

IN THE MATTER OF THE ARBITRATION BETWEEN;

UNITED GOVERNMENT SECURITY OFFICERS ASSOCIATION LOCAL 24

AND

**G4S REGULATED SECURITY SOLUTIONS, a division of G4S SOLUTIONS
(USA) Inc., f/k/a the Wackenhut Corp.**

FMCS Case No. 11-57684-3

DECISION AND AWARD OF ARBITRATOR

**Richard A. Beens
Arbitrator
1314 Westwood Hills Rd.
St. Louis Park, MN 55426**

APPEARANCES;

For the Union:

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For the Employer:

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**Date of Award:
July 26, 2012**

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between UGSOA Local 24 (“Union”) and G4S Regulated Security Solutions (“Employer”). Michal Powers (“Grievant”) was a member of the Union and employed by G4S Regulated Security Solutions.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on June 5, 2012 in Red Wing, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing briefs were submitted on July 17, 2012. The record was then closed and the matter deemed submitted.

ISSUES

The parties indicate three issues are presented by the instant case;

1. *Is this case substantively arbitrable under the case law presented by Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998)?*
2. *Is this case procedurally arbitrable?*
3. *If both of the first questions are answered in the affirmative, did the Employer have just cause to terminate Grievant and, if not, what is the proper remedy?*

¹ Joint Exhibit 1.

FACTUAL BACKGROUND

The Employer is a security company that provides armed, uniformed security officers to various entities. In the present case, they contract with Xcel Energy Corporation to provide security against terrorism and sabotage at the Prairie Island Nuclear Plant near Red Wing, Minnesota. Security work at nuclear facilities is heavily regulated by the federal Nuclear Regulatory Commission (“NRC”). Following NRC requirements either before or during the course of his employment, Grievant obtained licenses or certifications in security and as an armed guard. He also obtained a concealed weapons permit.²

Armed Security Officers are:

“Responsible to prevent radiological sabotage through the implementation of the NSPM Security Plan and Safeguards Contingency Plan as directed by site procedures and Security Department supervision.”³

All employees undergo a lengthy period of intensive training immediately after being hired. Each nuclear facility has “...a defensive plan that specifically spells out what equipment is where, how it’s used, how it’s used to defend the facility, what officers are where and what armament they have to defend the facility.”⁴ Even after their initial training, employees are periodically required to again demonstrate the knowledge and competence to respond to attacks on the facility. One of the tests regularly administered is the “Tabletop drill.” It consists of a table-sized mockup of the Prairie Island facility.

² Union Exhibit 1.

³ Employer Exhibit 1.

⁴ Testimony of Wayne Tyson, Transcript, page 24.

Employees must demonstrate a thorough knowledge of building and guard post locations, routes to take in response to an attack, and required actions to take when responding.

While the test is usually given in team groups, individual tests are given as employees return from leaves of absence, FMLA leaves, and any other absence of more than 90 days. The knowledge demonstrated by a passing is a critical element of an armed security guard's job.

Grievant, Michael Powers, was first hired conditionally as an armed security officer by G4S (formerly Wackenhut Corporation) in August 2005.⁵ At the time of his hire, Grievant filled out an Invitation to Self-Identify form indicating he needed accommodations relating to reading and spelling in order to perform his job.⁶ While early performance reviews indicate he had issues, “...of learning vital doors, vital areas, etc.”⁷ he subsequently showed improvement in this area and was rated “*competent*” in all other performance categories.⁸ Grievant was hired as a full-time officer in August 2006.⁹

In April, 2008 Grievant was diagnosed with chronic anxiety and mild depressive disorder,¹⁰ which he self-reported to the Employer.¹¹ In July, 2008, Grievant failed the Radiation Worker Testing¹² three times. He was placed on administrative leave which was grieved by the Union. The grievance was based on an allegation that Grievant was being discriminated against in violation of Articles 2 and 6 of the CBA. It was apparently

⁵ Union Exhibit 2.

