BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 1055, MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO

and

UNITED REGIONAL MEDICAL SERVICES, INC.

Case 9
No. 54235
A-5497
Donald Barwick Discharge

Appearances:

Podell, Ugent, Haney & Delery, S.C., 611 North Broadway Street, Suite 200, Milwaukee, WI 53202-5004 by **Mr. Alvin R. Ugent** appearing on behalf of the Union, Local 1055, District Council 48.

Michael, Best & Friedrich, 100 East Wisconsin Avenue, Milwaukee WI 53202-4108, by **Mr. Robert W. Mulcahy**, appearing on behalf of the Employer, United Regional Medical Services, Inc.

ARBITRATION AWARD

Local 1055, Milwaukee District Council 48, AFSCME (hereinafter referred to as the Union) and United Regional Medical Services, Inc. (hereinafter referred to as the Company or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator of a dispute over the discharge of Donald Barwick. The undersigned was so designated. A hearing was held on November 3 and 4, 1996 in Milwaukee, Wisconsin, at which times the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the dispute. No stenographic record was made. The parties submitted post-hearing briefs and on January 6, 1997, advised the arbitrator that no reply briefs would be filed, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

I. Issue

The issue may be fairly stated as follows:

> Did the Employer properly terminate the grievant, Donald Barwick? If not, what is the appropriate remedy?

II. Relevant Contract Language

1.05 MANAGEMENT RIGHTS

The employer retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to transfer and assign employees, subject to the terms of this Agreement; the right, subject to the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the employer reserves the right to make reasonable rules and regulations relating to Personnel Policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the employer reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union.

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3.01 DEPARTMENTAL WORK RULES

(1) The Union recognizes the prerogative of the employer to operate and manage its affairs in all respects in accordance with its responsibilities, duties and powers. The Union recognizes the exclusive right of the employer to establish reasonable work rules. The employer shall meet with the Union for the purpose of discussing the contemplated creation or modification of such rules five (5) days prior to implementation, except in emergency situations where no advance notification shall be required. In such situations, the employer shall meet with the Union as soon as practicable following implementation.

(2) Participation in such meetings shall be limited to Union representatives from the affiliated Local which represents the employees in the department under consideration.

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4.02 GRIEVANCE PROCEDURE

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(10) ARBITRATOR'S AUTHORITY

(a) The arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of this memorandum of Agreement. The arbitrator shall be confined to the precise issue submitted.

(b) If a dispute arises as to whether the issue referred to the arbitrator is within the arbitrator's jurisdiction, the arbitrator will have the authority to resolve that issue.

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4.07 REPRESENTATION AT DISCIPLINARY HEARINGS

(1) At meetings called for the purpose of considering the imposition of discipline upon employees, the employee shall be entitled to Union representation but only at the administrative level at which suspension or discharge may be imposed or effectively recommended.

(2) It is understood and agreed that such right is conditioned upon the following:

(a) At the hearing for disciplinary purposes, the employee may be represented by Union officials up to the number of management

officials present at such hearing.

(b) The meeting at which the Union official is permitted to be present shall not be an adversary proceeding. The Union official may bring to the attention of the employer any facts which the Union considers relevant to the issues and may recommend to the employer on behalf of the employee what the Union considers appropriate disposition of the matter. The employee shall not be entitled to have witnesses appear on the employee behalf nor shall the supervisory personnel present at such hearing be subject to cross-examination or harassment. These restrictions recognize that the purpose of Union representation at such hearings is to provide the employee with a spokesman to enable the employee to put the case before the employer and, further, to apprise the Union of the facts upon which the decision of the employer is made. These restrictions are in recognition of the further fact that, in accordance with other terms and conditions of this Agreement, the employee has recourse from the decision of the employer or its designee to the permanent arbitrator where the employee is entitled to a full measure of due process.

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III. Background

The Employer, United Regional Medical Services, is a wholly owned subsidiary of the Froedert Memorial Lutheran Hospital in Milwaukee, Wisconsin. It provides radiology and other laboratory functions for Froedert, services which had been provided by County employees at the Milwaukee County Medical complex prior to the privatization of those functions in 1992. The grievant, Donald Barwick, began work as a radiological technician for Milwaukee County in the 1970's, and became an employee of United when it succeeded the County on January 1, 1992. With the change in employers, the prior work records of employees were wiped clean.

