

IN THE MATTER OF ARBITRATION BETWEEN

AXIS Minnesota, Inc.)
"Employer")
AND) NLRB Case No. 18-CA-19172
SEIU Healthcare Minnesota)
"Union") Termination (Ngamne)

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: Minneapolis, MN; December 10, 2009

DATE OF RECEIPT OF POST-HEARING BRIEFS: December 26, 2009

APPEARANCES

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Kenneth Ngamne, Grievant

THE ISSUE

Did the Company have just cause to discharge the Grievant.

If not, what is the remedy?

FACTS

Kenneth Ngamne (the “Grievant”) was terminated for leaving his work area without permission to perform union business. On April 28, 2009, he was assigned to provide personal assistance and administer medications to two vulnerable adults living in the group home where he worked as a Direct Support person. One of the women assigned to his care was receiving medication through a nebulizer when he left the work site. He also left the other woman under his care unsupervised.

Axis (the “Company”) work rules prohibit an employee from leaving the premises without permission and without punching out. There is no dispute that Grievant left the work premises without requesting approval from his supervisor. In doing so, the Grievant violated the break policy that prohibits employees from leaving the premises, the nebulizer standard for administering medication, and his supervisor’s direct instructions that he was not to leave the premises during scheduled work hours without permission and notice to a supervisor.

There was no harm caused to the two vulnerable adults left unsupervised while he was off the work site. The rules and procedures were never challenged by the Union and are accepted as reasonable for the supervision and care of the disabled, medically fragile and basically non-verbal clients.

BACKGROUND

Axis provides support for people who have developmental disabilities with direct care services in group homes to vulnerable adults who are physically, mentally and/or medically fragile. Axis has maintained a bargaining relationship with SEIU Healthcare for about thirteen years.

The Grievant worked full-time for Axis as a direct support staff member from January 4, 2007 until his termination effective April 30, 2009. He worked at the Axis group home called Eldridge and supervisor was Shawn Burkman.

The Company’s clients are vulnerable adults who need a safe environment. The Company has instituted safety, supervisory and care policies and procedures to ensure its support staff are trained on their obligations.

Its clients need supervision, personal care, and medication administration. Many are non-verbal, in wheel chairs, and unable to care for themselves.

Axis emphasizes workplace safety and attention to the care of the clients as described in the Company’s Job Description and Performance Expectations. That description contains the following representative descriptions of the Company’s expectations:

4. General Work Performance Expectations
5. Maintains knowledge of and complies with policies and procedures.

11. Completes responsibilities in an organized, thorough, accurate, and timely fashion.
16. Takes actions necessary to maintain a safe environment.
17. Is at required places at assigned times.

Copies of this job description and performance expectations are given to all employees and the Grievant signed a copy of this document on January 4, 2007. Compliance with the expectations and rules is particularly important because of the needs of Axis clients.

Company documents and testimony from Star Papenguth, Director of Human Resources, verify that the Grievant received appropriate training on Company policies, including the break policy, timekeeping, and medication administration.

Axis' practice is to give the benefit of the doubt when an employee commits a rule infraction, and instead of a formal disciplinary action on the first offense, supervisors meet with the individual to discuss the situation. Axis provides the employee a clarification of expectations, and instruction of the rules and operating procedures that must be followed.

On April 2, 2009, Shawn Burkman met with the Grievant to discuss a report from a co-worker that he had left Eldridge while working his regularly scheduled shift when no supervisor was present. He admitted that he had left the premises on April 1, 2009 to go to the gas station to get something to drink and going on another occasion to Belmont, which is a nearby Axis group home. Burkman clarified to the Grievant that he was not to leave the work premises without permission or notification to a supervisor unless in an emergency. Even in the case of an emergency, she instructed him to notify his co-workers, get their okay that they would supervise his clients, punch out, and send an e-mail to the Program Supervisor explaining why he needed to leave. The Grievant said that he thought it was okay to go over to Belmont since it was an Axis home. She clarified that no one may leave the premises during work without permission because of the vulnerability of the people in the home.

Employees are not allowed to leave the premises while on work time even during breaks because there may be an emergency that requires the employee to cut short the break and assist the clients and/or their co-workers. Employees are paid for breaks because they cannot leave the premises and may be called off break to assist as needed.

On April 28, 2009, the Grievant was scheduled from 2:00 p.m. to 10:00 p.m. When his co-worker Emmanuel Orimogunie arrived for his shift starting at 3:00 p.m. he had a conversation with the Grievant, who was a union steward, about a letter from the union that his job could be in jeopardy because he had not paid his union dues. Orimogunie gave the Grievant his paystub that showed he had paid his dues and the Grievant assured him it would be taken care of (it was a computer error). He advised Orimogunie that another employee at the Belmont house had also received the same notice and he was going to go over later that day to pick up that employee's paperwork.

On April 28, 2009, Burkman was at Eldridge when the Grievant began his shift and was there until about 4:30 p.m. In addition, Anne Carlson, a Qualified Retardation Mental

Professional, also considered management, was at Eldridge until she left at about 6:05 p.m. From the time he started his shift until the time he left, the Grievant did not advise, or ask permission from Ms. Burkman or Ms. Carlson to go to Belmont. Indeed, Carlson said goodbye to each staff person and client when she left for the day and the Grievant made no mention of his intention to go to Belmont. Within minutes of Carlson's departure, he left the premises of Eldridge.

