

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**BAY AREA MEDICAL CENTER EMPLOYEES UNION LOCAL 3305,
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

and

BAY AREA MEDICAL CENTER

Case 21
No. 68334
A-6341

(Nick Lesperance Suspension)

Appearances:

Steve Hartmann, Staff Representative, AFSCME Council 40, appearing on behalf of the Union.

Daniel Dennehy, Attorney, vonBriesen & Roper, Attorneys at Law, appearing on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Employer, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance involving discipline imposed on Nick Lesperance. A hearing on the grievance was held on March 4, 2009 in Marinette, Wisconsin, at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs and the Employer filed a reply brief, whereupon the record was closed on April 29, 2009. Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties did not stipulate to the issue to be decided herein. That being so, it is necessary for the arbitrator to make that call. Based on the entire record, I find that the issue which is going to be decided herein is as follows:

Did the Employer have just cause to suspend grievant Nick Lesperance for one day? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2007-10 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 5 – DISCIPLINARY ACTION

Employees shall not be disciplined, except for just cause.

5.01 **Dismissal:** Employees may be discharged without warning or notice for the following offenses:

...

5.02 **Other Offenses:** For all other offenses, the progression of disciplinary action will be:

- a) Documented Verbal Warning
- b) Written reprimand
- c) Suspension, not to exceed five (5) scheduled working days;
- d) Dismissal.

The order of this progression may be altered depending on the severity of the offense. Generally, however, an employee will not be subject to suspension without having received a written warning on a prior occasion. Also, an employee will not be subject to dismissal without having been suspended on a prior occasion, with the exception of offenses identified in Article 5.01. These do not have to be for the same reason.

Progressive disciplinary action taken by the Center against an employee will be reduced to writing, with the document stating the reason for the disciplinary action. Discipline for patterns of unauthorized overtime, or patters of excess

absenteeism or tardiness will be preceded with a counseling session with the employee and the Director/Supervisor will call to the employee's attention that a counseling session is occurring. The individual employee and the Union shall be given copies of the document and a copy will be placed in the employee's personnel file. Documentation will not be used for disciplinary matters after the passage of two (2) years.

. . .

ARTICLE 17 - MISCELLANEOUS

17.03 **Smoking:** Employees may not smoke on duty, and smoking is prohibited throughout the campuses of any Center owned or leased facilities as of January 1, 2008. . . .

BACKGROUND

The Bay Area Medical Center provides hospital services to citizens in the Marinette, Wisconsin area. The Union is the exclusive bargaining representative for the Center's regular full-time and regular part-time non-professional employees, including janitor/aides. The grievant, Nick Lesperance, is employed at the Center as a janitor/aide and is included in the bargaining unit just referenced.

Lesperance works in the Environmental Services Department on the p.m. shift. The workers in that department clean the building. His usual work hours are 2 to 10:30 p.m. During that shift, he gets a 30-minute meal period from 5 to 5:30 p.m. He also gets two 15-minute breaks during his shift: one is at 7 p.m. and the other at 9 p.m. Work breaks are counted as time worked but meal periods are not counted as time worked. Employees can go outside on their work breaks but they are not allowed to leave the Employer's premises during their work breaks. An employee can leave the Employer's premises during their lunch period, but if they do, they are required to punch out and then punch back in.

In early 2008, the Environmental Services Department conducted several staff meetings wherein its managers reiterated to the employees that anyone who left the Employer's premises during meal periods needed to punch out. These meetings took place on January 17, February 1 and February 13, 2008. Lesperance attended these meetings wherein this policy/rule was reiterated. This policy/rule was also included in the Employer's Time Card Handbook. Lesperance has received a copy of that handbook.

Lesperance was aware that if he left the Employer's premises during his meal period, he was to punch out. The factual basis for this statement (i.e. that he knew he was to punch out if he left the Employer's premises) is that Lesperance had done so numerous times prior to June 2, 2008. Specifically, the record shows that Lesperance punched out 16 times between

March 19 and May 6, 2008 for his lunch period. On these occasions, he left the Employer's premises during his meal period.

...

Smoking is not allowed on the Employer's premises. Because of that proscription, some smokers had been going across the street to smoke in the parking lot of the YMCA. At a departmental staff meeting on February 13, 2008, managers told employees that due to complaints from the YMCA, employees were no longer allowed to smoke in the YMCA parking lot either. This directive put Lesperance, who is a smoker, on notice that he was not to smoke in the YMCA parking lot.

On June 17, 2008, the local AFSCME President, Tammy Johnson, issued a memo regarding the Employer's smoking policy. In that memo she warned all AFSCME employees that smoking was not allowed while on duty and was prohibited throughout the Employer's premises. Her memo provided thus:

Hello Union Brothers and Sisters,

I have given this e-mail much thought and after discussing it with Steve Hartman (our rep), and speaking to our Board, I have decided to send this message to you.