⁶ Union Exhibit 3.

⁷ Union Exhibit 9.

⁸ Union Exhibit 10, 19 and 20.

⁹ Union Exhibit 1.

¹⁰ Union Exhibit 23.

¹¹ Union Exhibit 21.

¹² Union Exhibit 24.

resolved by giving Grievant taking additional training, passing the test, and being placed back at work.¹³

He worked at Prairie Island until January, 2011 when he had a seizure. Subsequent testing at the Mayo Clinic revealed that the seizure was caused by medication Grievant was taking for anxiety and depression. After four months and a change in medication, he was cleared to return to work.¹⁴ During Grievant's absence, a new defensive strategy had been put in place for the Prairie Island Nuclear Plant. Upon his return, Grievant was required to take refresher training and again pass the Tabletop test. He was first tested on May 9, 2011. The instructor wrote the following report of Grievant's performance on the test;

"After instructing on the new protective strategy and defensive position areas, I, Dave Axt (SME Instructor) presented simple attack scenarios from each compass direction. The purpose was to evaluate knowledge of new defensive positions and redeployment locations. Mr. Powers was unable to recall almost anything. He could not find major, labeled buildings on the maps (Aux, Turbine Building, Old Admin, etc.), and he was unable to identify response locations (even with the answers in his handout). Several reviews were attempted unsuccessfully. There appeared to be a significant cognitive deficiency with Mr. Powers. he (sic) could not recall simple element even when given significant time to review."¹⁵

Following this failure, Grievant was assigned to "shadow" other security officers for one month. They were instructed to answer Grievant's questions and make sure he familiarized himself with the defensive procedures.¹⁶ Grievant was again given the Tabletop test on June 9, 2011. Instructor Brian Staniszewski reported the following:

Below are my comments regarding the tabletops performed today with Officer Powers. My approach for the tabletop evolutions was to challenge the knowledge

¹³ Transcript, pp. 141-142.

¹⁴ Union Exhibits 28 and 29.

¹⁵ Employer Exhibit 2.

¹⁶ Transcript, pp. 74-75

of the Officer regarding the Protective Strategy, the physical layout of the facility, protected targets, and Security related equipment. An overview of Protective Strategy positions, redeployments, and recent changes to Security barriers was conducted prior to the conduct of the evolutions. The Officer was allowed to utilize a response matrix during the tabletops.

Protective strategy -- Officer Powers displayed a low level of understanding regarding Responder locations, fields of fire, and ballistic protection provided. He was unable to identify how the Strategy would effectively mitigate an adversary's approach as the table tops progressed to different points throughout the facility. The table top evolution is considered a relatively low stress environment. This environment along with the ability to review a response matrix should provide ample opportunity to identify locations of responders and their respective engagement possibilities. This did not occur correctly in many cases, and in some it took far too long to make a decision that would allow for successful implementation of the strategy. Primary and alternate (redeployment) positions were tested during the course of the evolution. Many of the Primary positions are new, but have been trained to all Security personnel. The knowledge of the current strategy should assist with redeployment locations as they are similar in many cases. The officer did not readily identify the correct locations of primary locations redeployments, and in many instances identified the wrong building and elevation levels associated with them. Again this was even with the assistance of a response matrix at hand.

Physical layout of the Facility - The Officer had a difficult time identifying cardinal direction as it pertained to the Site. This had a negative impact on locating the positions of many of the Responders as well as identifying direction of travel for the adversaries. This was displayed through discussions of fields of fire, and simulated radio announcements from the Officer as he attempted to relay pertinent information to the response force. The officer also incorrectly identified buildings (that have not changed) around the facility, and was confused as to what equipment and Responders resided on many elevations throughout the structures.