The Grievant left the premises and went over to Belmont leaving his two assigned clients unattended in the kitchen area. One of the clients was in the midst of a medication administration via a nebulizer. His other client who is non-verbal was in her wheelchair. Before he left, the Grievant told Orimogunie that he was going to Belmont to do union business. At the time, Orimogunie was in the bathroom assisting one of his own clients. According to Orimogunie the Grievant did not ask him to care for his two clients. Nor did the Grievant tell him that one client was on a nebulizer for her asthma. As Orimogunie testified, he could not have attended to the Grievant's clients at that time since he was involved in helping his own client in the bathroom.

Shortly after the Grievant left, Burkman returned to the premises finding his two clients unattended. The one client on the nebulizer treatment and the other client was saying "help" "help." Burkman checked the nebulizer and assisted the other resident with her book. She then went to locate the Grievant. Orimogunie told her that he had left to go to Belmont and the other co-worker said she had not known he was gone until she saw from the window that his car was gone. Not knowing if or when the Grievant was returning, Burkman went to Belmont and saw the Grievant walking towards his car in the driveway of Belmont. She asked why he was there and he replied that Kamanda had a problem with her paycheck and she had paperwork for him. Burkman told the Grievant that he should not have left Eldridge premises. She asked him about the care of his clients while he was gone, and he replied that "one was taken care of" and he "had just started the other client's nebulizer." Burkman admonished him that he was not to leave Eldridge without notifying the supervisor. He admitted that he had not punched out and they both returned to Eldridge.

Upon return the Grievant checked the client's nebulizer and disengaged the machine. After conferring with the Program Director, Ellen Hill, Burkman met with the Grievant who again admitted that he did not ask permission to leave Eldridge and did not punch out. Burkman advised the Grievant that he had violated Company policies and sent him home.

Damaris Kamanda received a letter from the union advising that she had not paid her union dues, when in fact the dues had been deducted from her paycheck. She called the Grievant about it on April 27, 2009 and told him that her paystubs proved she had paid. The Grievant reassured her that it was a mistake and that he would stop over after his shift ended at 10:00 p.m. to pick up the letter and her paystubs. He forgot to stop that night and when Kamanda called him later he told her he would pick up the paperwork the next day. He showed up unannounced around 6:00 p.m. at Belmont and picked up her paystubs. He took the paperwork to the union on April 30, 2009 to clear up the issue.

Shawn Burkman interviewed Orimogunie and Monica Belmont regarding the event surrounding the Grievant's leaving the premises on April 28, 2009. Both confirmed that they were assisting their own clients and the Grievant did not request that they supervise his clients. He did not tell Belmont he was leaving, and did not tell Orimogunie that one client was on her nebulizer. Statements come also from Damaris Kamanda, Anne Carleson, and Octavius Hilary, staff person at Belmont.

After gathering the information, Burkman and Doug Boeckmann, Director of Programs, met with the Grievant. He confirmed that he had not asked permission to leave the premises, and that he had not punched out. He said he went to Belmont to do union work, and told Emmanuel he was leaving but that both were assisting their clients.

The management team of Nancy Turner, Doug Boeckmann and Star Papenguth reviewed the clarification of expectations on the exact same issue of leaving the premises on April 2, 2009, just 26 days before this incident. The team decided to terminate the Grievant since he knowingly, and willfully, left two vulnerable residents alone without permission in violation of Axis rules.

PERTINENT CONTRACT PROVISIONS

ARTICLE II Management Rights

Except as specifically regulated by this Agreement, the Employer retains its rights, powers, and authority including but not limited to the right to hire, layoff, promote, demote, transfer, discharge or discipline for cause, to make and require observance of reasonable rules and regulations, direct the work force and the right to determine the materials, means, staffing and type of service to be provided.

ARTICLE III Union Representation

A. Stewards

Stewards performing Union related business during their regularly scheduled shift will receive hourly credit for seniority purposes and benefit calculations. Examples of such activities are: negotiations, steward training, ratification, voting, etc.

A Union Steward shall be allowed to attend new employee orientations and distribute new employee orientation packets. Management will notify stewards and Business Representative when new employee orientation is taking place.

AXIS Employee Manual

Employee Break

Employees may take one 15 minute break for every four (4) hours worked. Breaks must only be taken at times when they do not interfere with individual support needs and when

staffing is otherwise adequate. Only one person may be on break at a time. If the employee chooses and the supervisor approves in advance, the two 15-minute breaks may be combined for one 30-minute break in eight (8) hours. As break time is paid, employees may not leave the premises during breaks.

Nebulizer Standard Policy

Frequently visit with the individual to check placement of mask and observe for effectiveness.

POSITION OF THE EMPLOYER

Article VII of the labor agreement vests the Company with the right to discharge employees for “just cause.” Where “just cause” is the contractual threshold required for upholding employee discharges, the employer’s actions are evaluated based upon the “arbitrary and capricious,” preponderance of the evidence standard. In this context, where an employee is terminated for his failure to perform satisfactorily or follow clear work directions, that termination is reasonable and for just cause.

The parties’ Agreement gives the employer the right to “make and require observance of reasonable rules and regulations, direct the work force and the right to determine type of service to be provided.” Employees are required to follow proper orders of an employer. Axis has legitimate business concerns to have its direct support staff members remain on the premises during scheduled work hours to assist their clients as well as be available to assist another staff member when necessary. This is a legitimate and reasonable break policy that requires employees to remain on the premises at all times.

Based on the vulnerability of the clients, employees on break may be called back to work to assist a co-worker or a resident. Here, despite knowing and being given a clarification of Axis’ written break policy, the Grievant willfully violated the policy.

In addition, Axis has a discipline policy that provides notice to employees that failure to “perform the job in an acceptable manner,” including failing to adhere to written policies, work rules, and written directives from a supervisor may result in termination. The Grievant knew the policies. No one in the vulnerable adult care industry would dispute the position that failure to follow directions to not leave the premises and not to leave your assigned clients without permission is an offense subject to discipline and, under these circumstances, discharge.