The grievant began with United as an assistant supervisor. In August of 1993, he was demoted to Senior Radiology Technician as part of a general reorganization. Two years later, in July 1995, he was demoted to Staff Technologist as a consequence of several poor evaluations and disciplinary warnings for poor attendance and unsatisfactory work performance.

A. The Morning of February 26, 1996

On February 26, 1996, two incidents occurred which gave rise to the grievant's discharge. The first involved an X-ray test on Dr. Glenn Meyer, a surgeon who was recovering from prostate surgery. The purpose of the test was to determine whether a foley catheter could safely be removed. The test involved first taking a scout film, then flooding the bladder with contrast fluid, and taking additional X-rays to show any leaks or ruptures. Dr. Kenneth Sparr was the

urologist performing the procedure. Scott Rucka was the Tech assigned to the Cysto Surgical Suite, where the procedure was undertaken. He took and developed the scout film and then received a call on his beeper to report to the gastrointestinal lab. Rucka contacted the supervisor, Senior Tech. Karen Mejaki, and asked for someone to relieve him in the Cysto lab. Mejaki assigned the grievant to relieve Rucka.

According to the Employer's witnesses, the grievant went to the control panel for the Cysto suite, arriving after the scout film was developed at 9:09 a.m. When he arrived, Dr. Sparr was already filling the patient's bladder with contrast medium. Rucka briefed him on the situation and told him the scout film had been taken. Rucka then left, and the grievant stood near the control panel in the hall outside the examining room, behind Trish Makowiak, a radiology student in her senior year. Makowiak had not yet qualified to work unsupervised in the Cysto suite. The grievant did not speak to Makowiak, nor did he enter the examining room. Shortly after Rucka left, Dr. Sparr asked that an X-ray be taken. Makowiak turned around and realized that the grievant was not there. Sparr demanded that the film be taken, and Makowiak told the nurse that she was a student and that she didn't know where the Tech had gone and she did not know what to do. The nurse showed her which buttons to push, and Makowiak took the X-ray. She went into the suite, and Sparr asked for another shot. Makowiak went back and pushed the same buttons she had for the first shot. When she developed the two films, the first one showed the catheter, but the second was blank. She told Sparr that the second shot was blank, but that she wanted to develop two other films that were in the room, in case she had mixed up the films and the second shot was still in one of the canisters. Makowiak apologized, and explained that she was just a student. Sparr replied "whatever, just hurry up." The other two films were also blank. She told this to Sparr, and again apologized, said she was just a student and that the Tech had left her alone. At this point, both Sparr and Dr. Meyer both yelled at her and told her to get Sandi Lemiesz, the Assistant Director of Radiology, on the phone. Makowiak called for help, and Tech Amy Rasmussen came over. Rasmussen adjusted the machine and took a film showing the distended bladder filled with the contrast medium. This film was developed at 9:24 a.m. After the film was developed, the patient's bladder was drained and the catheter was withdrawn. A final post-operative film was developed at 9:46 a.m. The procedure normally takes about ten minutes from beginning to end.

The grievant disagrees with the version of events related by the Employer's witnesses. According to the grievant, he reported to Cysto and asked Rucka what was going on. Rucka told him that he had done the scout film already, and that while there were some problems with the machine, it was in working order. Rucka also informed him that Trish Makowiak would be observing the procedure. The grievant testified that Rucka informed Dr. Sparr that he was leaving and that the grievant was relieving him. The grievant then entered the examining room and checked the film and the tray to be sure that both were working properly. The doctor was sitting or squatting next to the patient, with only the top of his head visible, and the grievant did not really notice who he was. He asked the doctor how long it would be until he needed X-rays taken, and the doctor said that it would be awhile. The grievant told him he was going to go back to the

general diagnostic area, and that they should page him when they were ready. He told Makowiak the same thing, and then walked over to the general area to help out there. He took care of several patients without receiving a page to return to Cysto. After a time, he was approached by Tech Amy Rasmussen, who told him that the doctor and the patient in Cysto were really mad at Makowiak for not being able to take the X-rays properly. The grievant told Rasmussen that he had been waiting for a page. He was surprised that no one had paged him, and shocked that Makowiak would have attempted to take the X-rays herself.