Protected Targets - The officer was asked what potential adversary targets were located in some buildings as the tabletops progressed. In some case the Officer identified the wrong building elevations of target equipment. In others, the Officer did not identify the target at all. When specifically questioned if the Officer believed a piece of vital equipment was a target he responded "No", however he could identify that it was part of a Security tour. This poses two problems: 1) the equipment is protected and part of a target and 2) the officer appears to not understand why he conducting the tour of that area.

Security related equipment - the Officer had difficulty readily identifying Security door locations and numbers. On Occasion, the correct number/location was

identified only to be replaced by a different (wrong) number/locations a few sentences later. This subject also cross ties with protected targets and the physical layout of the facility since many Security related items are included in those areas.

My professional opinion is the Officer did not display the knowledge necessary to effectively implement a Protective Strategy as it pertains to the items listed above. I would not be comfortable qualifying this individual as part of the protection and Security of this facility...¹⁷

Having twice failed the Tabletop drill, Grievant was terminated on July 8, 2011. The discharge was based on Grievant's failure to demonstrate the ability to perform essential elements of his job.¹⁸

Three days later, on July 11, 2011, Desiree Sullivan, the President of the UGSOA International Union filed a grievance on behalf of Powers pursuant to Step 2 in the CBA grievance process by sending a letter to Wayne Tyson, the G4S Project Manager at Prairie Island Nuclear.¹⁹ The grievance alleged Powers had been terminated without "Just Cause." The letter claimed the company had violated Article 2, Management Rights, and Article 6, Equal Employment Opportunity, of the CBA. The Union asked that Grievant be returned to work, made whole, and the Employer comply with the CBA. The letter was not signed by Grievant or the local union committeeman.

On July 22, 2011, Tyson, responded to the UGSOA Local 24 President with a copy to Grievant.²⁰ Tyson asserted, "*The grievance is null and void because it was not filed and processed in strict accordance with the Grievance Procedure in Article 7 of the CBA. Specifically, the grievance was not signed by the grievant or the Union*

¹⁷ Employer Exhibit 3.

¹⁸ Joint Exhibit 2.

¹⁹ Joint Exhibit 3.

²⁰ Joint Exhibit 3.

Committeeman... ”

While Sullivan and Tyson exchanged emails on July 25, 2011, There is no evidence that Sections 7.4 (Step 3) or 7.6 of the CBA grievance process were precisely followed by the Union or, for that matter, by the Employer. There is no written report from the Employer’s Corporate Director, Labor Relations, either reviewing or formally rejecting the grievance as required by Section 7.4. However, Tyson’s response to Sullivan’s enquiry was copied to the Employer’s Managing Counsel for Labor Relations.²¹ Further, Tyson’s response to Sullivan indicates he had spoken to the Employer’s Managing Counsel for Labor Relations specifically about the timeliness of this grievance.²² There is evidence that the Union had requested and was awaiting information pertaining to the grievance that was not forthcoming from the Employer.²³ On July 26, 2011, Sullivan notified Tyson via email of the Union’s intent to proceed to arbitration on behalf of Grievant.²⁴ The arbitrator was notified of his selection by email from FMCS on August 25, 2011.

APPLICABLE POLICY AND CONTRACT PROVISIONS

Contract Provisions²⁵

Article 2 Management Rights

It is understood by the Union and the Employer, that the Employer is a service provider to the Client, who is recognized by the Nuclear Regulatory Commission for licensed

²¹ Joint Exhibit 3.

²² Joint Exhibit 3.

²³ Joint Exhibit 3.

²⁴ Joint Exhibit 3.