The Union contends that the Grievant had no “warning” that leaving the premises without permission could be grounds for termination. This contention fails because Burkman unequivocally gave the Grievant specific instructions that he was not to leave the premises without permission. The Employer has no progressive discipline and serious infraction may result in termination.

Axis has also shown that it has consistently applied its policy not to leave the premises without permission. Other employees who have left the premises early from work shifts or during work hours without permission have been given a clarification of expectations, and based on a subsequent violation of the same rule have been terminated. There is also no evidence that the Employer treated the Grievant in an arbitrary or capricious fashion in the manner in which he was disciplined. Although the Union may assert that the Grievant was treated differently because he was a union steward, there is no evidence to support that assertion.

Employees must follow proper rules for administering medication via the nebulizer which require monitoring the process. Under no circumstances does the nebulizer standard provide for leaving a vulnerable adult unsupervised during the medication administration. The medication is per doctor's orders and the administration standard must be followed.

Both the break policy and the nebulizer policy are reasonably related to the efficient, orderly, and safe operations of the employer. The break policy prohibiting leaving the premises is not unreasonable. Rules prohibiting leaving the premises while in charge of attending to the care of vulnerable adults are reasonable, especially during medication procedures.

The Union attempts to raise a number of mitigating circumstances to support its contention that the Grievant's termination does not constitute just cause. These attempts must fail under the circumstances.

The Union contends a "no harm-no foul" theory to excuse the Grievant from failing to follow Company rules. The Company establishes rules and procedures to minimize significant risk to its clients. The fact is that one client was left in the midst of a medication administration, and another client was asking for help when the supervisor walked in. Although the Union attempted to minimize the potential harm to the client in the nebulizer treatment, Burkman testified that a few things could have occurred, such as improper medication flow or the mask could fall off. The fact that there was no significant harm during the Grievant's absence does not address the risk that an emergency or serious harm could have occurred while he was gone.

It is disingenuous for the Grievant to argue being gone only a short time to the nearby Belmont house should excuse his leaving the premises without notifying a supervisor. How far or how long he was gone is not the issue. The issue is that he was not available to attend to his clients. The Union also argues that employees may go on breaks, thereby having staff cover their assigned clients. But, the basis for the rule that employees remain on the property during breaks is that the employee is available to assist his clients and/or other staff and clients. If he is not on the premises, he is not able to fulfill his duties.

The Grievant also asserts that he told Orimogunie that one of his clients was on the nebulizer. Orimogunie specifically denies that he knew the client was on the nebulizer. Moreover, Orimogunie testified that he was assisting a resident in the bathroom and could have not attended to the Grievant's clients. In disciplinary cases, it is well-settled that arbitrators have resolved conflicts between testimony of the Grievant and that of a witness by "use of a presumption" that a witness unlike a grievant has no incentive for distorting the truth.

In addition, the specific performance failures were documented and were essential tasks in the Grievant's job description and the nebulizer standard. The Company provided evidence that the care of the vulnerable adults in its care requires constant supervision. There is a difference between going on a break, and leaving the premises, which effectively interferes with the employee's ability to effectively perform his duties.

The Union defends the Grievant's action by asserting that the Grievant was conducting "urgent" union business, and is, therefore, protected under the Parties' Agreement. Although the issue is not whether the Grievant was conducting union business (although it needs to be addressed), the issue is whether the Grievant needed permission to leave the premises and had to clock out. To accept the Union's argument effectively means that union business pre-empts the Employer's work rules, policies, and practices.

The Parties' Agreement provides that union stewards may perform Union related business during their regularly scheduled shift, such as "negotiations, steward training, ratification, voting, etc." Although the issue is not whether the Grievant was conducting union business, it is the Company's position that the Parties' intent in the Agreement was to provide union stewards the means to participate in significant union activities that require the union member to be absent from his/her regularly scheduled work shift, including those functions listed above. Picking up papers from a union member to deliver to the union office does not constitute significant union business sufficient to completely disregard the Company's policies and rules. Testimony by both the Union and the Employer established that in the event union stewards are participating in union activities that require them to leave their work shift, the regular practice is that the Union notifies the Company of the date and time the employee needs to be absent due to union business, and the Company schedules staff accordingly. There is no evidence in the record that union stewards are allowed to simply leave the premises, effectively walking off the job, based on their own determination.

The Grievant's assertion that he "thought" he could leave the premises without permission to conduct union business is in direct contradiction to the prior clarification and notice that Burkman gave to him that he was not to leave the premises. She unambiguously set the rules for the Grievant and did not distinguish between personal business and union business when she directed him not to leave without permission. He says he didn't think the rule applied to union business but the Grievant had asked either his supervisor or the Union whether he could leave the premises at his discretion he would have heard to the contrary. He did not seek permission or clarification. If the Grievant had asked to leave to conduct "union business" and was denied, then the proper procedure would be for the Union to grieve the Company's action. Given that the Grievant failed to follow procedures, he willfully disregarded the Company's right to make and enforce reasonable and legitimate policies and procedures. Regardless of whether the Grievant believed he did not need permission to leave the work site to pick up papers from a union member, the Company properly exercised its authority to direct him to not leave the work site premises, and it was his duty to comply.

The Grievant could have asked permission to leave, or clarified whether he needed permission to leave to pick up paperwork from a union member before he did so. He started his

shift at 2:00 p.m. and Orimogunie, who had received the same letter about dues from the union office.