B. The Afternoon of February 26, 1996

The second incident took place later that day, at the end of the first shift. The grievant is accused of leaving for the day, with two patients still waiting for X-rays. According to the employer's witnesses, the grievant was working on a patient in the general diagnostic area of Froedert West at about 4:10, when he was approached by Lillian Pollard, the receptionist, who told him that he might not get to go home, because there were three more patients waiting. At about 4:30, she told him that she was leaving. She may also have said that there were still two patients in the waiting area. Pollard left the paperwork for the two patients on the desk, turned out the light on her desk and went home. The normal procedure at the end of the day is for the Tech to stay and finish up the remaining patients, or to send them to the East wing, where the radiology department has later hours. At 4:35, Venancio Garcia, a Tech on duty in Froedert East, got a call informing him that there was one patient in the waiting area of Froedert West and another in the dressing room for X-rays in Froedert East, with no one there to take the shots. Both of the patients were quite upset. Garcia said he would come down and bring them to the East wing. Garcia hung up and saw the grievant walking down the hall. He asked the grievant if he knew there were still two patients waiting for X-rays. The grievant did not respond. Garcia asked him how the situation should be handled, and again the grievant did not respond. Garcia said "fine, we'll take care of it." He went down to Froedert West and met the two patients, both of whom were standing in the hallway in gowns with the tech who had come upon them and had called Garcia. He looked at the paperwork to see how long they had been waiting. One was listed as having come in at 4:14 and the other at 4:13. Both of them said they had been waiting longer than was shown on the paperwork. Garcia asked about the paperwork, and the patients said it had been in the slot on the desk. One of them said she had looked at her paperwork on the desk before 4:30, to confirm that she was the next to be seen. Garcia asked where they had been waiting. One of the patients said she had been in the waiting area, while the other said she had been in a dressing room.

Garcia had the two women gather up their clothes and took them to Froedert East for X-rays. He promised them he would bring the situation to the attention of the supervisor, and he did send an e-mail to Radiology Manager Susan Gunderson at 6:14 p.m.:

> At 4:35 P.M. two patients were left sitting on the FMLH side waiting for someone to do their X-rays. They were very upset

> because they were waiting for some time. The patients told me that (sic) were reinsured (sic) that their X-rays will be done shortly. One patient told me that she saw the person at the front desk get up and leave. The patient continue (sic) to wait and then finally asked housekeeping to check the X-ray area. She came back and told the patients that no one was back in X-ray.
>
> I asked Don Barwick regarding these patients and he seem (sic) to know nothing about them. I really believe that the front desk on FMLH side should check the area for patients to be done and report to a tech and/or the FMLH general tech should check for patients or requests before anyone leaves. This should help the patient and us. Thank you.
>
> p.s. Both patient requests shows that they were enter (sic) at 1613 and 1614 respectively. I even heard the overhead page for "tech x2" Plenty of time to do at least one or both of them, if more then (sic) one tech. was available.

According to the grievant, Pollard told him that there were three patients waiting shortly after 4:00 p.m. He observed one patient sitting in the reception area and assumed that the other two were in the dressing rooms. He took the patient who was in the waiting room, and when he was finished he went back to the reception area. This was at 4:30. There was no paperwork on the receptionist's desk, and the lights were out in both the reception area and the dressing rooms. The grievant assumed that the patients had either been seen by someone else or had tired of waiting and had left. He went back in, turned off the X-ray machine and cleaned up his work area. He walked down to Froedert East and spotted Venancio Garcia at the desk. He told Garcia there was nothing left to do on Froedert West, and while they were speaking the phone rang. Garcia spoke with someone, and then told him that there were still people waiting on Froedert West. The grievant said that was impossible, since he'd just come from there. He asked Garcia if he wanted him to help, but Garcia said he would take care of it. Garcia commented that he was going to send an e-mail suggesting that the hospital not allow multiple examinations that late in the day. The grievant agreed with Garcia that such an e-mail would be a good idea. He then left for the day.

