

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 2648, AFSCME, AFL-CIO

and

SHAWANO COUNTY

Case 163
No. 61683
MA-12035

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2010 Memorial Drive, #206, Green Bay, WI 54303, appearing on behalf of the Union.

Mr. John J. Prentice, Attorney at Law, Prentice & Phillips, LLP, 1110 N. Old World Third Street, Suite 405, Milwaukee, WI 53203-1117, appearing on behalf of the County.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2002-2004 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve a grievance involving written reprimands. A hearing was held on February 27, 2003, in Shawano, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by May 22, 2003.

ISSUE

The parties ask:

Did the Employer have just cause to discipline the Grievants? If not, what is the appropriate remedy?

BACKGROUND

The Grievants are Annette Ejnik and Joan Kosnicki, both certified nursing assistants at the Maple Lane Health Care Facility near Shawano. Ejnik has been a CNA for 16 years and Kosnicki has been a CNA for 17 years. They were given written warnings on July 10, 2002, for not being in the dining room on time. The written portion of the warnings stated that they were in a resident's room at 8:30 a.m. performing cares that could have waited until after breakfast, and that beds were made on the unit, taking precedence over feeding residents. Also a resident received a shower prior to breakfast, and the policy is no showers prior to breakfast. The warning concluded by stating that directions have been discussed numerous times and that they are required to be in the dining room at meal time. The Director of Nursing, Patricia Brown, signed the warnings. The facility has a concern about getting residents a hot meal under the regulations that apply to such facilities. Breakfast is supposed to be at a certain temperature and eaten in a timely fashion. State surveyors check food to see that the facility is in compliance with regulations.

Ejnik and Kosnicki have worked together on the first shift starting at 6:00 a.m. for more than 10 years. On the morning of July 10, 2002, Ejnik had car trouble and was late to work by about 20 minutes. Kosnicki started the tasks without asking for additional help, not knowing precisely how late Ejnik would be. The nurse working that day, Lori Johnson, was aware that Ejnik was going to be a few minutes late.

Ejnik and Kosnicki start their work by getting residents up, help them get dressed, get them to the toilet, etc. Every patient has a care plan. On July 10th, they gave a resident named Walter a shower before breakfast, since he refuses to take a shower after breakfast. The shower was on his care plan for that day. Other patients are not given showers before breakfast. Another resident named Cindy was the last one that they took care of before breakfast. This resident is in a vegetative state and needs to be repositioned every two hours. The night shift left at 6:00 a.m., and in-between that time and breakfast, Cindy had to have care provided, and the Grievants had to reposition her and change her pad.

Brown arrived at Maple Lane at approximately 8:00 a.m. on July 10, 2002. She usually spends the first 10 or 15 minutes of her shift checking the staffing, making sure the units are covered, and going through the building, making rounds, to check with supervising nurses to see if anything needs attention. After that, she and Deb Captain, the Nursing Home Administrator, usually assist in the dining room for breakfast. On July 10th, she first observed that trays were waiting and there were no CNA's to help, so she went to find out what was holding up progress that morning. Brown couldn't say what time she got to the dining room that morning.

Brown went to find the Grievants and found them finishing up with Cindy. She asked them what was going on that morning and why weren't they in the dining room. She did not remember exactly what they told her, but it was something to the effect that there was a lot to do and they were running behind because Ejnik was late that morning. She told them they

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needed to get into the dining room as soon as possible. She did not remember exactly what time they actually got into the dining room. While she wrote the disciplinary notice stating that they were in the resident's room at 8:30 a.m., she could have been off ten minutes or so. However, Brown did not believe that they could have been in the dining room by 8:10 a.m. that morning. As Brown went through the unit where the Grievants were working, she noticed that the beds were made and the unit looked tidy. She was sure that it was between 8:20 and 8:30 a.m. when she went to look for the Grievants.

Captain checked the unit about 8:40 a.m. and found only one bed unmade. She questioned whether 18 beds could be made while residents were toileting.

Brown testified that she was not aware that Walter gets a shower before breakfast. In any event, she stated that residents eating their breakfast should have taken precedence over Walter getting a shower on a particular day. Brown thought the Grievants should have known about the priority of getting to the dining room to help with breakfast. Captain agreed that Walter's shower should not have been given if the Grievants were falling behind. Captain also thought that Kosnicki should have asked for extra help when Ejnik was running late.