There was no testimony or evidence presented that leaving the premises to pick up a union member's paperwork could override the Company's work rules and policies, no evidence that the Grievant or any other union steward leaves the work premises without permission at any other time other than this one incident on April 28, 2009. Instead, the Union asserts that the Grievant had conducted other union business while on his scheduled work shift, such as taking a phone call for a few minutes, or meeting briefly with Lance Lindeman to accept forms for becoming a steward, or another brief conversation with a union representative who stopped at Eldridge. Lindeman testified that union stewards are instructed to be "practical" and if a task takes a minimal amount of time ("5-10 minutes") that they can do it. The minimal tasks of taking a phone call or talking to Lindeman outside the Eldridge house did not require the Grievant to leave the premises. Having conversations about union business, or conducting some brief union business during scheduled work hours is not the issue. The issue is that the Grievant left the premises without notice to a supervisor. Employees cannot decide whether they can leave the premises to conduct minor union business without notification to management. Such a result leads to limiting managerial rights to establish reasonable rules and procedures.

The Union contends that the Grievant left because it was "urgent" for him to pick up the papers at Belmont. Such assertion lacks credibility.

Kamanda had asked the Grievant about the letter on April 27, 2009, and he assured her that it would be taken care of since she had payroll stubs showing that she had paid her dues. In fact, the letter to Kamanda directed her to call the union office with questions, so there was no need for the Grievant to get involved. Despite this fact the Grievant told Kamanda that he would pick up the documents on April 27, 2009 after his work shift ended. Clearly there was no urgent need to pick up the documents immediately. Then the Grievant forgot to pick up the papers when Kamanda called him and he told her he would get the papers the next day. Instead of going over to Belmont either before his shift started or at 3:00 p.m. when Kamanda's shift started, he waited until the supervisor was gone and went at 6:05 p.m. There was nothing the Grievant could do with the papers that night since the union office is open until 5:00 p.m. He turned in the documents to the union office on April 30, 2009, a few days after he picked up the documents.

The Company was free to discharge the Grievant without first instituting other forms of discipline. To the extent that the Union argues his discharge was not warranted and that something like suspension or some lesser form of discipline was required instead, they are mistaken. First, Axis has no progressive discipline policy. Second, as a threshold matter, the supposition of progressive discipline turns largely on the responsibility of the offending employee to respond to it.

Here, the evidence supports Axis' actions in not imposing some other form of discipline short of termination. Nothing in the Parties' collective bargaining agreement in any way requires the Company to suspend or discipline previously warned employees prior to termination. Axis has expressly reserved the right to forego progressive discipline in favor of termination at its

discretion for severe offenses involving violation of the Company's rules, which is particularly true in this case where the rule violation puts the residents at risk.

Axis gave the Grievant a second chance to comply with the rule. His supervisor clarified the rule and in no uncertain terms directed him not to leave the premises without permission. There is no evidence indicating that discipline short of discharge would have motivated the Grievant from committing this kind of serious infraction. To the contrary, his actions demonstrate his disregard for the Company's rules. To conclude otherwise would act to punish the Company for its prior patience and good-faith efforts.

POSITION OF THE UNION

The Employer bears the burden of proving just cause by a preponderance of the evidence. The Employer's decision to terminate the Grievant was inconsistent with the traditional tests for just cause. (1) The Grievant should not have been terminated for exercising union steward rights that he reasonably believed were protected by the contract, past practice, and the applicable law where he had no notice that he would be terminated for doing union business off premises; (2) Termination was too severe a penalty for the nature of the conduct and in light of mitigating factors; and (3) The Employer denied the Grievant procedural due process by failing to properly interview him and thereby denying him the opportunity to explain the basis for his belief that he had a right to leave the premises for union business.

Arbitrators must determine whether the nature of the particular [union related] activity is an appropriate basis for absence. Arbitrators generally give "wide latitude to the unions" in classifying activities as official union business. Article III.A of the collective bargaining agreement lists some examples of "union related business" that stewards may perform during a regularly scheduled shift: "negotiations, steward training, ratification, voting, etc." The use of the word "etc." indicates that this is not an exhaustive list stewards are contractually authorized to perform "during their regularly scheduled shift." Article III also specifically mentions adjustment of "any controversy" as to the application of the agreement as well as "new employee orientation."

In this case, it is undisputed that a union member contacted the Grievant because he was a steward. He went to the Belmont facility to obtain documentation in response to her claim that she had paid her dues in compliance with the union security clause. Thus, the "union related business" consisted of a union steward's efforts to investigate compliance with Article IV, the Union Security clause, which states that "[I]t is the employee's responsibility and a condition of employment to ensure that payments to the Union are made on a timely basis." Matters pertaining to application of the CBA are plainly "Union business" within the meaning of Article III. Moreover, any matter dealing with payment of union dues is union business, not only because the CBA requires payment of union dues, but also because union dues constitute internal union business similar to "steward training," "ratification," and "voting" which are specifically listed in the contract.

Arbitrators traditionally interpret CBAs consistent with statutes and case law. Union security compliance issues constitute union steward activity protected by the National Labor Relations Act (NLRA). The National Labor Relations Board considers investigative activities on the job by a steward in connection with contract compliance to be protected concerted activity under Section 7 of the NLRA.

The Employer argues that the Grievant was not engaged in Union business because “picking up Damaris’ letter and pay stubs because he forgot to do it after work the previous day does not qualify as Union related business.” Miss Turner also implied that he was not engaged in Union business because the union security compliance issue came up as a result of a computer glitch. Neither of these arguments has anything to do with the nature of the conduct as union business. Both arguments attack the importance or urgency of the union-related business. “Urgency” should not be in dispute since, as Nancy Turner acknowledged, the issue of dues payments was “panicking” employees because of their jobs were on the line. Nor is it the Employer’s place to judge whether Union business is significant or not.