²⁵ Joint Exhibit 1.

operation of the Prairie Island Nuclear Generating Plant. This Agreement shall not be construed to infringe or impair any of the normal management rights of the Employer, which are not inconsistent with the provisions of this Agreement. Included among management rights is the authority to administer and/or manage the Employer's business, including but not limited to the direction of the working force; the right to hire, discipline, suspend or discharge employees for just cause, to relieve employees from duty because of lack of work, to assign shifts, to require employees to observe Employer, Client and NRC rules and regulations, to establish and enforce rules and regulations, to plan, direct, control and continue operations, to establish and change work schedules and assignments, to select and determine the number and classification of employees necessary to perform operations, to determine when overtime shall be worked, to determine the number, location and types of guard posts, or to discontinue temporarily or permanently any posts, to determine the method and manner of operations, to establish the standards of work performance for employees, to introduce new or improved methods, to change existing business practices, shall be vested exclusively in the Employer. This statement of management rights which remains unimpaired by the Agreement is not intended to exclude others which are not mentioned herein. In exercising these right, it is also agreed the Employer will not violate any of the provisions of this Agreement.

**Article 6
Equal Employment Opportunity**

The Employer and the Union agree to maintain a policy of non-discrimination in accordance with applicable federal laws by reason of age, sex, creed, race, color, national origin and union activity. The use of one gender in this Agreement shall include the other gender.

**Article 7
Grievance and Arbitration Procedure²⁶**

7.1 For the purpose of this Agreement a grievance is defined as a difference of opinion, controversy, or dispute between the Employer and an employee regarding only the meaning or application of this Agreement, by not involving any change in or addition to such provisions. In order to establish effective machinery for a fair, expeditious, and orderly adjustment of grievances, the parties agree that, in the event any grievance arises over the interpretation or application of any provisions of this Contract, it will be settled by the following procedure.

....

*7.3 **Step 2** - If the matter is not resolved in Step 1, the grievance shall, not later than ten*

²⁶ Only those portions of Article 7 deemed applicable to the present case are included.

(10) consecutive work days after the occurrence of the facts giving rise to the grievance, be reduced to writing setting forth the facts in detail, and specifying the Article and Section/Paragraph allegedly violated, and signed by the aggrieved employee and the Union Committeeman, and shall be submitted to the Site Manager or his designee....

The Site Manager or his designee will have ten (10) days (excluding Saturdays, Sundays and Holidays) from the date the grievance was presented to him to answer the Union President, in writing, with a copy to the aggrieved employee and the Union Committeeman.

*7.4 **STEP 3** If the grievance is still unsettled, it will be reviewed by the International Union representative or his designee and the Employer's Corporate Director, Labor Relations or his designee within thirty (30) days, (excluding Saturdays, Sundays and Holidays) from date of review.*

7.5 Grievances which have been processed in accordance with the requirements of the above paragraphs and which remain unsettled shall be processed to arbitration in accordance with the following procedures and limitations.

7.6 The Union International representative, or his designee within ten (10) calendar days (excluding Saturdays, Sundays and Holidays) after the rejection of the grievance by the Employer's Corporate Director, Labor Relations, or his designee, will, in writing, notify the Employer's Corporate Director, Labor Relations or his designee of the Union's intent to invoke arbitration....

....

7.9 The arbitrator's authority shall be limited to finding a direct violation of the express purpose of the Agreement provision or provisions in question rather than an implied or indirect purpose. The arbitrator cannot modify, amend, add to, detract from or alter the provisions of this Agreement, nor substitute his judgment for that of management.

7.10 Any grievance involving discharge, suspension or layoff shall be commenced at Step 2 of this procedure, and the written grievance shall be presented to the Site Manager or, in his absence, to his designee within five (5) calendar days (excluding Saturdays, Sundays and Holidays) after the occurrence of the facts giving rise to the grievance.

7.11 Any grievance shall be considered null and void if not filed and processed by the Union, or the employee represented by the Union, in strict accordance with the time limitations and procedures set forth above...

Policy Manual²⁷

4.13 *There are three levels of offenses (Levels I, II, and III). These are only guidelines for use by management and supervisory personnel...*

...

- *Any other acts which, by nature and impact, severely limit the employee's ability to perform essential elements of the job.*

....