Ejnik testified that as soon as she walked in the dining room, she looked at the clock and it was 8:10 a.m. She knew there was going to be an issue of what time she and Kosnicki got to the dining room because of the way Brown approached them that morning, so she made sure to look at the clock immediately upon entering the dining room. Kosnicki did not recall what time they got to the dining room. She thought they probably walked down the hall together. Ejnik did not recall whether Kosnicki was in the dining before her or not. Kosnicki did not recall exactly what time they arrived in the dining room but doubted that it could be as late as 8:30 a.m., as that would have been extremely late.

The breakfast cart for the residents does not always come at the same time. It can be 8:15 or 8:20 a.m., but it is more likely to be a little earlier, usually between 7:50 to 8:10 a.m. There was a change in the routine that brought the breakfast cart a half-hour earlier to this group of residents, putting more stress on the CNA's working the wing.

When Captain became the Administrator of the facility, she had several concerns about staffing. In November of 2000, she held a meeting with CNA's to brainstorm solutions for feeding breakfast. Another meeting was held in December of 2000 where the issue of feeding again came up. The Employer was able to add staff, but Captain continued to help in the dining room with feeding. Captain acknowledged that the Grievants are very good aides but had some problems getting to the dining room. Captain set up a meeting for April 23, 2002,

with the Grievants and their supervising nurse, Nancy Hoffert to talk about the problem. According to the notes made by Captain, the April 23, 2002 meeting went like this:

Met with Nancy Hoffert, RN, 400 Charge nurse, Annette Ejnik, CNA 400 Wing, Joni Kosnicki, CNA 400 Wing, and Pat Brown, Director of Nursing regarding continued slow response to breakfast by CNA staff, Joni and Annette.

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Writer reinforced that breakfast trays are to be passed immediately when available and that staff are to respond quickly when the 400 cart is paged by the kitchen as ready.

Writer reinforced the need for staff to be in the dining room at 8:10 a.m. CNA staff, Joni and Annette have been consistently getting to the dining room at 8:20 a.m. allowing trays to sit on cart. As this untimeliness does not consistently occur when other staff work the unit, the clear approach to disregard breakfast timeliness is apparent. Annette and Joni were told they could not empty garbage cans, make beds or do other housekeeping chores before breakfast unless they are specifically waiting for a resident that is being toileted in their room and they have some time. Many residents are incontinent on the 400 wing not requiring toileting, so several beds should remain unmade prior to breakfast. Maple Lanes policy has always been no showers prior to breakfast. This was also reinforced AGAIN, as it has many times in CNA meetings with Joni and Annette. As the night staff has been increased to assist with getting up more residents, getting to the dining room on time should actually be an easier process. Annette and Joni were told that if they were running behind that they should bring residents to the dining room in their robes rather than fully dressed to facilitate residents eating a hot breakfast meal. Writer reinforced SEVERAL times that the expectation of getting residents and themselves to the dining room in a timely manner is not new and the need to comply is in the residents best interest.

Joni became sarcastic regarding the expectation. Stating that she and Annette would not get their breaks if they did not get their "cleaning" done prior to breakfast. Again, writer reinforced that we were talking about changing their routine to afford 10 MINUTES and this 10 MINUTES would be available after breakfast and that this was not a huge change. As is the expectation for all staff on all units, if staff need help at any time, it is their responsibility to contact their nurse who can pull from other units or adjust assignments. Nancy Hoffert, RN, stated that she expects the staff to alert her to any deviations in the 400 morning assignments as she is busy back on the Alzheimer's Unit. This comment was made in response to Joni's comment that one of the residents could take up to a half-hour to provide cares for. Writer reinforced SEVERAL times during the meeting that morning cares time is a very busy time in all nursing homes, but the residents meal times must be observed in a timely fashion.

Ejnik testified that the Grievants told management that they were not going to rush their cares of residents, that they wanted to make sure they were done right. They were told to not take out the incontinence garbage before breakfast, and they responded that it smells up the hall if they didn't take it out. Ejnik questioned why there is not enough help for feeding residents on weekends if having help in the dining room is such a big issue during the week. She noted that during the weekdays, there are six to seven people in the dining room that help

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feed residents, while on the weekends, there are only three people. When Ejnik brought up the weekend problem to Captain, Captain told her that there are people to call, but Ejnik said no one is available on the weekends. During the April 23rd meeting, Captain told Kosnicki that everyone knows that things slip between the cracks on the weekends.