This is directed specifically to our members that smoke.

Management has become aware of employees violating article 17.03 in our contract that discusses smoking.

17.03 Smoking: Employees MAY NOT SMOKE ON DUTY, and smoking is prohibited throughout the campuses of any Center owned or leased facilities as of January 1, 2008.

This means if you are going to smoke, you **MUST** be punched out and you **MUST** leave campus.

Management is watching and if found in violation of this article, especially if you are off campus smoking and not punched out. This is grounds for immediate dismissal for falsifying your time card.

...

The collective bargaining agreement provides that discipline more than two years old evaporates.

Within the last two years, Lesperance has received the following discipline. In August, 2007, he was given a verbal warning for conduct which occurred on July 26, 2007 and August 7, 2007. He was reprimanded for failing to stay on task and focus on his work. A month later (in September, 2007), he was given a written reprimand for not following proper procedures, not wearing proper protective gear as required, and entering the surgical area without proper protective gear. He grieved both these disciplinary actions but neither was appealed to arbitration.

In addition to the formal discipline just noted, the record indicates that Lesperance has been counseled by his managers to follow the Employer's policies. Specifically, he was counseled in writing that he needed to stop assuming things in the workplace and doing things his way because, as the Employer saw it, that was causing unnecessary disruptions in the workplace.

FACTS

The Events of June 2, 2008

As previously noted, Lesperance's meal period is from 5 to 5:30 p.m. He did not punch out on June 2, 2008 for lunch. Since he did not punch out that day for his lunch period, he was supposed to be on the Employer's premises during his lunch period.

Lesperance testified that he remained on the Employer's premises that day during his lunch period (meaning that he did not go off site). He further testified that he spent most of his lunch break that day in the bathroom being sick.

Robert Szczepaniak is the Employer's facility manager. He oversees the supervisors who supervise Lesperance and maintenance employee Dave Kamin. Szczepaniak testified that when he drove past the YMCA on June 2, 2008 about 5:20 p.m., he saw Lesperance and Kamin smoking in Kamin's truck in the YMCA parking lot. That caught his attention for the following reasons. First, he knew that Kamin worked an 8-hour shift that included a paid lunch period. As a result, he knew that Kamin was not supposed to be off the Employer's premises for any reason during his shift. Second, Szczepaniak knew that Lesperance had been told he was not to smoke in the YMCA parking lot. Szczepaniak testified that after he saw the two men smoking in the YMCA parking lot, he turned his car around so that he could confront the two men about being off the Employer's premises and smoking in the YMCA parking lot, but by the time he drove into the YMCA parking lot, Kamin's truck was gone.

Around 5:30 p.m. that day, Lesperance approached his supervisor, Tess Dreyer, and told her that he had been in the bathroom for the last 20 minutes and needed to go home because he was sick. Upon hearing this, Dreyer allowed Lesperance to go home. Per the Employer's standard operating procedure, Dreyer then called Tina Prue, the first shift Environmental Services supervisor and the manager who handles the Environmental Services employees' timecards, to let her know that Lesperance had left work at 5:30 p.m. due to

illness. During their conversation, Dreyer told Prue that Lesperance told her he had been sick in the bathroom for the last 20 minutes, so she had let him leave work at 5:30 p.m. In response, Prue said that it was odd that Lesperance claimed to be sick in the bathroom till 5:20 p.m. because she had seen him in the parking lot at 5:20 p.m. getting out of Dave Kamin's vehicle. After talking with Prue, Dreyer checked Lesperance's time card to see whether he (Lesperance) had punched out for his meal period that day. He had not. Based on what Prue told her, Dreyer concluded that Lesperance had lied to her when he said he had been in the bathroom from approximately 5:10 to 5:30 p.m. because he was sick.

The next day (June 3, 2008), Szczepaniak told Dreyer that he had seen Lesperance and Kamin smoking in Kamin's truck in the YMCA parking lot the previous evening around 5:20 p.m. When Dreyer heard that, she felt it confirmed that Lesperance had lied to her as to his whereabouts the prior day before he left work and that he had been off the Employer's premises during his meal period without having punched out. Dreyer then confronted Lesperance about his whereabouts during his meal period the prior day. Lesperance denied that he went off the Employer's premises before he left for the day at 5:30 p.m.

That same day, Szczepaniak confronted Kamin about his whereabouts the prior day about 5:20 p.m. Kamin admitted he had gone offsite to smoke in the YMCA parking lot.

The Events of June 4, 2008

The following background is relevant to this matter. The Employer uses different codes to announce important events within the facility. A Code Red means that smoke or fire has been reported. When a Code Red is called, certain staff members have particular assigned duties. During a Code Red, Lesperance is supposed to bring the elevators down to the first floor and report to the area in the building where the smoke or fire is reported with a fire extinguisher. If he is not needed at that location, he is supposed to report to the float pool for further instructions.