Job Description²⁸

Position: ***Armed Security Officer***

Job Description: *Responsible to prevent radiological sabotage through the implementation of the NSPM Security Plan and Safeguards Contingency Plan as directed by site procedures and Security Department Supervision.*

- Qualifications:
- 1.) ***SHALL*** be competent and knowledgeable in matters related to contractor's rules, regulations and procedures.
 - 2.) ***SHALL*** possess mature judgment in all areas of the work assignment.
 - 3.) ***SHALL*** be knowledgeable and competent in speaking and writing English (sic) ***SHALL*** possess basic mathematical skills.

....

Duties:

- 3.) ***SHALL*** read and ensure a clear understanding of post orders, instructions and changes to orders, and contact a supervisor immediately if questions arise or clarification is needed for regular and/or compensatory posts.

²⁷ Employer Exhibit 4.

²⁸ Employer Exhibit 1. Only those portions deemed applicable to the present case are listed.

OPINION AND AWARD

1. Is this case substantively arbitrable under the case law set forth in *Wright v. Universal Marine*, 525 U.S. 70 (1998)?

The instant issue involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the CBA between the parties. The arbitrator may refer to sources other than the collective bargaining agreement for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the collective bargaining agreement with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement.

The Employer argues that arbitration of this case is precluded by the holding in *Wright*. Their argument presumes that Grievant is litigating an Americans with Disabilities Act of 1990 (ADA)²⁹ claim. They correctly point out the present CBA contains no agreement that statutory claims may be arbitrated. While the CBA contains a non-discrimination clause,³⁰ the ADA is not specifically listed. Even if it were listed, there is no clear agreement within the CBA to litigate statutory discrimination claims, per se, in the arbitration context. Further, Article 7, Section 7.9 of the CBA limits the Arbitrator's authority, "*...to finding a direct violation of the express purpose of the Agreement provision or provisions in question rather than an implied or indirect purpose...*" Reading into the CBA a right to litigate an ADA claim per se lies beyond the powers granted the arbitrator.

²⁹ 42 U.S.C. §12101 et. seq.

³⁰ Joint Exhibit 1, Article 6

Nevertheless, I disagree with the Employer's premise. The precise holding in *Wright* is, "...that the collective -bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination." That holding is not applicable to the present case. This matter does not present an either-or choice of forums to Grievant. While he certainly retains the right to pursue an ADA claim in federal courts, he also retains the clear right under the CBA to contest whether or not his termination was for "just cause." Grievant is not seeking the plethora of damages allowed under the ADA, such as injunctive relief, front pay, punitive damages and attorney's fees. He simply asks to be reinstated and to be made whole.

When reviewing "just cause," the majority of arbitrators will look to standards contained in external law for guidance.³¹ "Just cause" is a broad, generic standard, but it cannot be considered in a vacuum. A "just cause" consists of a number of substantive and procedural elements. A review of discipline for alleged misconduct requires an analysis of several factors, including commonly accepted statutory standards that may be applicable. Under the facts of this case, the existence of "just cause" will ultimately turn on the classic first question in ADA cases; Can Grievant perform the essential functions of his job with or without accommodation? While the ADA is the law of the land, asking and answering that question does not turn Grievant's case into a statutory ADA claim. It is simply applying an external legal standard in the course of considering just cause.

I find that *Wright v. Universal Marine* does not preclude arbitration of this claim.

³¹ See *Melding External Law With Just Cause*, Bonnie G. Bogue, Proceedings of the National Academy of Arbitrators (1997) p. 82.

2. Is this case procedurally arbitrable?

The Employer points to two facts in support of their contention that this grievance is procedurally deficient: 1) The grievance was not signed by the Grievant and Union Committeeman, and 2) The parties never engaged in a Step 3 review of the grievance.