Kosnicki disagreed with Captain's memo with respect to being consistently in the dining room at 8:20 a.m. Kosnicki admitted that it probably has happened, because they never know what the day will bring for work. In April, there were different residents with different health problems that were consuming more time. Kosnicki told Captain that they could use more help but was told that it wasn't in the budget. Kosnicki recalled Captain telling her it was unnecessary to take out the garbage before breakfast.

Ejnik disagreed that they were told numerous times about getting to the dining room late and that they were not always that late. She admitted that they were told a few times, perhaps five times, about getting to the dining room late, but those were times when they had a lot of trouble on the wing. Ejnik also noted that the night shift has been getting more people up for them now. Back in July of 2002, they got up about four residents, but now the night shift is getting more people up.

Captain and Brown considered the April meeting to have been an oral reprimand. Although Brown did not say at that meeting that the Grievants were being disciplined, she thought it would have been hard for them to walk out of that meeting and not know that they were being warned to correct their behavior. Captain thought it was black and white and perfectly clear to the Grievants.

Captain agreed with CNA's that they could make beds while waiting for residents to finish toileting. Captain testified that she tried to get the Grievants to get 10 more minutes out of their morning schedule in order to get into the dining room earlier, and that suggestions all met with resistance, whether it was not taking out the garbage, not making beds, or having residents come to breakfast dressed in gowns.

Since the April 2002 meeting, there has been extra help a couple of times a week provided by a work-to-school girl that comes in from 6:00 to 10:00 a.m.

Brown talked with the Grievants several times about getting to the dining room by 8:10 a.m. and she felt that the Grievants did not think they could rearrange their schedule to accomplish that without adding additional staff.

Hoffert was the charge nurse on the unit but had left by July of 2002. She testified that the breakfast cart would come some days at 7:40 a.m., sometimes later, but never consistently at the same time. Hoffert noted that while aides were not to make beds before breakfast, they also were asked not to waste time standing around, and that if somebody was being toileted, they could make beds while waiting. Hoffert spoke with Brown about Walter's shower, and Brown told her that it was his right to get a shower before the meal. Hoffert disputed Brown's earlier testimony that Brown was not aware of Walter being an exception to getting a shower before breakfast, and Hoffert testified that Brown specifically told her they had to do it.

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Hoffert acknowledged that the Grievants were rarely in the dining room on time. She stated that one of her concerns at the facility was that they had a heavy workload on their wing with patients needing total care, but they got their breakfast cart early. Hoffert felt they were set up to fail. They could not give good care and also be on time. She asked to have the breakfast cart sent at a different time, but Brown told her it was none of her business. Hoffert recalled in the April meeting that Captain said that the issue of getting to the dining room was not open for discussion, that they had to figure out a way to be there when the trays were there. Hoffert said that the night shift sometimes got patients up – anywhere from two to five patients. The occupational therapist got one person up. If the night shift got more people up, it made a difference on getting the work done before breakfast.

Renee Popovich is the President of the Union. In her experience, the Union regularly receives copies of oral warnings, although Captain and Brown have occasionally forgotten to give her copies. Popovich did not get a copy of an oral warning in late April of 2002 for the Grievants. She reviewed the Grievants' personnel files and found no reference to an oral warning.

THE PARTIES' POSITIONS

The Employer

The Employer contends that the April 23, 2002 meeting between Captain, Brown and the Grievants constituted an oral warning. Section XVI (D) 1 of the bargaining agreement requires a face-to-face meeting between an employee and the employee's supervisor to discuss unsatisfactory work performance and suggestions for improvements. Captain met with the Grievants on April 23, 2002, and verbally reprimanded them for not reporting to the dining room on time. Captain and Brown carefully discussed the issues involved with feeding patients and the need to do so on time. While the bargaining agreement technically requires informing the Grievants of possible future disciplinary action, the failure to do so in this case should not be fatal. Captain substantively complied with the contractual requirements, and the Grievants had received several verbal warnings in the past, which did nothing to deter their unsatisfactory conduct. Simply because Captain did not utter some magic words does not vitiate the oral warning under these circumstances. Just as courts are willing to reform pleadings containing technical errors, arbitrators have done so with respect to alleged flaws in the progressive

disciplinary process. After two years of meetings and periodic warnings from Brown and Captain, it is inconceivable that the Grievants would not know that they were being warned at the April 23, 2002 meeting. Even if they did not, the contract does not require strict adherence to the progressive disciplinary process. It is clear that the Grievants received adequate oral warnings and that their failure to report to the dining room in a timely manner was unacceptable. Thus, the imposition of a written warning on July 10, 2002, was justified and consistent with the progressive disciplinary scheme of the labor contract.

