnesses called by the Union were, in fact, not witnesses at all. Although each of these witnesses testified that they did not see or hear anything in the locker room on the day in question, the Employer asserts that their denial of observing any inappropriate behavior is not a denial that the behavior occurred. It argues that the Grievant could have engaged in the conduct, but those witnesses simply missed seeing it.

The Employer concludes that the evidence proves that the Grievant violated the work rule and because he was an “at-will” Employee, his discharge was appropriate and consistent with the terms of the Agreement.

DISCUSSION

I. Is the Employer required to prove that it had “just cause” to terminate the Grievant from employment?

Article 23 of the parties’ collective bargaining agreement sets forth a grievance procedure of three steps of review within the workplace and a fourth step of outside review by a neutral arbitrator. However, the typical provision that states explicitly that the Employer must have “just cause” or “cause” to discipline or discharge an employee is not evident. The only places in the parties’ collective bargaining agreement that mention “just cause” or “cause” are as follows:

Article 3. UNION MEMBERSHIP

3.4 Probationary Employees: All employees hired either prior to or after the effective date of this Agreement shall not be considered regular employees of the company until after a probationary period of sixty (60) days. During the probationary period, the employees will be represented by the Union, but will not be covered by any of the terms and conditions of this Agreement **and may be discharged with or without cause** and without recourse to the grievance procedure of this Agreement. (emphasis added)

Article 11. VACATIONS

11.5 Vacation for Terminated Employees: Employees who voluntarily terminate without notice or **are dismissed for cause** shall not be eligible for a prorated vacation. If a person quits with at least a one (1) week written notice they will be paid a prorated vacation. The Company agrees not to terminate the employee, **without cause**, to the end of their notice and agrees to pay the employee to the end of his/her notice **if terminated without cause**. (emphasis added)

ARTICLE 23. GRIEVANCE PROCEDURE

23.5 No Strikes; No Lockouts: The Company shall not declare any lockout during the life of this Agreement and the Union shall not cause, call or permit any strike, sympathy strike, work stoppage, slow down, sit down, stay-in, walkout, picketing or other interference or interruption with the Company's operation and the Union shall cooperate with the Company in bringing the same to an end. It is further agreed that the Company shall have the right to discipline and/or discharge any employee participating in any conduct prohibited by this paragraph and that "**just and sufficient cause**" for such **discipline or discharge** shall be deemed established by the fact of such participation. (emphasis added)

Article 23.4 states, in part, the following regarding the arbitrators authority:

The arbitrator shall have the authority to apply the provisions of this Agreement and to render a decision of any grievance properly coming before him/her, but he/she **shall not have the authority to amend or modify this Agreement or to establish any terms or conditions of this Agreement** ... (emphasis added)

The Employer argues that because the collective bargaining agreement does not contain an explicit "just cause" provision applicable to terminations, the Grievant is an "at-will" employee as set forth in its work rules and may be terminated for any reason. The Employer also argues that an arbitrator does not have the authority to imply a "just cause" or "cause" provision because Article 23.4 (cited above) precludes an arbitrator from amending or modifying the collective bargaining agreement.

When the Employer first raised this argument in its opening statement, the Union responded in its opening remarks that it had never been argued that its members were "at will" employees. In its brief the Union states that it "learned for the first time at the arbitration that the Employer considered all of its employees "at will," an assertion that we vehemently contest and that, once again, shows the Employer's disregard for common understandings of due process."

To support its position the Employer cites *In re Cleveland Construction, Inc.*, 96 LA 354 (1990). But in that case the arbitrator did not need to address the issue of the absence of an express "just cause" standard because the parties had stipulated that "just cause" was the appropriate standard. The statement quoted by the Employer from that case amounts to dicta - unpersuasive editorializing that does not directly address the specifics in this case.

In *Indiana Convention Center and Plumbers and Steamfitters Union, Local 400*, 98 LA 713 (1992), the parties' collective bargaining agreement did not contain a provision that expressly

limited the employer's right to discharge for just cause, but authorized the employer to establish reasonable rules for the conduct of employees. The employee handbook cited a general standard of conduct and a non-exclusive list of specific types of misconduct and their corresponding disciplinary penalty. The Arbitrator ruled as follows:

By writing into the contract of a reasonable standard of conduct for employees, the Center has expressly recognized that it cannot discipline or discharge employees, except under the measured, reasonable, non-arbitrary and non-capricious rules it has laid down. ... By adopting such rules, the parties have implicitly adopted a "just cause" standard for discipline of employees because the essence of "just cause" is that the employer, in carrying out its inherent or express right to discipline employees, must do so in a manner that is not unreasonable, arbitrary, capricious or discriminatory. ... Accordingly I find, as many other arbitrators have done, that a just cause limitation must reasonably be implied from this Agreement." *Id.*, at 719.

As in *Indiana Convention Center*, Article 17.1 of the parties' collective bargaining agreement authorizes the Employer establish "reasonable" work rules:

The Union recognizes the exclusive right of Company management to manage the business and direct the working force including, but not limited to the following:
(a) Promulgate and publish reasonable working rules (copies to Union)...