There is a general presumption that favors arbitration over dismissal of grievances on technical grounds. Where the CBA has specific language and requirements regarding the filing of grievances, they will be followed absent mitigating circumstances. It is also incumbent on the employer to follow the grievance procedure.³² Given the general presumption favoring arbitrability, the challenging party bears the burden of proof by clear and convincing evidence.³³

Article 7.3 of the CBA applicable here provides that grievances be signed by the aggrieved employee and the Union Committeeman. Nevertheless, significant mitigating circumstances are present in this case.

While there is no dispute that the Grievant and local Union Committeeman were not signatories, the International Union President was. Since the grievance was filed three days after Grievant's termination, there was obviously communication between the Local 24 office in Minnesota and the International Union Office in Colorado. More importantly, I find it problematic to demand the signature of an employee with self-identified learning problems known by the Employer and who clearly has issues comprehending the written word. This is particularly true when those very learning

³² Elkouri & Elkouri, *HOW ARBITRATION WORKS*, (6th Edition) 2003, Chapter 5.3.B.

³³ *Department of Veteran Affairs*, 126 LA 369 (Henderson, 2009).

issues constitute the Employer's basis for terminating Grievant.

No evidence was presented by the Union explaining the lack of signatures. However, there is also no evidence that the Employer failed to understand or was in any way prejudiced by their absence. International Union President Sullivan's letter clearly states the reason for the grievance, the contractual basis for the grievance and the requested remedy. Since it was filed within three days after the termination, the underlying facts had to be fresh in the mind of Project Manager Wayne Tyson. His Step 2 response shows no confusion. Tyson raises the signing issue and, in addition, asserts just cause, "...even if the grievance is not null and void..."³⁴ Under these circumstances, I come down on the side of those arbitrators who regard such signatures as "mere formalities."³⁵ Dismissal of a grievance for the lack of pro forma signatures under the present facts would be manifestly unjust in denying Grievant his "day in court" and turn the process into a meaningless "gotcha" game.

The Employer also asserts the parties never engaged in the Step 3 grievance review process. That provision of the CBA, Article 7.4, provides that if a grievance remains unsettled,

*"..it will be reviewed by the International Union representative or his designee and the Employer's Corporate Director, Labor Relations or his designee within thirty (30) days, (excluding Saturdays, Sundays and Holidays), of the denial by the Site Manager or his designee at Step 2. The Employer's Director, Labor Relations or his designee will respond in writing within fifteen (15) days (excluding Saturdays, Sundays and Holidays) from date of review."*³⁶

The Employer argues that the Union never requested the review and, as a consequence, it

³⁴ Joint Exhibit 3.

³⁵ Elkouri & Elkouri, HOW ARBITRATION WORKS, (6th Edition) 2003, pp. 210-211.

³⁶ Joint Exhibit 1, Article 7, Section 7.4.

never occurred.

I find this argument disingenuous on two counts. First, Section 7.4 of the CBA does not require the Union to request the review. The provision is silent with regard to who initiates the Step 3 process. Either party could do so. The Section is clearly intended to promote possible resolution of the grievance by review at the highest levels in both camps. If the review is that important, it could just as easily have been initiated by the Employer. It is unconvincing to point an accusatory finger at the other party while refusing to exercise exactly the same right.

Second, the evidence before me indicates there was substantial compliance with Section 7.4. In the first instance, the grievance was initiated and processed by the International Union President, Desiree Sullivan. In an email response to Sullivan dated July 25, 2011, Tyson indicates that he had discussed the grievance with Employer's Managing Counsel for Labor Relations and directs any further enquiries she may have to him.³⁷ On the following day, July 26, 2011, Sullivan notified Tyson of the Union's intent to proceed with arbitration.³⁸ Clearly, this grievance was reviewed by the International Union President and the Employers Managing Counsel for Labor Relations which is the essence of Section 7.4. The Employer, as is it's right, strongly felt there was just cause to terminate Grievant. Requiring written responses from the Employer before the Union could proceed is an empty exercise under these facts. There is no evidence that Employer responses would have resulted in anything but repeated assertions they had just cause to terminate Grievant. He should not be denied his grievance rights simply because his

³⁷ Joint Exhibit 3.