The Employer subsequently investigated the two incidents, and determined that the grievant had engaged in misconduct. He was discharged, effective March 12, 1996. The instant grievance was thereafter filed, challenging the discipline. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

Additional information, as necessary, will be set forth below.

IV. Arguments Of The Parties

A. The Position of the Employer

The Employer takes the position that the grievant was properly discharged. At the outset, the Employer notes that the contract reserves to management the right to make reasonable rules and to discharge employees, but does not contain a just cause standard, nor any reference to progressive discipline. The contract further contains a specific limitation on the arbitrator, in that he may "neither add to, detract from nor modify" the contract. Given this language, and in light of the fact that there is no claim that the work rules involved were not reasonable, the arbitrator's role is restricted solely to determining whether the decision to impose discipline was arbitrary or capricious.

The evidence demonstrates that Mr. Barwick was an employee with a poor work history, featuring numerous counseling sessions and reprimands, a suspension, a demotion, poor performance ratings and four consecutive denials of any merit increase. In spite of the Employer's patient efforts to improve his work performance, the grievant continued to be one of the worst employees ever encountered by the managers of his unit.

The incidents in late February of 1996 were the proverbial last straw. In the first incident, the grievant abandoned a patient to the care of an untrained student. This resulted in a procedure that generally takes ten minutes stretching out for nearly forty minutes, during which time the patient was not only in extreme discomfort, but was at risk for a rupture of the bladder. The uncontroverted medical evidence shows that this could have serious, even fatal, consequences. The grievant left the surgical suite for no apparent reason and was absent for almost an hour. While he contends that he was working nearby and waiting to be summoned, the attending doctor and the student both deny that he told them to call when they were ready, or even mentioned that he was leaving. The grievant's story is wholly unworthy of belief, given that he could not even correctly identify the doctor involved in this procedure, nor could he document any work he had performed between 9:10 a.m. and 9:50 a.m. The grievant's conduct violated the work rule against unsafe acts posing a threat to life or limb, a rule which allows for summary discharge. He also violated the training standards of the facility, which require techs to actively supervise students who are not comped out in a given lab or area.

The grievant compounded his offense later in that same day, by simply leaving work at the end of his shift, leaving two patients waiting for X-rays. He made no effort to provide service to them or to arrange for someone else to provide service. Instead he left them sitting in gowns in the closed west side of the Radiology Department until they were discovered by another employee who was passing by the area. The grievant was leaving the building when another employee, Vennie Garcia, told him two patients had been left in his work area. Garcia decided to bring them down to the east wing for X-rays, but the grievant never offered to stay and finish his duties by taking care of these patients.

The grievant has attempted to evade his responsibility for misconduct on February 26th, but his denials are contradicted by every disinterested witness. No matter what standard is applied

to the discharge decision, the inescapable conclusion is that he has utterly failed in his professional responsibilities and is deserving of discharge. For these reasons, the grievance must be denied.

B. The Position of the Union

The Union takes the position that the grievant cannot be discharged without just cause, and that there is no proof of any misconduct in the record, much less misconduct rising to the level of just cause. When the grievant arrived at the Cysto Lab on the morning of February 26th, the doctor was not ready to proceed, and he advised both the doctor and the student that he would be nearby and should be called when they were ready for him. The doctor, impatient to be finished, instead demanded that the student take the x-rays. She did, and the first came out fine. The doctor asked for a second x-ray, and it did not turn out. This angered the patient, a brain surgeon, who berated the student. The attending doctor also became angry and called for another tech. All of this occurred, not because the grievant stepped away to do other work, but because no one called for him when they were ready. The attending physician's impatience intimidated the student, and she was afraid to tell him she was just a student and could not do the procedure. Had the doctor done as he had been asked, summoning the grievant back to the lab when he was ready rather than bulling ahead, the discomfort to the patient could have been avoided. The employer cannot credibly blame the grievant for the mistakes of the doctor and the student.

Turning to the second incident, again the grievant cannot be blamed for things he could not have known about. He was told that there were patients waiting near the end of the day, but when he finished with the patient he was working on and went to look for them, they were not there and their records were not there. He reasonably concluded that they had tired of waiting. In all probability, they had taken their records and had walked out into the hospital to seek out someone to take care of them. In either event, it was not the grievant's fault that the two patients were gone when he looked for them. He cannot be disciplined for leaving work at the end of the day when he had no reason to think there were any more patients to be seen.