A Code Red was called on June 4, 2008 at 7:28 p.m. Lesperance was on duty at the time, so his job – as just noted – was to bring the elevators down to the first floor and get a fire extinguisher and go to where the fire was, and if not needed there, report to the float pool for further instruction. Lesperance did not do any of these things as he was supposed to do. Specifically, he did not bring the elevators down, report to the location of the fire with a fire extinguisher, or report to the float pool. When the Code Red occurred, Lesperance was on break outside the building with Dave Kamin. While an alarm went off inside the building, Lesperance and Kamin did not hear it because they were outside. At some point though they became aware that a Code Red was occurring because they saw flashing strobe lights going off inside the building. About the same time, a fire truck arrived at the facility. At that point, Kamin said that he thought the fire was in the bio-med department. It is unclear from the record how Kamin would know that. In any event, Kamin told Lesperance to stay outside and direct the firefighters to the rear of the building. Lesperance did what Kamin told him to do:

he went into the building with the firefighters and walked around with them while they (the firefighters) attempted to locate the source of the alarm.

After the Code Red was over, Dreyer asked Lesperance why he had not done his assigned tasks during the Code Red. He responded that he was doing something else, namely, directing the fire truck and firefighters. Dreyer responded that it was not his job to do that. Lesperance did not tell Dreyer that the reason he directed the fire truck and firefighters during the Code Red was because that's what Kamin told him to do.

...

On June 6, 2008, management summoned Lesperance to a disciplinary meeting where it imposed a one-day suspension on him. Here's how that meeting unfolded. At the start of the meeting, Dreyer gave Lesperance a seven-page discipline notice packet. The first page was a form the Employer uses to notify employees when they are disciplined. The form is entitled Employee Discipline Notice. One line on that form is entitled "Date of Offense". In that line, Dreyer had written "6-6-08". After she had done that, Dreyer wrote the number 4 over the number 6, so that it read "6-4-08". In the section of the form entitled "Nature of Offense" Dreyer wrote: "Not following proper procedures for break times. Please see attachments." The next item in the packet was a two-page document entitled "Disciplinary Action for Nick Lesperance" The first part of that document identified what managers had reviewed with staff at departmental staff meetings on January 17, February 1 and February 13, 2008 relative to break times. That portion of the document is not reproduced here. The next part of the document dealt with what happened on June 2 and 4, 2008. It provided thus:

...

On 6-2-2008 Nick Lesperance was seen at the YMCA. Nick has been seen many times leaving the premises on his 30 min. lunch break. We have checked time cards to make sure that the proper procedures were getting followed and we have discovered that Nick has not been following the procedure. We have attached copies of time cards that show he has punched out in the past and that he knows the procedure to follow. Nick started off following the procedures and for some reason has quiet (sic).

On 6-4-2008 a code red was called overhead and there was not a response from Nick for approximately 7 to 10 Minutes. The code was called at 7:28 p.m. When the Nursing Supervisor talked to Nick he stated that He did not know there was anything going on until he seen lights flashing on the building. Nick should have been in the building at this time. Therefore he was not accountable for his time worked.

With this attachment I have a copy of Section 1: Punching In and Out in the AFSCME Version of the BAMC Employee Time Card Handbook which

every employee receives. It clearly states the procedure to follow when leaving the building for non-work related reasons. It also states in the union book in Article 5 the disciplinary action for falsifying time cards is a dismissal. We do not want to take this disciplinary action to that extreme so what we have agreed upon is to Suspend Nick for 1 day due to the fact that Nick had been disciplined with a written disciplinary action for not following proper procedures in September of 2007. It seems like Nick has an issue with staying on track and following proper procedures while on Bay Area Medical Centers time.

Corrective Action Plan:

Nick needs to follow the procedure at all times while employed at Bay Area Medical Center. If procedures do not get followed there will be further disciplinary action.

The next item in the disciplinary packet was one page from the Employer's Time Card Handbook (AFSCME version) which deals with "Punching In and Out". The final item in the disciplinary packet consisted of contract language dealing with discipline. It was a reprint of pages 10, 11 and 12 of the parties' collective bargaining agreement. After Lesperance had been given a copy of the disciplinary packet, Dreyer read the second item aloud in its entirety (i.e. the two-page document entitled "Disciplinary Notice for Nick Lesperance"). After that, those present discussed the events of both June 2 and June 4. When the events of June 4 were discussed, Lesperance admitted that during the Code Red, he did not go to the area where he was supposed to go and did not perform the tasks he was supposed to perform. His defense for not doing so was that he was instead directing the fire truck outside in the parking lot and the firefighters inside the building. During this discussion, Lesperance did not say that the reason he directed the fire truck and the firefighters during the Code Red was because that's what Kamin told him to do. When the events of June 2 were discussed, Lesperance twice denied being off site during his lunch period that day and averred he was on site in the bathroom for much of that time. After Lesperance's second denial of being off site at that time, Szczepaniak angrily said that he saw Lesperance smoking in the YMCA parking lot that day at 5:20 p.m. Lesperance then said something in response - exactly what is unclear - that involved the word "whatever". The management representatives who were present understood Lesperance's "whatever" comment to be an admission that he was indeed smoking in the YMCA parking lot at 5:20 p.m. on June 2, 2008. Lesperance testified at the hearing that he made no such admission in that meeting.