Union representative Lindeman and the Grievant testified that he had briefly performed steward duties, including meeting with Lindeman and Union Political Director Rick Varco, during work time without punching out and without disciplinary consequences. Both Lindeman and Supervisor Shawn Burkman were aware of these steward activities on the clock. Miss Turner testified that stewards were compensated and did not punch out when performing new employee orientation and time spent at Weingarten interviews.

Both Lindeman and the Grievant testified that the Grievant and other stewards did not have to request supervisor permission before engaging in union business during their regularly scheduled shifts. The language of the CBA says nothing about stewards requesting supervisor permission to perform union business, and such a requirement would fly in the face of the legally protected role of a steward as an equal of the employer when performing steward duties.

Axis owner Miss Turner admitted that all of the steward duties specifically listed in the second paragraph of Article III of the contract would normally be performed off premises during a shift. Lindeman confirmed this. The plain language of the steward’s rights provision illustrates the parties’ intent that stewards may conduct union business off premises during a regularly scheduled shift. Both Miss Turner and Lindeman testified that stewards had typically performed Union business off premises without disciplinary consequence.

Nancy Turner acknowledged that the break-time policy is silent as to union steward duties. On its face, the policy does not speak to whether Union stewards can perform their duties off premises. Contract language, past practice, and the applicable law permit union stewards to perform reasonable duties off premises during their regularly scheduled shifts. To the extent there is any conflict between the contract and the Employer’s break-time policy, the Employer’s policy must yield. The Union Recognition clause of the CBA prohibits the Employer from unilaterally enforcing a rule which “conflicts with or contradicts any of the provisions of the Agreement.” The Management Rights clause states that the Employer may “make and require observance of reasonable rules and regulations,” “[e]xcept as specifically regulate by this

Agreement.” It is well established that [u]nilaterally promulgated company policies that conflict with the terms of the parties’ collective bargaining agreement are nonbinding.

“Arbitrators are likely to set aside or reduce penalties when the employee had not been reprimanded and warned that his or her conduct would trigger the discipline.”

In this case, Supervisor Burkman admitted that on April 2, 2009, the Grievant had only received a coaching and had received no discipline for leaving the premises on break time for personal reasons. She testified that this was a “clarification of expectations” rather than discipline. She also admitted that she did not warn him that he could be terminated if he left the premises again. Accordingly, on April 2 coaching did not adequately put him on notice that he would be terminated upon a recurrence. Since this was merely a “clarification of expectations,” the Grievant was also not given the opportunity to contest the allegations.

The circumstances of the April 2 coaching are different from the conduct in this case because that instance involved leaving the premises for personal reasons while this case involves performance of steward duties off premises. For a warning to provide adequate notice that similar subsequent actions will be disciplined more severely, arbitrators have held that, at a minimum, “the two offenses must be comparable.” Leaving the premises for union business consistent with the contract and the law is not comparable to leaving the premises for personal purposes. Accordingly, the April 2 coaching did not provide adequate notice that the Grievant would be terminated for leaving the premises for union business.

In cases of discipline and discharge, it is axiomatic that the degree of penalty should be in keeping with the seriousness of the offense. This case falls within that category of less serious infractions where arbitrators are very likely to change or modify an employer’s discipline if such discipline is too harsh for the offense committed. In the instant case, the Grievant’s actions posed no medical risk to the residents and his absence was brief and protected under the contract. Accordingly, the presence of these and other mitigating factors require the termination to be set aside.

The nebulizer standard provides that employees should “[f]requently visit with the individual to check placement of mask and observe for effectiveness.” The direction to check the nebulizer “frequently” is not specific as to how often the individual must be visited. Mary Sulonteh, a co-worker who has worked at Axis for seven years, testified that it is proper to check a nebulizer every “five to ten minutes.” The Grievant testified similarly, and the Employer produced no witnesses to rebut this testimony.

The Belmont facility is too close to Eldridge that he reasonably expected to be able to return from his steward’s errand in less than five minutes. The Belmont facility is located about one minute’s drive away from Eldridge. There are only fourteen houses and two stop signs between Eldridge and Belmont. *Id.* The Grievant testified that checking the nebulizer before and after his less-than-five-minute trip to Belmont would conform to the policy’s “frequent visit” provision. As a matter of common sense, the Grievant did not violate the nebulizer policy by taking a short trip to Belmont for steward business on his break.

To the extent the Grievant took any longer than five minutes to return to Eldridge, it was because Supervisor Shawn Burkman waylaid him in the parking lot to lecture him that “he should not have left Eldridge property to do union business and if he needed to be should punch out and the union could pay him for his time.” Notably, Burkman admittedly did not direct staff to visit the resident on the nebulizer in her absence because she was more concerned about going after the Grievant. Under these circumstances, it can hardly be said that the Grievant should be terminated for violating the nebulizer policy.

The rationale stated for requiring employees to remain on the premises is because “break time is paid” – not resident safety. Shawn Burkman’s testimony and written report of the incident reflects that at the time she was concerned with whether the Grievant had “punched out” and whether “the union could pay him for his time.”

In fact, the safety of residents during breaks is ensured through other conditions that the policy places on employee breaks, all of which were met in this case: (1) breaks may only be taken when they will not interfere with individual support needs, (2) only one person may take a break at a time, and (3) breaks may only be taken when staffing is otherwise adequate. In this case, there is no evidence that the Grievant’s choice of when to take a break interfered with individual support needs, that any other staff person was taking a break at the same time, or that staffing was inadequate. The contract provides for a minimum safe staffing level of one employee to four residents, and it is undisputed that staffing was above this standard during the trial period of the Grievant’s errand.