³⁸ Joint Exhibit 3.

Union choose to forego further “NO!” responses from the Employer.

The FMCS notified this arbitrator of his selection by the parties on August 25, 2011, one month later. Presumably, the parties had requested an FMCS panel, struck names of those unacceptable, and notified the FMCS of their selection during the intervening four weeks. While no evidence was presented by either side, these multiple inter-party contacts suggest ample opportunity for review at the highest levels.

Dismissing a grievance for non-compliance with Section 7.4 under these facts would elevate form over substance. This case proceeded from termination of Grievant to selection of an arbitrator in about six weeks, an unusually fast track. Again, there is no evidence the Employer was in any way harmed or prejudiced. If the purpose of Section 7.4 is to facilitate possible settlement (and I believe it is), there were ample opportunities for such a dialogue during multiple inter-party contacts. Given the facts before me, I find the Employer is estopped from hiding behind non-compliance with CBA Section 7.4. Consequently, I find the grievance to be procedurally arbitrable.

3. Did the Employer have just cause to terminate Grievant and, if not, what is the proper remedy?

It is well established in labor arbitration that where an employer’s right to discharge or suspend an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a “preponderance of the evidence” standard.³⁹ That standard will be applied here.

As previously stated, a “just cause” consists of a number of substantive and

³⁹ Elkouri & Elkouri, HOW ARBITRATION WORKS, (6th Edition) 2003, pp. 949-953.

procedural elements. A review of discipline requires analysis of several factors. First, has the Employer relied on a reasonable rule or policy as the basis for Grievant's termination? Second, was there prior notice to the employee, express or implied of the relevant rule or policy? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were the facts gathered fully and fairly gathered without a predetermined conclusion: Finally, did the employee perform or not perform as charged by the employer?

There is little dispute over the underlying facts in this case. The Employer contracts with Xcel Energy to provide armed security officers for the Prairie Island Nuclear Power Plant near Red Wing, Minnesota. Security requirements at American nuclear facilities are heavily regulated by the Nuclear Regulatory Commission. Their Job Description makes them, "*Responsible to prevent radiological sabotage...*"⁴⁰ Since nuclear facilities can be considered targets for terrorism, armed security officers undergo extensive training and undergo periodic testing to assure maintenance of their skills. Given the post 9-11 perceived threats to nuclear facilities, repeated retraining and retesting is a reasonable job requirement for the position of Armed Security Officer. The Tabletop test at issue in this case appears particularly important. The officers must have a thorough knowledge of the facility in order to identify and respond to the location and targets of attacks.

Second, the Grievant was completely aware of the Tabletop testing process. Prior to his seizures and hospitalization, he had successfully passed numerous similar

⁴⁰ Employer Exhibit 1.

exercises. He was aware of the need to pass a Tabletop test to re-qualify for his position.⁴¹

Third, Grievant's deficiencies when taking the two Tabletop tests after his return were well documented by the Employer.⁴² No further investigation is required.

The fourth element, the reasons for Grievant's discharge, presents a far more difficult problem. While there is no dispute Grievant twice failed the Tabletop test, the Union attributes the failures to disability discrimination. They argue that Grievant was treated differently than others and that his learning problems were not properly accommodated by the Employer. I disagree.

Since no medical or psychological testimony was presented on the issue of disability, it is difficult to determine whether or not Grievant has a "disability" as defined by the ADA.⁴³ However, for the purposes of this arbitration, I will assume he does have a qualifying disability. The evidence indicates he has difficulty reading and comprehending written materials. The question then becomes whether or not he can perform the essential functions of the job, with or without accommodation.⁴⁴ In general, the term "essential functions" means the fundamental job duties of the position the employee holds or desires.⁴⁵ The function may be essential because the reason the position exists is to perform that function.⁴⁶

The ability to identify and defend critical buildings at the Prairie Island plant is

⁴¹ Transcript, pp. 148-149.