Lesperance subsequently grieved his suspension. On July 7, 2008, the Employer's Assistant Administrator, Curt Oberholtzer, met with Lesperance and a union representative to discuss the grievance. In their discussion, they addressed both the events of June 2 and 4, 2008.

...

Kamin was given a three-day suspension for being “unavailable and unresponsive to page and alarm” on June 2 and 4, 2008. Kamin’s Employee Disciplinary Notice form was filled out by Szczepaniak (whereas Dreyer filled out Lesperance’s Employee Disciplinary Notice form). When Szczepaniak filled out Kamin’s Disciplinary Notice form, on the line entitled “Date of Offense”, he listed both the dates of June 2 and June 4, 2008. Kamin grieved his suspension, but it was not appealed to arbitration. Kamin subsequently resigned.

...

Additional facts will be addressed later in the DISCUSSION.

POSITIONS OF THE PARTIES

Union

The Union’s position is that the Employer did not have just cause to suspend the grievant for one day. As the Union sees it, that discipline was not warranted under the circumstances. It makes the following arguments to support these contentions.

First, the Union addresses the scope of the disciplinary events at issue herein. While the Employer maintains that the events of both June 2 and June 4 are at issue, it’s the Union’s position that only the latter date (i.e. June 4) is at issue. Thus, the Union objects to any consideration being given to the events of June 2, 2008. Here’s why. The Union notes that when Dreyer completed the Employee Disciplinary Notice form, in the section entitled “Date of Offense”, she only listed one date, namely the date of “6-4-2008”. For comparison purposes, the Union notes that when the Employer wrote up Kamin’s disciplinary notice, it listed two dates on the form. According to the Union, this shows that the Employer knew how to put two dates on the form as a basis for the discipline. Here, though, that didn’t happen and the Employer listed just one date (namely, June 4, 2008). The Union argues that since Dreyer did not list the date of June 2, 2008 on that form in that line, that means that Lesperance was not disciplined for his conduct on June 2, 2008. Building on that premise, it’s the Union’s view that the Employer should not be allowed to add the events of that date (i.e. June 2, 2008) as another reason for the discipline. The Union contends that if the arbitrator reviews the events of June 2, 2008 over the Union’s objection, he will unfairly be allowing the Employer to add another charge that was not there initially. The Union notes that arbitrators routinely reject employer’s attempts to expand the reasons for discipline beyond what was said or listed at the time of the original discipline. The Union asks the arbitrator to not allow that expansion to occur here. As part of its argument on this matter, the Union acknowledges that the “attached letter” to the notice of discipline did reference the events of June 2, 2008. However, as the Union sees it, that’s not a sufficient reason to consider the events of June 2, 2008 because that document also referenced other events as well. What the Union is referring to is that the document also referenced what happened at departmental staff meetings on January 17, February 1 and February 13, 2008. It was the Union’s impression that those dates were listed

on the document for the purpose of giving background, so it surmised that the events of June 2, 2008 were listed for the same reason (i.e. for the purpose of background).

In the event that the arbitrator finds otherwise and does address the events of June 2, 2008, it is the Union's position that Lesperance was not off site smoking at the YMCA as the Employer alleges. To support that contention, the Union relies on the grievant's flat assertion at the hearing that he spent most of his lunch break that day in the bathroom being sick, and his denial that he was smoking in the YMCA parking lot.

Next, with regard to what happened June 4, 2008, the Union first addresses the fact that the grievant was outside when the Code Red occurred. According to the Union, that was permissible conduct because he was on break at the time. The Union also avers that there is nothing in the record which suggests his break time was excessive. Second, the Union acknowledges that the grievant did not do what he was supposed to do during the Code Red but instead did something else (as the Union put it in their brief, going with the firefighters "to help them locate the source of the alarm.") The Union contends that the reason he did that (rather than perform his normally-assigned tasks) was because Kamin directed him to do that. The Union characterizes Kamin as an "internal fire marshal". According to the Union, this meant that Kamin was "authorized to give instruction during a fire emergency." Building on that premise, the Union maintains that "the grievant was required to follow his [Kamin's] instructions." As a result, it's the Union's view that the grievant did nothing wrong on June 4, 2008 when he did what Kamin directed him to do rather than the duties he was supposed to perform during a Code Red.