The Employer asserts that the credible evidence demonstrates that the Grievants did not arrive in the dining room until at least 8:20 a.m. Although the Grievants will likely contend that they reported to the dining room at 8:10 a.m. on July 10, 2002, and that it was not

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possible to report to the dining room earlier that day, a careful examination of the facts will prove otherwise. Grievant Ejnik claims that she arrived in the dining room at 8:10 – Grievant Kosnicki does not recall what time it was when she arrived in the dining room. Brown testified that she was not certain exactly when the Grievants arrived but insists that it could not have been before 8:20 a.m.

The Employer submits that Brown's recitation is the most credible account. Although Ejnik claims she recalled looking at the clock when she entered the dining room, she also said that this clock is sometimes wrong. And she was confused about other events that occurred on that day, such as whether or not Kosnicki was in the dining room before or after her on that day. Kosnicki testified that they walked to the dining room together. So compare the Grievant's testimony with that of Brown's. Brown arrived at Maple Lane at about 8:00 a.m. and checked the staffing to make sure the units were covered. She went through the building to check with supervising nurses, which took about 10 to 15 minutes. When she reported to the dining room, the Grievants were not there. So she went to find them, which took at least five more minutes. Add that to whatever time it took for the Grievants to finish repositioning Cindy, washing up and reporting to the dining room, and the Grievants could not possibly have been in the dining room at 8:10 a.m. In any event, they were still not in the dining room for meal call, which after all is the primary directive.

The Employer notes that the Grievants allege that they could not report on time because Ejnik was late, Cindy had to be repositioned, and Walter needed to be showered. Ejnik was 20 minutes late but that did not put the Grievants too far behind. If they were worried about complying with the care plan for Cindy, they should have repositioned her earlier, perhaps when another patient was toileting. The care plan for Cindy required that she be repositioned every two hours, so even if repositioning Cindy was the last thing staff on the night shift did, the Grievants still would have been late repositioning her. Walter's shower could have been postponed until after breakfast or even the following day. There are a number of things that the Grievants could have done or should have done but they were resistant to implementing management's suggestions. Perhaps after working so long together, they were too set in the way they did things.

The Employer urges the Arbitrator to not set aside the discipline imposed if it was fair

and within the realm of reason. It is primarily the function of management to determine the appropriate penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other similar cases, an arbitrator should not disturb it. The only time in which a penalty imposed by management can be rightfully set aside by an arbitrator is when there has been an abuse of discretion. The discipline imposed by management is more than reasonable under the circumstances here. The requirement to be in the dining room at breakfast was repeatedly communicated to the Grievant. A written warning is not unreasonable in light of all the verbal admonishments that preceded it. An oral reprimand would not have impressed upon the Grievant the need to conform their priorities to those of management. The proof is in the pudding – it was not until the written warning was issued that the problem was resolved.

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The Union

The Union submits that the Grievants were disciplined without just cause. It asserts that the Grievants were in the dining room by 8:10 a.m. as instructed. Brown's behavior on the morning in question made it clear to the Grievants that their work was being scrutinized. Ejnik testified that she was aware of this scrutiny because of the tone that Brown used with them. Kosnicki testified that she remembered the door swinging open and then Brown popped in with her hair flying, asking why they were so late that morning. Because of Brown's visit to the resident's room, the Grievants were aware that the time they arrived at the dining room would be an issue. Ejnik specifically checked the clock when she arrived in the dining room and it was 8:10 a.m. Ejnik was adamant about the time and testified that she looked at the clock because she knew it was going to be an issue. Kosnicki knew that it was probably no later than 8:10 a.m. and not as late as 8:30 a.m., which would be extremely late.

The Union notes that the only witness for the County on this matter was Brown, who testified that she had no idea what time she arrived at work that morning. Then she did a quick walk through of the facility for about 10 or 15 minutes. Brown admitted that she could be off 10 minutes or so on the written warning but that it was definitely between 8:20 and 8:30 a.m. She did not know exactly what time the Grievant got to the dining room. Her testimony is riddled with inconsistencies. Compare that to Ejnik's clear and consistent recollection of looking at the clock when she reached the dining room. Inconsistencies in the testimony of a witness will detract from his or her credibility, as Arbitrator Daugherty noted.