These rules advise employees, among other things, that violation of the absenteeism policy, refusal to submit to a drug test, profanity, fighting, sexual harassment, discrimination, harassment, bringing a weapon into the workplace, leaving the job site without permission, insubordination, incompetence, theft, property damage, abuse or loss of equipment, unauthorized conversations, leaving the assigned work area, or falsification of time cards may subject them to discipline. However, the last provision in these work rules states as follows:

You should be aware that conduct listed above and that which is unprofessional or potentially embarrassing, adversely affects or is otherwise detrimental to the company's interests, or the public at large, may result in disciplinary action, up to and including immediate termination. Inclusion of the above list does not limit or diminish the Company's policy of "at-will" employment.

In the first sentence of this provision, the Employer sets forth what is essentially a "just cause" standard; but in the second sentence the Employer confounds the "just cause" standard by asserting its policy of "at will" employment. I find these two sentences to be inconsistent in the context of the collective bargaining contract.

The Employer is correct when it states that Article 23.4 precludes an arbitrator from amending or modifying the parties' agreement or from establishing any terms or conditions in the agreement. However, it is within the scope of an arbitrator to clarify inconsistencies and ambiguities that exist within the contract and the work rules that have been incorporated by reference. Based upon specific provisions in the parties' collective bargaining agreement, I find that a "just cause" standard applies to disciplinary actions under this collective bargaining agreement for the following reasons:

- 1) The reference in Article 3.4 of the parties' collective bargaining contract that permits the Employer to discharge probationary employees "with or without cause" implies that cause is required for the discharge of non-probationary employees.
- 2) The reference in Article 11.5 of the parties' collective bargaining agreement to "[e]mployees who voluntarily terminate without notice or are dismissed for cause" implies that "cause" is required to discharge an employee.
- 3) Article 23.5 of the parties collective bargain contract states that "just or sufficient cause" is established for the purposes of discipline or discharge if the employee participates in conduct that violates the "no strike, no lockout" provision. This provision implies that "just and sufficient cause" is required in discipline and discharge cases.
- 4) The extensive listing of various types of misconduct in the work rules amount to a "just cause" standard.
- 5) In this matter, the parties' have negotiated a detailed grievance procedure that specifically mentions "progressive discipline." In determining "just cause" arbitrators typically ask two questions: 1) did the grievant engage in misconduct and 2) if misconduct occurred, was the penalty appropriate? In actuality, the concepts of "progressive discipline" and "appropriate penalty" are two sides of the same coin. An employer determines what level of "progressive discipline" is appropriate. An arbitrator determines if this level of "progressive discipline" - i.e., the penalty- is appropriate. They review the same considerations - the seriousness of the misconduct, previous discipline,

length of employment, etc. Thus, the use of the phrase “progressive discipline” equates to the use of the phrase “just cause.”

- 6) The number of express references to some version of a “just cause” standard outweighs the single mention of “at will”.

II. Did the Grievant engage in the misconduct alleged by the Employer?

The Employer must have just cause to discipline the Grievant. The analysis to determine whether or not just cause exists typically involves two distinct steps. The first step is to determine whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If the alleged misconduct is established by a preponderance of the evidence, the next step is to determine whether the level of discipline imposed is appropriate, taking into account all of the relevant circumstances. *See* Elkouri & Elkouri, *HOW ARBITRATION WORKS* 905 (5th ed. 1997).

A. Suspension. The Union has challenged the 3 day suspension given to the Grievant on September 29, 2008. Testimony from a representative of the Employer revealed that a new procedure had been established for obtaining supplies from the supply room. Instead of all employees being allowed to enter the supply room and choose the needed supplies, Employee A was to be stationed at the entryway to the supply room and when employees needed supplies they were to ask Employee A to get the supplies for them.

The “Employee Conference Report”, a document created by the Employer states as follows:

On September 26, 2008 at 5:06 p.m. you barged into the supply room and did not request gloves from [Employee A] but instead ripped open a box of gloves and took three pair of latex gloves. I have on at least two occasions instructed employees that they must request items from [Employee A]. You also have been given proper rubber gloves for cleaning the dishwasher which you have in your locker. Latex gloves are not appropriate for cleaning the dishwasher. Because you failed to follow your manager’s instructions you are being suspended for three days ...

In his testimony the Grievant provided an adequate explanation as to why he used both rubber and latex gloves. But he did not deny that he personally took the gloves out of the supply room. His explanation for doing so was unclear and not credible. I find that his actions were in violation of the Employer’s directive on how to properly obtain supplies and constituted misconduct.

B. Discharge.

1. Did the Employer's investigation lack due process thereby invalidating the discipline?

Zegarra, the object of the Grievant's alleged obscene behavior, testified that he was sitting on a chair in the workplace locker room getting ready to start his 5:00 p.m. shift. He stated that the Grievant walked into the locker room and approached him. Zegarra testified that the Grievant grabbed his crotch (the Grievant's), moved his hips back and forth and said, "Do you want it?" Zegarra testified that he made a statement to the Grievant to the effect of, "Despite being given warnings, you still haven't learned." Zegarra also testified that this was the third time within the past few weeks that the Grievant had confronted him in this manner. Zegarra said that the Grievant's behavior upset him and was not normal.