Finally, the Union argues that the level of discipline which the Employer imposed on the grievant was unwarranted under the circumstances. As the Union sees it, even if the grievant committed misconduct by his actions on either June 2 or June 4, 2008, a suspension was not warranted.

In sum, it's the Union's view that the Employer did not prove that it had just cause to suspend the grievant. The Union therefore requests that the grievance be sustained, the suspension overturned, and a make-whole remedy issued.

Employer

The Employer's position is that it had just cause to suspend the grievant for one day for his workplace behavior on June 2 and 4, 2008. According to the Employer, he did not follow the proper procedures and protocols on both those days, and that constituted misconduct. As the Employer sees it, his misconduct on either day was sufficient to sustain a one-day suspension. It makes the following arguments to support these contentions.

The Employer initially addresses the Union's contention that the events of June 2, 2008 should not be considered because that date was not listed on the Employee Discipline Notice form. It contends that under the circumstances, that mistake should be considered harmless

error. Here's why. First, the Employer notes that that form says that the reason for Lesperance's one-day suspension was "not following proper procedures for break times. Please see attachments." The first attachment then went on to explain how Lesperance had not followed proper procedures on June 2 and 4, 2008. This attachment was read aloud at the disciplinary meeting on June 6, 2008 and the events of both dates were then discussed. Second, Oberholtzer discussed the events of both June 2 and 4 with Lesperance at the grievance meeting. Building on the foregoing, the Employer maintains that Lesperance clearly knew that his conduct on both those days was at issue. The Employer avers that when notice issues arise in arbitrations, arbitrators commonly look to whether the party asserting improper notice was prejudiced. The Employer argues that neither the grievant nor the Union was prejudiced by the fact that the date of June 2, 2008 was left off one line of the Employee Disciplinary Notice form, so the error should be considered inconsequential.

Next, the Employer addresses the events of June 2, 2008. For background purposes, it notes that if employees leave the premises during their meal period, they are required to punch out and then punch back in. It further notes that Lesperance did not punch out or in on June 2, 2008 during his meal period, so that means that he should have been on site during that time period. It's the Employer's position that notwithstanding Lesperance's assertion that he was on site in the bathroom over his lunch period, it established that Lesperance went off site during that time period. It cites the testimony of two different managers – Szczepaniak and Prue – to support that contention. It cites Szczepaniak's testimony that while driving past the YMCA building around 5:20 p.m. that day, he saw Lesperance and Kamin smoking in Kamin's truck in the YMCA parking lot. It also notes that the next day, Szczepaniak confronted Kamin about being off site in the YMCA parking lot during work hours, and Kamin admitted to him that he had indeed been smoking in the YMCA parking lot about 5:20 p.m. The Employer asks rhetorically if Szczepaniak was not telling the truth about seeing the two men in the YMCA parking lot, how did he just happen to know that they were smoking in Kamin's truck? Was it just a lucky guess? As the Employer sees it, Szczepaniak's testimony alone should be enough to prove that Lesperance was off the Employer's premises during his meal period on June 2, 2008 without having punched out. To buttress its case though, the Employer also cites Prue's testimony that when she was leaving work that day about 5:20 p.m., she saw Lesperance and Kamin coming back into the Employer's parking lot, and she saw Lesperance get out of Kamin's truck. The Employer asks rhetorically if that was a lucky guess, too? To further buttress its case that Lesperance was at the YMCA parking lot during his lunch break, the Employer notes that Lesperance is a smoker with a history of leaving the Employer's premises on his meal break to smoke. To support that contention it notes that Lesperance punched out 17 times for his meal period between March 19 and May 6, 2008. As the Employer sees it, this evidence establishes that Lesperance was not on site during his meal break on June 2, 2008 in the bathroom as he testified, but rather was off site at the YMCA parking lot smoking. Building on all the foregoing, it's the Employer's view that what the grievant did on June 2, 2008 constituted misconduct warranting discipline.

Next, the Employer addresses the events of June 4, 2008. For background purposes, it notes that employees are given specific tasks to perform and particular locations to report to in