The Union contends that the Grievants were performing appropriate duties before breakfast. They had to reposition Cindy and were required to follow the care card for her. They made beds when residents were toileting as they had been instructed to do. Brown and Captain suspected that they made beds during times when patients were not toileting, but the County has not provided any evidence to substantiate this charge. Assumption of guilt is no basis to impose any penalty. Proof is an essential element of just cause. While there is a general rule against showering residents before breakfast, one exception is the resident named Walter who was given a shower on the morning in question. Hoffert added that they had to do that, although Brown testified that she did not know about it. Hoffert disputed Brown's lack of

knowledge. Kosnicki testified that the day that a resident gets a shower is on their care card which they are required to follow. Brown confirmed that if another nurse approved the shower before breakfast, no rule was broken. Only one of the Grievants showered him and they were both disciplined for it. Just cause requires that the County prove which Grievant allegedly violated the rule.

The Union further contends that the County disregarded progressive discipline. Both Grievants were employed for over 16 years and have no disciplinary history or no discipline in their files at the time the written warning was issued. If these allegations were sustained, the appropriate level of discipline would be an oral reprimand. The Union disputes the County's assertion that the April 23, 2002 meeting with the Grievants was an oral reprimand. Oral warnings are documented on a form similar to the written warnings and discipline is copied to

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the Union. The Grievants were not warned of future disciplinary action if the situation was not corrected. The County began to interpret the April 23rd meeting as an oral reprimand in order to justify the written warnings issued in July. Progressive discipline cannot be ignored at a whim. The parties have bargained a contractual standard that has been ignored in this case.

Arbitrators have disturbed penalties where the employer has condoned the violation of a rule in the past. Lax enforcement of rules may lead employees to believe that the conduct in question is sanctioned by management. The County asserts that residents have a right to a hot meal, but on weekends, it has not placed any emphasis on making sure residents get a hot meal. The Union concludes by noting that the Grievants are conscientious and compassionate employees who strive to do the best job they can for the residents.

In Reply, the Employer

The Employer responds to the Union by stating that the Grievants' recollection of events was often convenient and their testimony appeared unduly coordinated and contrived. The merits of this grievance and the appropriateness of the discipline all boil down to whether the Grievants were in the dining room by 8:10 a.m. on July 10, 2002. The Grievants knew Brown was upset when she confronted them in Cindy's room and they did not challenge the fact that Brown asked them why they were so late that morning. Regarding alleged inconsistencies in Brown's testimony, the Employer notes that the hearing was some eight months after the disciplinary memorandum. Brown did not waiver in her testimony that it was at least 8:20 a.m. by the time the Grievants arrived. The most compelling piece of evidence is the actual disciplinary warning, which was drafted contemporaneously with events giving rise to the discipline.

The Employer asserts that the Grievants were not disciplined for collateral matters such as preparing residents for the day, making beds, and showering a resident. They were disciplined for not reporting to the dining room in a timely manner because they performed

those tasks. It is somewhat curious that there was only one bed unmade by the time they reported to the dining room. If showering Walter caused them to be late for breakfast, then Water should have been showered on another day.

The Employer disputes the claim that there was no oral warning. The Grievants relied in part on the testimony of Popovich who testified that it was the parties' practice to document oral warnings and copy the Union. However, Popovich also testified that management occasionally forgot to give her a copy of warnings. The Employer also has the contractual right to depart from progressive discipline, and to issue another oral warning under these circumstances would be ridiculous. Captain's conduct was anything but "flip" as the Union claims, and she conducted herself with temperance, patience and in good faith. The attack against her is unjustified. Also, there is a difference between the weekday and weekend staffing. The problem on weekends was not with getting the CNA's to the dining room on time but rather having enough people to feed residents.

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Getting to the dining room on time was only a problem for these two Grievants. They have attempted to turn the tables and point the finger at management, suggesting that management is "flip" for disciplining them or that it is management's fault that they did not report on time. They have not accepted responsibility for failing to do what other employees do – get to the dining room on time.

In Reply, the Union

The Union disputes the Employer's assertion that the Grievants were the only two employees having trouble getting residents to the dining room on time. There were a number of meetings where the general problem with meals was discussed. The Employer also indicated that there have not been problems since the written warnings were issued. However, the Union believes that the reasons the problem was resolved were not related to the written warnings. The Grievants received additional assistance from the night shift. They also received part-time assistance from a work-to-school girl a couple times a week.