⁴² Employer Exhibits 2 and 3.

⁴³ 42 U.S.C. § 12102 (1).

⁴⁴ 29 C.F.R. § 1630.2(m).

⁴⁵ 29 C.F.R. § 1630 (n) (1)

⁴⁶ 29 C.F.R. § 1630 (n) (2) (i).

clearly “essential functions” of an Armed Security Guard. Similarly, the ability to identify and communicate the cardinal direction of an attack is also an “essential function.” The sole reason the position of Armed Security Guard exists is to perform these functions.⁴⁷

I take at face value the assertion that Grievant was performing the essential functions of an Armed Security Guard prior to his seizure in January, 2011. The evidence indicates he always took the tabletop test in a group at that time. Additionally, it appears he was occasionally given additional study time as in the case of the Radiation Worker test. The Union asserts having to take the 2011 tests alone plus insufficient study time on the new defensive strategy as the primary reasons for his failures.

Grievant was treated like any other employee when required to take the Tabletop test alone upon his return to work in April, 2011. If no group testing was scheduled, returning employees were commonly put through the Tabletop drill alone after returning from leave.⁴⁸ Grievant was first tested about three weeks after his return to work. The extent of training he received on the new defensive strategy is unclear. Grievant claims only 45 minutes was given.⁴⁹ The Employer claims “an entire week” of training was given.⁵⁰ While I find the Employer’s version more credible, Grievant was unable to discern cardinal directions and locate major buildings on the site, knowledge that should have been imprinted during his previous years of working at the facility.

Although Grievant never requested accommodation, the Employer allowed him

⁴⁷ Employer Exhibit 1.

⁴⁸ Transcript, pp. 167-169.

⁴⁹ Transcript, p. 164.

⁵⁰ Transcript, pp. 37-38.

another month of re-familiarization before re-testing. Grievant was assigned to “shadow” another officer during the time. The officer was specifically instructed to answer any questions Grievant might pose.⁵¹ Presumably, he also had time to study the new defensive strategy during this period.

Grievant again failed the Tabletop test on June 9, 2011. Of greatest concern to me is his apparent inability to identify cardinal directions or buildings around the facility. These are unchanged from his prior years of work at the nuclear site. In my view, knowledge of these elemental facts is essential to the job of Armed Security Guard. Further, the Employer accommodated Grievant by giving him more than generous time to study for and pass the second Tabletop test. He was given prompting and ample time to formulate answers.⁵² Last, this is a verbal, not written test. Ordering the Employer to retest Grievant in a group setting would only give the opportunity to hide glaring deficiencies.

I have no idea why Grievant was able to pass such tests without help prior to January, 2011. I am mindful of and sympathetic to his reading and comprehension difficulties. I do not doubt that reading difficulties have affected his life. It could well be that the January, 2011 seizure left Grievant with additional cognitive deficits. However, since no medical or psychological testimony was presented on the issue, we have to baseline for measurement. What is clear is that he can no longer perform the essential functions of an Armed Security Guard. While a different, less critical setting might lead to a different result, I will not return someone with his deficits to an armed security

⁵¹ The Union makes much of one or two incidents where Grievant was chided for taking bathroom breaks without following proper procedures. I find them irrelevant to the issue at hand.

⁵² Transcript, pp. 44 and 86.

setting where the lives of others could be dependant on his ability to identify and react to terrorist threats.

Under the facts before me, I find the Employer had just cause to terminate Grievant.

AWARD

1. I find the grievance to be substantively arbitrable.
2. I find the grievance to be procedurally arbitrable.
3. Michael Powers grievance of his termination is DENIED.

Dated: July 26, 2012

/s/ Richard A. Beens

Richard A. Beens, Arbitrator.