the event of a fire (i.e. a Code Red). The Employer emphasizes that it is very important that employees perform their assigned tasks and report to their particular location during a Code Red. Having given that context, the Employer emphasizes that what happened when the Employer had a Code Red on June 4, 2008 was that Lesperance did not follow the protocol he was supposed to follow during a Code Red. Specifically, he did not respond for seven to ten minutes because he was outside and did not hear the alarm. Additionally, he did not take the elevators down to the floor level, bring fire extinguishers to the site of the fire or report to the float pool for further assignment. Instead, by his own admission, he directed the fire truck and the firefighters. He testified at the hearing that the reason he directed the fire truck and the firefighters was because that's what Kamin told him to do. The Employer addresses that contention as follows. First, it notes that Kamin was a maintenance employee – not a manager or a supervisor. Second, while it acknowledges that Kamin – like Lesperance – was to respond quickly to a fire in the building, it disputes the assertion the Union made in its brief that Kamin was an “interim fire marshal”. Third, the Employer opines that it would be one thing if Lesperance had reported to the float pool as he was supposed to do and then been instructed by the house supervisor that he (Lesperance) was to follow Kamin's lead. If that had happened, then the Employer acknowledges that what Lesperance did would have been acceptable. However, the Employer emphasizes that that's not what happened. In any event the Employer sees this defense as irrelevant, because Kamin and Lesperance were AWOL for approximately 10 minutes after the Code Red was called – “and that was what they were both disciplined for.” Fourth, the Employer argues that if the arbitrator thinks it is important that Lesperance took directions from Kamin that day, then the arbitrator needs to take into account that Lesperance did not provide that information to Dreyer when she asked him about his whereabouts after the Code Red, or at the June 6, 2008 disciplinary meeting, or at the grievance meeting with Oberholtzer. Instead, Lesperance raised this defense for the first time at the hearing. The Employer contends that “it is not proper for an employee to not provide allegedly exculpatory information when questioned by supervisors, and then testify to it at an arbitration hearing.” As the Employer sees it, “an employer determines just cause based on the information it has after investigating the matter and questioning the employee.” The Employer avers that's what it did here. Building on all the foregoing, it's the Employer's view that Lesperance's failure to perform his assigned duties during the Code Red – and instead doing other things – constituted misconduct warranting discipline.

Finally, with regard to the level of discipline which was imposed, the Employer argues that a suspension was the next step in progressive discipline since Lesperance had already received a verbal and written warning in the two-year time period applicable here. Since that was the discipline which was imposed, the Employer asks that the one-day suspension not be overturned.

DISCUSSION

At issue here is whether the Employer had just cause to impose a one-day suspension on the grievant. Since that issue involves discipline, I'm first going to review the contract language which deals with same.

The first sentence in Article 5 provides that “employees shall not be disciplined, except for just cause.” This language obviously subjects employee discipline to a just cause standard.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase “just cause” is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of “just cause”, one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee’s misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was commensurate with the offense given all the circumstances. That’s the approach I’m going to apply here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee’s misconduct. In making that call, I will address two separate components: did the employee do that which was alleged, and if so, was that misconduct? These two components will be addressed in the discussion which follows.

Before I begin my analysis of the conduct at issue, it is first necessary to decide what conduct is going to be considered. Here’s why. While the Employer maintains that the events of both June 2 and June 4 are at issue, it’s the Union’s position that only the latter date (i.e. June 4) is at issue. As the Union sees it, no consideration should be given to the events of June 2, 2008. To support that premise, the Union relies on the fact that when Dreyer completed the Employee Disciplinary Notice form, in the section entitled “Date of Offense” she listed only one date, namely the date of “6-4-2008”. The Union argues that since Dreyer did not list the date of June 2, 2008 on that form in that line, that means that Lesperance was not disciplined for his conduct on that date (June 2, 2008), so the arbitrator should not consider the events of that date (i.e. June 2, 2008) as a reason for the discipline. While the Union correctly notes that arbitrators routinely reject employer’s attempts to expand the reasons for discipline beyond what was said or listed at the time of the original discipline, I find that is not the situation here because both Lesperance and the Union knew that his conduct on both June 2 and 4, 2008 was at issue. The following record evidence shows why. First, in the section of the same form entitled “Nature of Offense”, Dreyer wrote: “Not following proper procedures for break times.” What is noteworthy about this statement is that the words “procedures” and “times” were written in the plural. If just one day was involved (meaning just the events of June 4 were involved), these words would presumably have been written in the singular. Second, the next item in the disciplinary packet was the two-page document entitled “Disciplinary Action for Nick Lesperance”. That document provided the details to support the conclusory statement that Lesperance had “not follow[ed] proper procedures for break times.” The first four paragraphs of that document gave some pertinent background and explained that break/lunch periods and smoking issues were discussed at different staff meetings on January 17, February 1 and February 13, 2008. Having provided that background, Dreyer

then went on in paragraphs five and six of that document to say that what Lesperance did on June 2 and 4 was unacceptable. Paragraph five specifically dealt with the events of June 2 and paragraph six specifically dealt with the events of June 4, 2008. Those two paragraphs referencing the events of two different days clearly put Lesperance and the Union on notice that his conduct on both days was at issue. Third, when the Employer held the disciplinary meeting with Lesperance on June 6, 2008, management representatives discussed the events of both those dates with him. Finally, Oberholtzer discussed the events of both June 2 and 4 with Lesperance at the grievance meeting. The foregoing evidence persuades me that Lesperance knew from the get-go that his conduct on both June 2 and 4, 2008 was at issue. That being so, Dreyer's listing of just one date on the "Date of Offense" line – rather than two dates – was a mistake. That said, it certainly would have been better if Dreyer had listed both dates like Szczepaniak did when he filled out Kamin's Employee Discipline Notice form. However, the fact that Dreyer did not list the date of June 2, 2008 on that form does not preclude me from considering the events of June 2 in addition to the events of June 4, 2008. Those events will be discussed in the order just listed.