While the Employer alleges that Brown's account of the facts is more credible, the only support for that claim is that Ejnik was confused about other events such as whether or not Kosnicki was in the dining room before or after her on the day in question. The Employer does not say what other events she was confused about. Moreover, the Employer does not know what time the Grievants arrived in the dining room. In the April 23rd meeting, Captain reinforced the need for staff to be in the dining room at 8:10 a.m. While the Employer alleges that there are a number of things the Grievants could or should have done, the only thing mentioned is that Walter's shower could have been postponed until after breakfast or even the following day. The Grievants could have faced discipline for deciding to postpone Walter's shower.

The Union also responds to the Employer's contention that an oral reprimand had been given previously. There is more than a procedural defect when an employer fails to comply with several steps of the procedure used in issuing an oral reprimand.

DISCUSSION

Section XVI of the collective bargaining agreement provides for just cause for discipline, and provides for progressive discipline although departments have the authority to take more severe disciplinary action without first using lesser options if the conduct of an employee warrants it. The contract also states:

(C) When considering the application and magnitude or degree of disciplinary actions, the following should be reviewed:

1. The seriousness and circumstances of the particular offense.
2. The employment history of the employee involved, including length of service.

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3. The recency and nature of prior disciplinary action taken with respect to the same employee.
4. Past practice of the Facility in similar cases.

(D) The following procedures constitute the Maple Lane Health Care Facility Employee Discipline Procedure:

1. Oral Reprimand. This involves a face-to-face meeting between the first line supervisor and the employee to discuss the unsatisfactory areas of their work performance or conduct and suggestions for improvements. The employee should be warned of future disciplinary action if the situation is not corrected. The occurrence of such discussion should be documented by the supervisor.
2. Written Reprimand. In cases where oral reprimand has not been successful, or where the circumstances are more extreme or unusual, a written reprimand may be used. The written statement should include the causes of the reprimand and should indicate that further disciplinary action will result if not corrected. Where applicable, references(s) to previous oral reprimands should be noted. The written reprimand should be discussed with the employee and then placed in his/her permanent employee file. A copy shall also be sent to the Union.

. . .

The Employer correctly states that this case all boils down to whether or not the

Grievants were in the dining room by 8:10 a.m. on July 10, 2002. The problem for the Employer is that it simply cannot prove what time the Grievants reached the dining room. One has to weigh the clear recollection of Ejnik against the vague recollection of Brown. Brown's uncertainty of the time frame in this case leaves the Employer without sufficient proof of the alleged infraction.

The Grievants knew that Brown was coming after them and that there would be a price to pay if they were late to the dining room. Therefore, Ejnik in particular looked at the clock and remembered well that it was 8:10 a.m. when they entered the dining room. Brown disputes this but has no specific recollection of what time they got to the dining room, although she believes it had to be between 8:20 and 8:30 a.m. But her testimony was very vague on this point in contrast to Ejnik's testimony. Ejnik had a good reason to take note of the time.

There is contradictory evidence, of course – nothing is so simple. There is evidence that Brown and Ejnik and Kosnicki all knew that they were running late. Ejnik was late getting to work. Brown went looking for them because they were running late. However, the record does not show when Brown saw them in Cindy's room. Furthermore, the record fails

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to show when the food cart arrived in the dining room on July 10th. It arrives at different times, according to the testimony, and while Brown found trays waiting and the Grievants not in the dining room, there is no evidence of what time that occurred. Brown did not take particular note of what time that she found the trays in the dining room and went to look for the Grievants, although she believes it had to be between 8:20 and 8:30. Brown had no recollection of exactly when she arrived at the facility that morning. Although Brown wrote up the disciplinary notice at the same time, she had no certain knowledge of what time the Grievants got to the dining room. That should have been a basic requirement for her disciplinary action, since the discipline is all about not being on time.

Captain and Brown had talked to the Grievants about getting 10 more minutes out of their morning schedule. If that 10 minutes were so critical, it is odd that Brown did not look at the clock as Ejnik did to confirm the time that the Grievants arrived in the dining room. It is fundamentally fair to base discipline on fact rather than assumption. The Employer has failed to convince the Arbitrator of the facts as the Employer sees them in this case. This is not to say that the Grievants may show up late for breakfast or ignore orders to be in the dining room at a certain time. This Award is only based on insufficient proof of wrongdoing. Ejnik's testimony on the main point of contention – the arrival time in the dining room – is much more compelling than Brown's testimony. End of story.

AWARD

The grievance is sustained.

The Employer did not have just cause to discipline the Grievants. The Employer is ordered to remove the written warnings from the Grievants' personnel files and any other records where such actions are kept.

Dated at Elkhorn, Wisconsin, this 20th day of June, 2003.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator

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