The Grievant took steps to ensure the safety of his residents prior to leaving for Belmont, especially Heather, the resident on the nebulizer. He informed his co-worker Orimogunie, that he would be gone for five minutes and that Heather was on the nebulizer, made sure that the nebulizer was working and secure. No evidence suggests that the residents were exposed to medical risk as a result of the Grievant’s brief absence. Indeed, Shawn Burkman agreed that “no harm resulted from Kenneth’s trip to Belmont.”

Burkman engaged in guesswork about potential risks, speculating that since the nebulizer treatment was prescribed by a physician if it was delayed or not done properly that would be a concern. She acknowledged that in the absence of the nebulizer treatment the resident would not experience any emergency. She could not identify what risks existed, if any, because she “is not a nurse.”

Even if the nebulizer would have ceased to function during the Grievant’s brief absence, Heather’s safety would not have been in danger. Since the nebulizer was used to administer non-life-sustaining doses of drugs used for maintenance treatment of asthma and need not be administered at a fixed time, but rather as circumstances allow. Burkman felt it was safe to leave Heather unattended to look for the Grievant.

The Employer presented evidence of other employees who were terminated for leaving the premises during their shifts. None of them is relevant because Miss Turner admitted that none of them was a union steward and none claimed to be doing union steward business. Further, the listed employees were terminated for violating the Employer’s Early Departure

Policy – not the break policy – which expressly notifies workers of the consequences of violations.

The following mitigating factors weigh against termination. First, the Grievant's absence was very brief. Steward duties are a legitimate reason for absence during a regularly scheduled shift. The absence occurred during a break, and the Grievant travelled a "stone's throw" to another Axis facility. The Grievant notified a co-worker that he intended to go to Belmont briefly. The Grievant felt it urgent to leave for this Union business during his shift because, as Nancy Turner pointed out, union members were "panicking" about losing their jobs. No harm was caused by the absence, and no evidence shows that the Grievant's actions exposed the residents to risk.

On balance, in light of all the mitigating circumstances, termination is not justified in this case and the grievance should be sustained.

The Employer denied the Grievant due process. Due process requires at a minimum, (1) that the Employer must conduct a full and fair investigation before imposing discipline, and (2) that the accused must be provided "an opportunity to be heard in his own defense." The opportunity to be "heard in his own defense" includes the opportunity to respond to all the evidence used to support the termination. Procedural due process is integral to a just cause determination because it provides an opportunity for him to offer denials, explanations, or justifications that are relevant before the employer makes its final decision."

Miss Turner and Burkman testified that the termination notice, submitted as Company Exhibit 20, contains an accurate statement of the basis for the termination. The date of the termination notice in the upper right hand corner is 4/20/09 – just one day after the alleged events and the day before the termination took place. On its face, the termination notice is based almost exclusively on the observations of "this witness," which refers to supervisor Shawn Burkman, who signed the notice.

After-the-fact witness statements should not be considered where the Grievant was not given the opportunity to respond to them. Even though evidence of pre-discharge misconduct discovered after the discharge may be considered, the existence of the misconduct must have been established in a process that permits the Grievant to fairly test it. Additionally, an undated, after-the-fact "termination summary" likewise should not be considered.

Shawn Burkman admittedly did not interview the Grievant before terminating him. Burkman's lecture in the parking lot hardly constitutes an investigative interview. The Employer did not ask him about what happened besides the conversation in the parking lot. It is a cardinal principle of procedural just cause that the grievant must be interviewed regarding the alleged misconduct before a punishment is carried out so that the accused may be heard in his own defense. The Grievant was not permitted an adequate opportunity to present his own defense because he was not allowed to explain the basis for his belief that as a union steward he had the right to perform a brief errand off premises during his regularly scheduled shift and was denied the opportunity to offer other mitigating factors.

DISCUSSION AND OPINION

What makes resolution of this dispute particularly complicated is that each party presents key elements of their respective cases which are flatly wrong. Perhaps the more egregious error lies in the Union's position which argues that a union representative is empowered by law to leave his work area without permission to conduct self-determined "urgent" union business. This proposition fails on several accounts.

In the first instance, merely holding the position of union steward cannot and does not immunize the Grievant from his obligation to comply with reasonable work rules that apply to all other employees – except as specifically exempted under contractually agreed upon conditions. Article III.A. of the collective bargaining agreement provides, in relevant part, that stewards may perform during a regularly scheduled shift "negotiations, steward training, ratification, voting, etc."

In the instant matter, the union contends that not only picking up a member's paystubs proving she was current on her union dues constituted "covered union business" but "urgent" union business under both law and labor contract.

This line of argument lacks merit on both counts – neither NLRB decisions nor the language of CBA Article III.A can be stretched to cover the Grievant's picking up these items as falling into a class with activities meant to be covered. As for the NLRB, it can be categorically stated that case law applies the concept of protected concerted activities which are essentially limited to core functions of the labor organization. It cannot be truly said that picking up pay stubs which could easily have been done before or after the Grievant's shift was either a core function nor hardly urgent since he didn't turn these in at the union office until days later.

As for the claim that the "etc." at the end of the examples of recognized union activities motioned in Article III.A, the interpretative principle of "ejusdem generis" defeats this assertion. That principle means that where a labor agreement gives examples of items not listed but intended to be included, such items must bear a reasonable similarity or likeness to the items specified.