What's at issue about June 2, 2008 is Lesperance's whereabouts over his meal period. The reason his location during that time period is important is this: if employees leave the Employer's premises during their meal period, they are required to punch out and then punch back in. There's no question that Lesperance did not punch out or in on June 2, 2008 during his meal period, so that means that he should have been on site during that time period. There was conflicting testimony about where the grievant was during his meal period. Lesperance asserts he was on site in the bathroom during much of his meal period. The Employer disputes that assertion and contends Lesperance was off site at the YMCA parking lot smoking with Kamin. To support its contention, the Employer relies on the testimony of supervisors Szczepaniak and Prue. Szczepaniak testified that while driving past the YMCA building around 5:20 p.m. that day, he saw Lesperance and Kamin smoking in Kamin's truck in the YMCA parking lot. Prue testified that when she was leaving work that day about 5:20 p.m., she saw Lesperance and Kamin coming back into the Employer's parking lot, and she saw Lesperance get out of Kamin's truck. In order for me to credit Lesperance's assertion that he was in the bathroom for much of his meal period, I would have to discredit Szczepaniak's and Prue's testimony about what they saw. I decline to do so for the following reasons. First, Prue's testimony that she saw Lesperance and Kamin coming back to the Employer's parking lot corroborated Szczepaniak's testimony in that it established that Lesperance and Kamin returned to the Employer's parking lot about 5:20 p.m. from somewhere off site. Second, Szczepaniak's testimony is also corroborated by what Kamin told him the next day. I'm referring to the fact that the next day, Szczepaniak confronted Kamin about being off site in the YMCA parking lot during work hours, and Kamin admitted to him that he had indeed been smoking in the YMCA parking lot the prior day about 5:20 p.m. If Szczepaniak had not seen Lesperance and Kamin in the YMCA parking lot, why would he have confronted Kamin about being off site? Rhetorically speaking, was it just a lucky guess? Third, no evidence was offered why Szczepaniak would make up his charge against Lesperance. Insofar as the record shows, there is no history of animosity between him and Lesperance, so there is no reason for Szczepaniak to make up his charge against Lesperance or relay something that did not take

place. Fourth, of the two, Lesperance has more at stake in this matter than Szczepaniak does. After weighing the testimony of Szczepaniak and Prue against Lesperance's uncorroborated assertion that he spent most of his lunch period in the bathroom, I reach the same conclusion as the Employer did and find that Lesperance was not on site during his meal break on June 2, 2008 in the bathroom as he asserted, but rather was off site at the YMCA parking lot smoking.

Lesperance's actions that day constituted misconduct. Here's why. Lesperance was aware that if he went off site over his lunch period, he was to clock out. He knew that was the procedure because he had complied with it numerous times before – that is, until June 2, 2008. On that date, he failed to follow this procedure and clock out when he went off site during his meal period to smoke. Aside from that, Lesperance knew that employees were not supposed to smoke in the YMCA parking lot. He violated that directive as well on June 2, 2008 by doing that proscribed act.

The focus now turns to the events of June 4, 2008. For background purposes, it is noted that employees are given specific tasks to perform and particular locations to report to in the event of a fire (i.e. a Code Red). During a Code Red, Lesperance is to perform the following tasks: he is to bring the elevators down to the first floor and report to the area in the building where the smoke or fire is reported with a fire extinguisher. If he is not needed at that location, he is supposed to report to the float pool for further instructions. On June 4, 2008, there was a Code Red at the hospital. When the alarm went off, Lesperance did not hear it because he was outside the building with Kamin on break. When he became aware of the alarm though, he did not perform any of his Code Red assigned tasks. Instead, he did other tasks. What he did was this: he directed the fire truck outside in the parking lot and then he went into the building with the firefighters and walked around with them while they (the firefighters) attempted to locate the source of the alarm. The reason he did these tasks – as opposed to his assigned tasks – will be addressed below.