The Employer is eager to be rid of the grievant, but there is simply no disciplinary basis for its actions. Even if the arbitrator believes he may have failed somehow in his duties, discharge is far too severe a penalty for an employee with twenty five years of service to the institution.

V. Discussion

A. The First Incident

The first incident, in which the grievant is accused of abandoning his post and causing an unnecessary and potentially hazardous delay in a procedure, turns on credibility. If, as the grievant claims, he told the doctor and the student that he was leaving and should be notified when they were ready for him, there is no cause for discipline. In that case, the doctor created the problem by not waiting for the grievant to respond to a summons. The great weight of the record evidence suggests that the grievant's version of events is not true. The doctor testified that the grievant never entered the examining room or spoke to him, and the student, Trish Makowiak, verified this claim. The doctor further testified that he was ready to start the procedure immediately after the scout film was developed, and thus would not have told the grievant he could

leave. Moreover, if the grievant entered the room and spoke with the doctor, he should have known the doctor's identity. When questioned at the unemployment compensation hearing, the grievant could not correctly identify Dr. Sparr. He did not claim that he couldn't recall who the doctor was. Instead, he asserted that it was another doctor who bears no resemblance to Dr. Sparr. The grievant's explanation that his view was obstructed by the sterile drape and the doctor's being bent over is contradicted by Dr. Sparr, who said that he would have stood upright during the procedure and that there was no drape. There is simply no way to reconcile the testimony of the grievant with that of Dr. Sparr, and there is no apparent motive for Dr. Sparr to lie about what happened.

Makowiak, having improperly attempted to take the X-rays, might have a motive to lie in order to deflect blame to the grievant, but if his story is true her actions make very little sense. If the grievant had told the doctor he was leaving and should be paged, and had told Makowiak the same thing, Makowiak's natural response to the doctor's request for a shot should have been to say she would summon the grievant. The doctor would have expected this response, and could not have objected. Makowiak knew she was not qualified to take the X-ray, and if she had been told to page the grievant when they were ready, there is no reason for her to have responded to Sparr by trying to take the shot. It would merely have added to her troubles, as she would inevitably have been called on the carpet by the grievant for ignoring his orders. Her course of action, while still inappropriate, is more understandable if she was abandoned by the grievant.

The grievant's explanation of where he was and what he was doing once he left the Cysto suite also undermines his credibility. He initially told Amy Rasmussen he had left Makowiak alone because he had a problem with a patient and needed to check in on that patient. At the hearing, he said that he had left because he had been criticized in the past for letting patients sit for too long, and did not want to have unproductive time in Cysto if he could be in the General Diagnostic area doing productive work. When shown records that indicated he took no X-rays during the time he was gone, he said he had helped students with their work. The evolution of his explanation, from the disproved to the unprovable, leaves very little doubt about the truth of the grievant's testimony. Taking the record as a whole, the only reasonable inference is that the grievant is lying about his actions on the morning of February 26th.

The Union asserts that the doctor and the student still bear primary responsibility for the problem, because he insisted on an X-ray and she took it. That explanation only holds up if one assumes that the doctor had reason to think the X-ray machine was not manned. If, as I have concluded, the grievant walked away leaving the doctor unaware that he did not have a qualified tech on duty, the doctor's insistence on having the shots taken immediately is completely natural. Speed is important with this procedure, both because it posed some health risk from rupture of the bladder, and also because it is extremely uncomfortable for the patient. As for the student, she certainly erred in attempting to take the shots, but it is not surprising that a student might be intimidated by a doctor and make an error in judgment. That is one reason that students are supervised. This sequence of events was reasonably foreseeable, and it was the grievant, not the doctor or the student, who created the situation. Thus I conclude that the grievant neglected his duties, caused an unsafe situation for the patient, Dr. Meyer, and engaged in serious misconduct.

B. The Second Incident

The issue in the second incident is whether the grievant knew that there were two patients waiting for X-rays on Froedert West when he left work on February 26th. He claims he looked around, the lights were off in the dressing rooms and the waiting area, and no one was sitting in the waiting area. He reasonably assumed that the patients had either left or had been seen by someone else. If this is true, he may be guilty of a mistake but he obviously is not guilty of misconduct. If, on the other hand, he left without checking, having been told that two patients were waiting, even he concedes that he is guilty of a serious offense.