It cannot be persuasively argued that the Grievant's errand to handle a trivial clerical error in a member's dues payment notice – an item more quickly resolved by a phone call and with nothing of consequence hanging on the result – falls into a class or type of activity listed as examples of union business in the CBA. A review of published NLRB decisions reveals no case citations to support the Union's contention that the Grievant was absent from his assigned work area at the time in question for a legally recognized union activity.

It must be added that the Union produced no testimony or documentation to effectively rebut Axis' contention that a clear practice had grown between the parties for union representatives to notify their supervisors of their intent to leave their areas for union business. The credible testimony established that supervisors were authorized to deny requests considered not qualified as covered by the CBA, or to require the union representative to punch out if any

significant time away from the job might be required. The reason for this, according to reliable testimony, was to avoid having the Employer pay for the conduct of union business.

This aspect of the dispute ought not close without comment on the underlying argument presented by the Union in regard to the claimed right of its on-site officers to leave their assigned work, without seeking permission, to carry out union business. Nothing in law or in this CBA empowers a union representative who is “on the clock” to unilaterally determine what activity constitutes union business, the conditions at the work site which safely permit his absence without arranging for appropriate coverage of clients, or to decide the amount of time to be away from the assigned work area without punching out on compensable work time.

The perpetual conflict between management and union over the right of at work union officers to conduct activities on behalf of their members is traditionally resolved by securing supervisory permission to do so. If permission is unreasonably withheld, the proper procedure requires repairing to a grievance and, if not resolved to the union’s satisfaction, appeal to arbitration. In plain truth in my almost sixty years of industrial experience as local union president, plant manager and arbitrator, I have not encountered a single case of where a union officer on the clock can leave his assigned work area and duties to pursue even legitimate union business without notifying his supervisor. This entire line of argument fails.

Having disposed of the major flaw in the Union’s case, this review now turns to the central defect in the Employer’s position. That error consists of the Employer surprising insistence at the hearing and its brief that “Axis does not have a progressive disciplinary policy.” I can only assume that Axis management are simply confused about standard industrial relations parlance regarding the types of disciplinary systems extant.

Having taught the subject matter covering labor and industrial relations systems at four major universities for close to fifty years, I advise the parties that in western industrial societies there are only two distinguishable disciplinary systems: (1) Progressive corrective programs which feature escalating penalties for any and all remediable offenses and performance failures, i.e., positive disciplinary policies; and (2) Randomized penalty programs completely dependent on ad hoc punitive measures subject entirely to managerial discretion on whim, i.e., negative disciplinary policies.

Progressive corrective disciplinary programs routinely carve out exceptions for so-called “capital offenses” i.e., dischargeable misconduct. These include the kinds of offenses that substantially threaten or disrupt the workplace and tend to rupture the employer-employee relationship and cover such misconduct as fighting, theft, possessing or using illicit drugs on property, carrying a firearm on plant premises, sabotage of machine or product and the like. All the above offenses pose obvious industrial risk for the employer and arbitrators rarely expect the use of progressive, corrective disciplinary procedures in dealing with them.

By contrast, no employer in a collective bargaining relationship, including Axis, has the authority to unilaterally declare that it has no progressive disciplinary policy. Arbitrators, with

the rare exception of the misinformed, widely agree with the principle stated by Arbitrator Gladys Gershenfeld in The Common Law of the Workplace:¹

Because industrial discipline must be corrective rather than punitive most arbitrators require use of progressive discipline, even when the collective agreement or employment contract is silent on the subject...with progressively increasing penalties, employees have an opportunity to conform their performance and conduct to the employer's reasonable expectations.

In like vein, Arbitrator Perry A. Zirkel's published research on the issue illustrates that the courts have generally upheld arbitrators who have inferred and applied the principle of progressive discipline in cases where the labor contract was silent on the matter.

Lest any lingering doubt about the Company's obligation to supply the Grievant with progressive disciplinary measures, such doubt should dissolve by referring to the voluminous professional literature on the subject, including the following authoritative treatises:

Abrams and Nolan, Fleming, Robbem, "Some Programs of Due Process and Fair Procedure in Labor Arbitration," 13 Stan. L. Rev. 235 (1961).

Koven, A.M. and Smith, S.L., Just Cause: The Seven Tests (1992).

Jenning, K. and Pheffield, B., and Walters, R., "The Arbitration of Discharge Cases," 38 Lab. L.J. 33 (1987).

Wirtz, W., "Due Process Arbitration," 11 NAA 1 Proceedings, BNA (1958).

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The record in the instant matter shows that Axis substantially violated at least two of the Grievant's due process rights, both resulting from the absence of the required steps in a progressive, corrective disciplinary procedure. By far the more serious of these procedural flaws was the failure to give the Grievant clear notice of the probable penalty – that of discharge -- for his next violation of the absent from duty site or similarly serious infraction. Instead he was merely counseled concerning leaving his post without permission – with conspicuous absence of mention of the discharge penalty if he did so.

Elemental concepts of fairness and common sense buttress the well-settled principle in labor arbitration that the employer must give "the employee forewarning or foreknowledge of the possible or probable consequences of the employee's conduct." As stated by Arbitrator Gershenfeld in The Common Law of the Workplace:

¹ The Views of Arbitrators, Edited by Ted St. Antoine, National Academy of Arbitrators, BNA Books, Washington, DC (1998).

See also Zirkel, P., "Labor Arbitrators' Inference of Progressive Discipline in Just Cause Cases: The Courts' View," 17, Journal of Collective Negotiations (1988).

An employee is entitled to be informed of, or to have a sound basis for understanding, the disciplinary consequences that will result from violating policies or work rules in effect at the employee's place of employment.²

See Whirlpool Corp., 58 LA 421, Arb. Daugherty (1972).