I've decided to begin my discussion on Lesperance's conduct that day by commenting on the following matters raised by the Employer. First, the Employer criticizes Lesperance for being outside the building when the Code Red occurred. I find that criticism unwarranted because Lesperance was on break when the Code Red occurred and employees are allowed to be outside the building on their break. Second, the Employer criticizes the timing of Lesperance's break that day. What the Employer is referring to is that Lesperance must have started his 7 p.m. break later than the official start time of 7 p.m. because he was still on break when the Code Red occurred at 7:28 p.m. Assuming for the sake of discussion that he did start his break later than 7 p.m., I find that criticism unwarranted because the record indicates that employees sometimes take their breaks at times other than the official break time. Apparently, that's what happened on June 4, 2008. To the extent that the Employer is suggesting that Lesperance's break time was excessive (i.e. beyond 15 minutes), I find that criticism lacks a basis in the record. Third, the Employer characterizes Lesperance as being AWOL during the Code Red. In my view, that characterization exaggerates the seriousness of the charge made against Lesperance. In point of fact, he was not disciplined for being AWOL; rather, he was disciplined for being "not accountable for his time worked." I think there's a

difference between these two charges with the former (i.e. being AWOL) being a more serious charge than the latter (i.e. being “not accountable for his time worked”). The focus now turns to deciding whether the record evidence supports that charge.

After the Code Red was over, management officials learned that Lesperance had not done his assigned tasks during the Code Red, so they asked him several times **what** he had done during that time. Each time, his response was that he had directed the fire truck outside and the firefighters inside the building. While he told management officials **what** he did during the Code Red, he never told them **why** he did that work instead of his assigned tasks.

At the hearing though, Lesperance offered an explanation **why** he did what he did during the Code Red. His explanation was that Kamin told him to direct the fire truck in the parking lot and the firefighters inside the building and he simply did what Kamin told him to do.

In choosing to do that (i.e. do what Kamin told him to do), Lesperance chose poorly. Here’s why. First, Kamin was a maintenance worker, so he essentially was Lesperance’s co-worker. Kamin was not a manager or a supervisor and, insofar as the record shows, he was not even a lead worker who assigned work. That being so, it does not appear that Kamin was empowered to assign work to Lesperance nor does it appear he had ever done so before. Second, in seeking to bolster Kamin’s non-supervisory/non-managerial status to someone who nonetheless was empowered to give Lesperance a work directive during a fire emergency, the Union characterizes Kamin as an “interim fire marshal”. Building on that premise, it’s the Union’s view that Lesperance was required to follow Kamin’s instruction. The problem with this contention is that it lacks a basis in the record evidence. The arbitrator therefore rejects the Union’s contention that Kamin was empowered to overrule the Employer’s established protocol for responding to a fire, and direct Lesperance to do something else. In so finding, it is expressly noted that Kamin was also disciplined for not following the Employer’s Code Red protocol on June 4, 2008. That fact hardly bolsters his credentials. To the contrary, it undermines the Union’s contention that he was someone empowered to give Lesperance a work directive.

When the Code Red occurred, Lesperance should have followed the Employer’s protocol for that emergency and performed his assigned tasks. Kamin’s directive for Lesperance to do other work did not relieve Lesperance of his obligation to perform his regularly assigned tasks. To the extent that Lesperance thought it did (relieve him of that obligation), he was just plain wrong. It would be one thing if Lesperance had done his regular tasks, and then reported to the float pool as he was supposed to do, and then been instructed by the house supervisor that he (Lesperance) was to follow Kamin’s lead. If that had happened, then Lesperance could have done what Kamin told him to do. However, that’s not what happened, so Lesperance has no justifiable defense for failing to perform his assigned tasks during the Code Red.

The record indicates that Lesperance had previously been counseled by his managers to follow the Employer's practices. Specifically, he had been counseled to stop assuming things in the workplace and doing things his way. During the Code Red on June 4, 2008, that's essentially what he did because he failed to follow the Employer's established procedure and instead did something else. That was unacceptable workplace behavior which warranted discipline.

Having found that Lesperance engaged in workplace misconduct on June 2 and 4, 2008, the next question is whether the penalty which the Employer imposed for that misconduct (i.e. a one-day suspension) was appropriate under the circumstances. I find that it was. Here's why. First, it is noted that the parties' collective bargaining agreement specifies that the normal disciplinary sequence is that before the Employer imposes a suspension, it will first impose oral and written warnings on the employee. That had already happened, so the Employer followed progressive discipline in this instance. Second, I conclude that the grievant was not subjected to disparate treatment in terms of the punishment imposed. In order to prove disparate treatment, it is necessary to show that other similar factual situations occurred where the Employer imposed either lesser or no punishment. That was not shown. Since that type of proof is lacking here, the Union has not shown that the grievant was subjected to disparate treatment in terms of the punishment imposed. Given the foregoing, I find that the grievant's one-day suspension was not excessive, disproportionate to the offense, or an abuse of management's discretion, but rather was reasonably related to his proven misconduct. The Employer therefore had just cause to suspend him for one day.

In light of the above, it is my

AWARD

That the Employer had just cause to suspend grievant Nick Lesperance for one day. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of June, 2009.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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