Zegarra mentioned the incident to a co-worker who subsequently informed their supervisor. The supervisor then spoke to Zegarra regarding the incident. Zegarra provided the names of four coworkers who witnessed the incident. The supervisor then reported the incident to the building manager. On that same evening, the two of them talked to the individuals that Zegarra stated had witnessed the incident. After talking to the human resources director by telephone, the Grievant was placed on the standard 3-day investigatory suspension the evening of the incident. The Grievant denied any involvement in the incident.

On October 13, 2008, a human resources representative conducted interviews of the witnesses and tried unsuccessfully to contact the Grievant by telephone. The Grievant and his union representative met with the Employer on October 15, 2008, to discuss the matter. At that time the Union presented a written statement signed by five of the Grievant's co-workers stating that they did not see or hear any obscene or sexually inappropriate movements when the Grievant and Zegarra were in the locker room that evening. The Grievant was discharged at the end of the meeting.. A written statement made by Zegarra shows a date of "October 7-08." Written statements that corroborate Zegarra's assertions show a date of "October 16th" and "10/17/08", respectively. A memorandum created by a human resources representative notes that one of the witnesses named by Zegarra stated on October 16, 2008, that he did not see or hear the Grievant do or say anything inappropriate in the locker room that day.

The Union claims that the Employer was biased in conducting its investigation because it only interviewed witnesses that corroborated Zegarra's testimony. I do not find such bias

because the Employer interviewed all of the witnesses that Zegarra reported as being in the locker room at the time of the incident. The Union or the Grievant did not provide names of other witnesses until they met with the Employer on October 15, 2008. While it may not have been a wise thing to do, I do not find that the failure of the Employer to interview these witnesses amounts to the due process rights of the Grievant being violated. Furthermore, even though written statements of the eyewitnesses were not taken until after the Grievant's discharge, it appears that all but one of these witnesses were interviewed prior to the Grievant's discharge.

The Union also claims that the investigation is flawed because the Employer failed to interview the Grievant before it made its decision to discharge him. While it may have been a better practice to interview the Grievant prior to the October 15th meeting, the Grievant was given the opportunity at this meeting to provide information.

The Union has made a commendable effort to discredit the Employer's investigation. While I agree that the investigation was lacking in many regards, its insufficiencies do not amount to a violation of the Grievant's due process rights.

2. Did Employer prove by a preponderance of the evidence that the Grievant engaged in misconduct? Two co-workers corroborated Zegarra's testimony. These co-workers were standing by Zegarra talking to him when the Grievant entered the locker room. They testified that they saw the Grievant make the gesture and statement as testified to by Zegarra.

The Grievant denies making any such gesture or statement. The Union presented several witnesses who stated that they were in the locker room that afternoon, but did not see the Grievant do or say anything to Zegarra.

I find that Zegarra's version of the incident is more credible than the Grievant's version. First of all, there was no evidence to suggest that Zegarra had any motivation to make up a story that would damage the Grievant. Not even the Grievant could come up with an explanation as to why Zegarra would make up such a story. Neither was there any motivation for the corroborating witnesses to fabricate a harmful story about the Grievant. Although the Union presented witnesses who said they did not see the Grievant do or say anything to Zegarra, it was never clearly established that they were in the locker room at the same time of the alleged incident and/or that they were in a position to see any interaction. The Employer has met its burden of proving that the Grievant engaged in misconduct as alleged.

The Union faults the Employer's evidence for failing to establish the exact date of the incident. I agree with the Employer that witnesses often have difficulty remembering precise dates. But in this case it is clear that the incident took place on the same day that the Grievant was placed on disciplinary suspension.

III. What is the appropriate penalty for the Grievant's misconduct?

The Grievant' disciplinary history reveals the following:

March 26, 2008 – Verbal Warning for failing to follow the Employer's key policy.

July 15, 2008 – Written Warning for using cell phone on floor during shift.

September 2, 2008 – Second Written Warning for visiting with another employee.

Given this disciplinary history, I find that a 3-day suspension for violating the supply room policy was in accord with the Employer's progressive discipline policy.

I also find that the penalty of discharge is appropriate for the following reasons. First of all, the Grievant has failed to admit his wrongdoing. Secondly, the gestures he made towards Zegarra are not "typical locker room behavior" or "horseplay" as implied by the Union. These types of gestures are highly inappropriate in the workplace and clearly violate the Employer's policies regarding sexual harassment. Also, the credible evidence proved that this was the third time the Grievant had acted in this way towards Zegarra. Finally, the Employer also established that it has a history of terminating employees who have violated its sexual harassment policy.

AWARD

The grievance is denied.

DATED: _____

Barbara C. Holmes, Arbitrator