The fundamental fairness of the clear notice and forewarning requirement can be fully understood by merely posing the following rhetorical question:

Does anyone really believe the Grievant would have left his assigned post to perform a trivial errand, i.e., to pick up a member's paystub, if he understood he would be discharged if caught?

The second significant due process flaw by the Company occurred in the inadequate opportunity for the Grievant to tell his side of the story with the presence of a union representative. The confrontation with Supervisor Burkman falls short by a wide margin of meeting the due process obligation to hear his defense, if any, with the available counsel of a union representative.

The sparse facts presented at the hearing portray Supervisor Burkman as asking why he was away from his post. He replied that he was straightening out a union problem with a dues payment notice and was now returning to his assigned area. The supervisor informed him he violated a rule that she had already counseled him about and that she intended to report him to the owner. When Burkman subsequently informed Miss Turner, she promptly decided to terminate his employment.

A due process failure of this kind of insufficient opportunity to be heard was addressed by the U.S., Supreme Court in NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975). The Court shaped this right to have representation by specifying that an employer has the obligation of informing an employee that he is, or will be, engaged in a disciplinary interview in order that he has time to summon representation.

In the instant situation, Burkman made no mention of informing the Grievant that she intended the parking lot confrontation to be a formal disciplinary hearing – much less that it could lead to his discharge. Equally serious is the fact that Miss Turner decided to terminate his employment on what essentially was hearsay, i.e., Burkman's oral report of what the Grievant may or may not have said, which signifies not that she misstated material facts but merely that she supplied her interpretation of the conversation without any representative of the Grievant to challenge her version of events.

As a result, one cannot speculate what Miss Turner may have decided if she had before her any other than a "cut and dried" version of what the Grievant may have said in his own defense if he had been granted his Weingarten notification and had union representation when he presented his defense. In this regard it must be noted that his due process rights dictate that the Grievant be fully and fairly heard with representation, if he so requested, before the decision to discharge him was reached. In the absence of his exercise of such right, there can be no way of

² Op. cit.

ascertaining whether or not Miss Turner would have reached her decision to terminate the Grievant's employment.

This complex case thus boils down to a virtual collision between the Company's proof of substantial grounds for appropriate discipline and the Union's showing of substantial violations of the Grievant's due process rights. All that remains to resolve at this point is a proper remedy which holds the Grievant to account for a violation of employer's work site policies of which he should have understood from an earlier counseling, and a reasonable penalty on the Company for substantial violation of the Grievant's due process rights.

This type of shared liability for an unfortunate result is not altogether rare in arbitration. Three different approaches can be found where procedural errors have been committed by an employer but where the facts show a violation of work rules by a grievant. First, some arbitrators who favor strict procedural purity will treat any substantial due process denial as fatal and reinstate the discharged employee with full make whole remedy. A clear majority of arbitrators reject this approach as unduly legalistic and unrealistic in the industrial setting.

A second approach which some arbitrators favor minimizes due process errors as merely technical missteps which should have no effect on the outcome unless it can be shown that "but for" the procedural error the discharge would probably never happened. This kind of analysis seems to borrow from tort law and tends to place an unreasonable burden of proof on the grievant.

The third arbitral approach, and the one that will be applied in this case, calls for fashioning a remedy which equitably distributes responsibility to each party for the unfortunate results leading to this arbitration. This third approach can be readily discerned as the majority view among arbitrators in such cases and, further, the approach favored by the U.S. Supreme Court.

In this regard, the Court wrote in Steelworkers v. Enterprise Wheel and Car³ that:

An arbitrator...is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in reaching a wide variety of situations. The [labor agreement] draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

For further discussion of the issue of remedy, the parties are encouraged to read the oft-quoted treatise Remedies in Arbitration by Marvin Hill and Anthony Sinicropi.⁴ This definitive reference work contains detailed discussion of courts and arbitrators, including extensive citations, covering the issues of remedy presented in the instant matter.

³ Op. cit.

⁴ BNA Series on Arbitration, Washington, DC (1981).

DECISION AND AWARD

1. The Grievant be assessed three (3) work week unpaid suspension for his violation of the work place policy prohibiting covered employees from leaving their assigned area without permission of an authorized supervisor or manager.
2. This directive shall apply to all time “on the clock” whether on break or on union business.
3. Permission to conduct union business shall not be unreasonably denied or conditioned.
4. The Grievant shall be reinstated to his former position but placed on “last chance” agreement. As a condition of reinstatement, the Grievant must agree that the violation of the work rule against leaving his assigned post for which he is herein suspended constituted his last chance to save his employment with Axis. In sum, any further violation of this reasonable rule shall constitute just cause FOR HIS TERMINATION.
5. In recognition of the procedural flaws in handling of the Grievant’s infraction, Axis shall reimburse him for lost wages in the amount of one-half (50%) of his provable loss. This means that his earnings which he must subsequently document with a copy of his tax return for the calendar year 2009 which will offset the Company’s damages for the period of lost time.

The Grievant’s wage loss will toll from the three work suspension following the date of discharge until the date of his return to work.

6. The Grievant shall not receive any holiday or vacation pay credit for the duration of his separation from employment, nor shall he receive continuation of seniority credit for this period.
7. The Arbitrator retains jurisdiction in this case, solely for the purpose of resolving any dispute over the remedy directed.
8. The Union shall post a copy of this Decision and Award with the NLRB. It should be noted in this connection that the Arbitrator found no evidence of unfair labor practice in any aspect of the Employer’s actions in this case.

1/29/2010
Date

John J. Flagler, Arbitrator