It is impossible to determine what the grievant subjectively knew when he left work on February 26th. However, the overall record makes his version of events difficult to credit. Pollard testified that she told him there were three patients waiting at about 4:10 p.m. He saw one of the patients, leaving two to be seen. She thought she might have told him there were still two patients waiting when she left, but she was sure that she at least told him she was leaving. She says that she left at 4:30, while the grievant claims she didn't speak with him before leaving, and that she generally leaves at 4:25. According to his testimony, he finished with a patient at 4:30, and walked to the front desk, saw that the area was deserted, there was no paperwork on the desk and all of the lights were off. Pollard says the patients were there when she left, the paperwork was on the desk, and that the only light she turned off was the one on her desk. The Union's theory is that the two patients became impatient and left the area to look for someone to serve them. If Pollard is right about leaving at 4:30, it would have been a matter of moments between her leaving and his coming to the desk. Even granting that Pollard may have left at 4:25, accepting the Union's theory means that in a span of five minutes two female patients became frustrated enough to start wandering through the hospital, dressed only in gowns, clutching their paperwork in hopes of finding an X-ray technician, while someone else for some reason came through and turned off all of the lights in the waiting area and dressing rooms. This is not impossible, but it is quite improbable.

Accepting the Union's theory requires crediting the grievant's testimony, and the grievant's credibility is not strong. As discussed above, he lied about the events in the Cysto suite that morning. It also appears that he misrepresented the discussion he had with Garcia after he left Froedert East. He claims that he chatted with Garcia for a bit before the call came through, that he expressed shock that patients were still waiting, and he offered to go back and take care of the patients. Garcia told him that he need not do that, and mentioned that he would send an e-mail suggesting that multiple admissions not be allowed late in the day. The grievant agreed that this would be a good idea. Garcia told a completely different story, in which he and the grievant did not converse, because the grievant refused to respond when told patients had been left, and simply stared at him when he asked how they should handle it. I can find no reason for Garcia to lie, and the content of his e-mail to Gunderson is not what the grievant described. It is fairly non-accusatory in tone, but it is a report of a specific lapse, not a general critique of admitting procedures.

Garcia was a credible witness, and I accept his testimony as truthful. Garcia's version is

consistent with a view of the grievant as someone who had simply decided he was leaving, no matter what work remained to be done. That is a reasonable interpretation of the events on the afternoon of February 26th, and on the state of the record, it is a more reasonable conclusion than that offered by the grievant. I therefore find that the grievant, knowing that patients were waiting, elected to leave work without serving the patients or arranging to have them served. This constitutes serious misconduct.

C. The Standard for Discipline

The contract does not specify that just cause is the standard for discipline, nor does it expressly require the use of progressive discipline. I have concluded that the grievant is guilty of the conduct ascribed to him by the Employer. Both of these incidents constitute serious misconduct under the work rules and expose the grievant to discipline. The only question remaining is whether the penalty imposed is excessive or discriminatory. Given that (1) he has previously been disciplined for performance related problems (including a demotion in lieu of a suspension for poor work), (2) that his behavior on February 26th demonstrates that the prior discipline has not had any corrective effect, and (3) that his failure to testify truthfully demonstrates a continuing unwillingness to address his deficiencies, it is not necessary to determine what the contract requires as far as proportionality of penalty. Even under a just cause standard, the Employer has some discretion to decide upon the appropriate penalty once misconduct is established. There is no evidence that employees with similar records and similar offenses have been treated more favorably than the grievant. In arriving at the decision to discharge rather than to reprimand or suspend the grievant, the Employer weighed his prior work record, the pattern of his behavior, and the impact of his actions on February 26th on the facility and the well-being of the patients. Whatever standard is applied, the Employer cannot be said to have abused its discretion in deciding to discharge the grievant.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Employer did not violate the collective bargaining agreement when it discharged the grievant. Accordingly, the grievance is denied.

Dated at Racine, Wisconsin this 30th day of April, 1997.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator