

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION LOCAL 39**

and

MADISON GAS & ELECTRIC COMPANY

Case 77
No. 68706
A-6359

(Fujioka Termination)

Appearances:

Richard Thal, Lawton & Cates, Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53707-2965, appearing on behalf of OPEIU Local 39.

Peter Albrecht, Albrecht Labor & Employment Law, S.C., Attorneys at Law, 131 West Wilson Street, Suite 1202, Madison, Wisconsin 53703, appearing on behalf of Madison Gas & Electric Company.

ARBITRATION AWARD

OPEIU Local 39, hereinafter referred to as Union, and Madison Gas & Electric Company, hereinafter referred to as the Company or MG&E, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the grievance relating to Chris Fujioka's discharge. The undersigned was so designated. A hearing was held in Madison, Wisconsin on June 4, 2009. The hearing was transcribed. The parties filed briefs and reply briefs whereupon the record was closed August 17, 2009. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

At the hearing, the parties did not stipulate to the issue to be decided herein. In their briefs though, both sides proposed that the grievant's discharge be reviewed under a just cause standard. That being so, the issue which is going to be decided herein is as follows:

Did Madison Gas & Electric Company have just cause for terminating Chris Fujioka? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

While the arbitrator normally cites the relevant contract language from the collective bargaining agreement in his awards, no contract language need be cited in this case because both sides proposed that the grievant's discharge be reviewed under a just cause standard. Consequently, no contract language is involved in this case.

BACKGROUND

The Union represents the Customer Service Representatives (CSRs) who work in the Company's call center in Madison, Wisconsin. The grievant, Chris Fujioka, was a CSR at the call center from 2002 until his discharge on September 25, 2008. This case involves his discharge.

CSRs handle incoming telephone calls from MG&E customers. They take calls; their main job responsibility is to service callers. They wear a headset and work at a workstation. Some of the calls which they take involve non-emergency matters such as appliance hookups, billing inquiries and energy use. Other calls which they take involve emergencies. The emergency calls can involve gas leaks and downed power lines. The call center has several lines dedicated to emergency calls, but emergency calls can come in on any line at any time day or night. In addition to handling incoming telephone calls, CSRs also make outbound collection calls and help those customers who come to the Company's walk-in area, but those parts of the job are not involved here. The only part of a CSR's job which is involved in this matter is handling incoming calls.

CSRs receive extensive training on the importance of customer service and public safety, and the importance of answering all calls in a timely and professional manner. They also receive training on handling emergency calls properly. Because of that training, CSRs know that ignoring Company operating procedures could cause extensive damage to property and place the customer in grave danger. They also know that the Company employs them to have interaction with the customer and address the customer's concern. CSRs are not supposed to hang up on the customer without having interaction. If a CSR encounters silence on the line, they are supposed to repeat their greeting a second time. If there is still no response from the customer, and the CSR still encounters silence on the line, then the CSR is supposed to say they will be ending the call, at which point they can end the call (i.e. hang up).

The calls that come into the call center are put into a queue. CSRs can take these calls via one of two methods: the “manual-in” method or the “automatic-in” method. When a CSR uses the “manual-in” method, after they complete a call they have to press a button that says, “Yes, I can take a call.” After that button is pressed, the CSR gets another caller. When a caller comes on the line, the CSR hears a beep. If a CSR uses the “automatic-in” method, they don’t have to press that button to get another caller. When one phone call ends, another caller is automatically on the CSR’s line. The method which Fujioka used was the “manual-in” method.

This case involves the “dropping” of incoming customer calls. In the context of this case, dropping a call essentially refers to not servicing a customer who has called the Company’s call center. Several situations could constitute a dropped call. For example, if a CSR released the caller (i.e. hung up on the caller) without saying anything, that would constitute a dropped call. Another way that a CSR could drop a call is if the CSR remained silent and did not greet the customer. If that were to happen, and the caller heard no one on the phone saying “this is MG&E”, the customer could hang up out of frustration. A dropped call could also occur if the CSR greeted the customer by saying “this is MG&E” and then released the caller (i.e. hung up on the caller). As these examples show, either the CSR or the caller can hang up. From the Company’s perspective, a call which ends under any of these circumstances is considered a “dropped” call.

CSRs have their calls recorded. CSRs get monitored by call center supervisors two times a month.

In October, 2006, the call center supervisor, Tim Fischer, reviewed some of Fujioka’s recorded calls with him. In doing so, Fischer noted that on some of the calls received, there were delays or pauses before Fujioka started speaking. With regard to the delays and pauses, Fischer told Fujioka to “keep an eye” on them.

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Prior to being discharged, Fujioka had not been previously disciplined for delays in receiving calls, dropped calls, or for any other reason.

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The Company does not want CSRs to drop calls because dropped calls can pose a public safety threat. Thus, the Company considers dropping calls to be a serious infraction. While in and of itself a single dropped call will not warrant discipline, the Company has discharged CSRs who showed a pattern of dropping calls. That happened in 2001 and 2006. In both instances, the employee was fired without any prior progressive discipline. The first such instance occurred in 2001 and involved Tara Chamberlin. Her discharge letter stated she was fired for “intentionally releas[ing] incoming customer calls immediately upon presentation and prior to any customer contact.” The second such instance occurred in 2006 and involved

Adam Stevanovic. The Company discovered that he was transferring his calls into a queue less than seven seconds after receiving them, whereupon the transferred calls would go to last place in line. There was a paper trail which proved this. His discharge letter stated that he was fired for “intentionally transfer[ing] incoming customer calls immediately upon presentation and prior to any customer contact.” After Stevanovic was fired, the Company sent out an e-mail to CSRs informing them of same. This memo identified what Stevanovic had done. The memo concluded thus:

As you are aware, transferring or hanging up on customer calls before they say a word is a serious offense due to the risk that the caller could be calling to report a gas leak or other life-threatening emergency where time is of the essence. Not only does it result in endangering public safety and in terrible customer service, it is also unfair to co-workers.

The Union grieved Stevanovic’s discharge. Fujioka was the union steward who processed the grievance to arbitration. Since he processed this grievance to arbitration, Fujioka knew that the Company had fired a CSR for dropping calls.

FACTS

On August 26, 2008, Fujioka took a call from a Madison School District employee. That person asked Fujioka to fax a certain document to the Madison School District. Upon learning that the requested information had been faxed once before to the District, Fujioka told the caller that he would not re-fax the document a second time and then said something “rude” to the customer. (Note: The record does not identify what Fujioka said, but Fujioka later admitted that what he said was “rude”). Fujioka’s response irritated the customer, who then asked to be transferred to a supervisor. Fujioka did not transfer the caller to a supervisor as requested. Instead, Fujioka put the caller on hold, and left the caller there (i.e. on hold) for over six minutes. While that caller was on hold, Supervisor Tia Davis listened to the call in real time because it was unusual for a caller to be on hold for that length of time. The phone call ended when Fujioka disconnected the caller.

After listening to this phone call, Davis discussed it with the management of the call center. The supervisors in the call center felt that Fujioka’s response to the caller was inappropriate and constituted poor customer service. They did not know though whether that call was an aberration (on Fujioka’s part), or part of a pattern of poor customer service. As a result, they decided to investigate Fujioka’s handling of recent calls to determine if his poor customer service in the August 26 call was an isolated incident, or part of a pattern of conduct.

Supervisor Tim Fischer then started listening to some of Fujioka’s calls for the express purpose of finding instances of poor customer service. He found several calls that he felt involved poor customer service by Fujioka. However, he found something else that he considered more troublesome than poor customer service. What he found were instances where Fujioka dropped incoming customer calls. The first such call which Fischer discovered

was from August 21. In that call, after getting on the line, Fujioka said absolutely nothing to the caller. In other words, Fujioka did not greet the caller or say anything to the caller. As a result, there was complete silence on the line – not even background music was playing – for a minute and 42 seconds, at which point the caller hung up. Fischer’s discovery of this call prompted him to listen to all of Fujioka’s calls from August 21, 22, 26 and 27. In the course of doing that, he found about a dozen calls that were somewhat similar to the August 21 call just referenced. Specifically, Fischer found calls where Fujioka either failed to greet the customer at all (after he picked up the call), or delayed his greeting to the customer. When this happened, there was complete silence on the line – not even background music – and the customer did not know that a CSR was on the line. Following this silence, Fujioka hung up on the customer or the customer hung up on Fujioka. Fischer considered all these calls to be dropped calls.

On August 28, Davis met with Fujioka and his union representative and talked with him about the calls just referenced. At this investigational meeting, Davis played recordings of all the calls referenced above. The meeting lasted over an hour. The meeting began with Davis playing two calls that she felt involved poor customer service. The first call was the call which involved the Madison School District employee who Fujioka left on hold for six minutes. When Fujioka was asked why he left the customer on hold for that long, he responded that he forgot the customer was on hold, and released the caller (i.e. hung up on the caller) in error. The second call that Davis played was a collection call which Fujioka made on August 21. Davis felt that Fujioka exhibited poor customer service in that call. The third matter which Davis referenced was not a phone call but rather an e-mail exchange which Fujioka had with a customer. Davis felt that Fujioka exhibited poor customer service in his e-mail exchange with that customer. After these calls and e-mails were reviewed, Davis moved on to a different category of calls. Davis characterized these calls as containing a delayed greeting, no greeting whatsoever, or a greeting followed by a short release (i.e. hang up). Davis then played 13 of Fujioka’s calls which she felt fell into that category. The first such call was from August 21. In that call, Fujioka did not offer a greeting to the caller until 20 seconds into the call, at which point Fujioka ended the call (i.e. hung up on the caller). The second such call also was from August 21. In that call, Fujioka greeted the caller but then hung up before the caller said anything back. The total length of the call was seven seconds. The third such call was the call already referenced where Fujioka never greeted the customer or said anything and there was complete silence on the line for a minute and 42 seconds at which point the caller hung up. The fourth such call was from August 22. In that call, Fujioka greeted the caller but then hung up before the caller said anything back. The total length of that call was seven seconds. The fifth such call was also from August 22. In that call, Fujioka offered no greeting to the caller and did not say anything, whereupon the caller hung up after 16 seconds of silence. The sixth such call was also from August 22. In that call, Fujioka delayed his greeting to the customer. Just as the caller says “hi” in response, Fujioka ended the call (i.e. hung up). The seventh such call was also from August 22. In that call, Fujioka delayed his greeting to the caller until 20 seconds into the call, at which point the caller hung up. The eighth such call was also from August 22. In that call, Fujioka offered no greeting to the caller and did not say anything, whereupon the caller hung up after 47 seconds of silence. The ninth such call was from

August 26. In that call, Fujioka offered no greeting to the caller and did not say anything, whereupon the caller hung up after 23 seconds of silence. The tenth such call was also from August 26. In that call, Fujioka offered no greeting to the caller and did not say anything, whereupon the caller hung up after 29 seconds of silence. The eleventh such call was from August 27. In that call, Fujioka greeted the caller but then hung up before the caller said anything back. The total length of that call was seven seconds. The twelfth such call was also from August 27. In that call, Fujioka delayed his greeting to the caller, at which point the caller hung up after 17 seconds. The final such call was also from August 27. In that call, Fujioka delayed his greeting to the caller until 30 seconds into the call. Just as the customer says "hi" in response, Fujioka ended the call (i.e. hung up). In about half of the calls just referenced, it was Fujioka who hung up on the caller; in the other half, it was the caller who hung up. Also, in about half of these calls, Fujioka offered no greeting to the caller. During the course of the meeting, Fujioka offered several defenses for his delayed greetings, no greetings, or quick release of calls. First, he said he may have been distracted at the time, and some of his delayed greetings could have been the result of those distractions. Second, he speculated that there was something wrong with the Company's phone line and/or equipment (specifically his call start indicator, his phone, or his headset). Davis indicated in response that the Company would investigate his claims about the Company's phone equipment. She also indicated that the Company would continue its investigation into his calls as well as those of other CSRs.

Following the August 28 meeting, the Company tested Fujioka's call start indicator, his phone and his headset to see if there was something mechanically wrong with them. The Company found nothing wrong with them.

As the Company continued to investigate Fujioka's calls, the management of the call center was in frequent contact with the Company's Human Resources Department for direction and guidance. The Human Resources Department told the management of the call center to listen to a large number of Fujioka's calls and to also listen to a large number of calls handled by other CSRs; afterwards, Fujioka's percentage of dropped calls would be compared to those of his co-workers.

Supervisors Davis and Fischer conducted the Company's investigation. At the outset, Company supervisors decided that their investigation of Fujioka would have to be different from their investigation of Stevanovic. Here's why. Stevanovic dropped calls by hanging up on customers in less than seven seconds. The Company had the technical ability to detect dropped calls that lasted less than seven seconds. However, the Company could tell from its initial investigation into Fujioka's calls that his dropped calls usually lasted more than seven seconds. The Company did not know if this was merely a coincidence. In any event, Company supervisors decided that their investigation would have to consist of listening to phone calls between CSRs and customers. This was a labor-intensive process because they ultimately listened to over 7400 calls. For about a month, Davis and Fischer personally listened to all of Fujioka's phone calls from June, July and August, 2008. They also listened to Fujioka's phone calls from December 5, 2007 and January 3, 2008 (two dates which they

selected at random). All told, they listened to 2,113 of Fujioka's calls. They also listened to 5,305 calls from 19 other CSRs in the call center. The calls which they listened to were randomly selected from June, July and August, 2008. In all these 7,400 calls, Davis and Fischer listened for situations where the CSR offered no greeting or gave a delayed greeting, at which point the call ends because the CSR hangs up or the customer hangs up due to silence on the line or delay. If Davis and Fischer found such a situation to exist in a phone call, they assessed/charged the CSR involved with a dropped call. They applied the same criteria for a dropped call to all CSRs who had their calls reviewed (including Fujioka). After listening to 5,305 calls from 19 of Fujioka's co-workers, Davis and Fischer concluded that those 19 CSRs dropped a total of 19 calls out of the 5,305 calls reviewed for an overall dropped call rate of 0.36%. After listening to 2,113 of Fujioka's calls, Davis and Fischer concluded that Fujioka dropped 58 of those calls for an overall dropped call rate of 2.74%. They also found that two of the calls which Fujioka dropped came in on the emergency gas leak line. In the first call on July 31, 2008, there was silence on the line for 11 seconds, at which point the customer hung up. In the second call on August 5, 2008, Fujioka offered a greeting, but then hung up before the customer said anything.

After Davis and Fischer finished their investigation, the results were shared with the Company's Human Resources Department. Afterwards, the Company's Vice-President of Human Resources, Joseph Pellitteri, concluded that Fujioka was dropping an unacceptable number of incoming customer calls, and that posed a threat to public safety. He also concluded that no discipline short of termination would be feasible as it would require a supervisor in the call center to monitor all of Fujioka's calls on a real-time basis. The Company discharged Fujioka on September 25, 2008. His discharge letter provided thus:

Dear Mr. Fujioka:

You have been employed as a Customer Service Representative in the Company's Call Center since November 19, 2002. During this period, you have had extensive training on the importance of customer service and public safety, and the importance of answering all calls in a timely manner. Emphasis was placed on the seriousness of handling emergency calls properly. You have been trained that ignoring Company operating procedures could cause extensive damage to property and place the customer in grave danger.

On August 26, 2008 the Company became aware that you had a conversation with a customer in which you spoke in a very rude manner. This led to an investigation of your recent call activity to see whether this was an isolated incident. During the course of this investigation, it was discovered that you have been routinely dropping customer calls. This includes delayed response to the customer when you picked up the call, silence to the customer when you picked up the call, and finally either you abruptly ending the call or the customer ending the call after an extended period of silence from you. Of the calls reviewed by management, it was discovered that you had dropped 58 customer

calls, two of which came in on the gas leak line (1111). You have been trained that gas leak calls may come in on any line — making it imperative that all incoming calls be answered in a timely and professional manner.

The Company can come to no other conclusion than that you, on a regular basis, intentionally dropped customer calls with either little or no interaction with the customer. This was done clearly without regard to the nature of the incoming calls for service. Your 70 months of experience taking telephone calls, as well as ongoing management emphasis and frequent departmental training makes it clear it is not uncommon for emergency calls to be taken on non-emergency lines, and to ignore such a request without regard for the safety of the caller is unacceptable.

The Company cannot in any way tolerate the actions you deliberately took without regard for consequences to the Company and our customers. Following a thorough review by management, your employment is terminated immediately.

Sincerely,

Joseph Pellitteri
AVE - Human Resources

The Union grieved Fujioka's discharge, and the grievance was ultimately appealed to arbitration.

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The 58 dropped calls referened in the discharge letter were compiled onto a compact disc.

At the hearing, Supervisor Davis acknowledged that four of the calls on that disc were not dropped calls. The four were the following: 1) the January 3, 2008 call; 2) the undated call which dealt with a power outage on Barlow Street; 3) the undated call which dealt, in part, with the charge for a gas leak investigation; and 4) the undated call which dealt with a power outage on Wright Street.

At the hearing, Fujioka admitted that he dropped "some" calls, but he contended that he did not do so intentionally or deliberately. In his view, he had nothing to gain by doing that (i.e. intentionally dropping calls).

Additional facts are included in the DISCUSSION section.

POSITIONS OF THE PARTIES

Union

The Union's position is that the Company lacked just cause to discharge Fujioka and also acted unreasonably when it discharged him. The Union argues that even if Fujioka committed misconduct by dropping more calls than other CSRs, he should have been progressively disciplined for it – not discharged. Thus, it's the Union's view that the discipline which the Employer imposed on Fujioka was too severe and therefore should be reduced. It makes the following arguments to support these contentions.

First, the Union addresses the standard which the arbitrator is going to use to review the discharge. It notes in this regard that at the hearing, the parties could not agree on whether the arbitrator was to use a just cause test or a reasonableness test. According to the Union, there is no significant difference between these two tests (i.e. a just cause test and a reasonableness test). In its brief, it puts the matter thus:

If the Arbitrator finds that Fujioka deliberately and routinely dropped customers calls with indifference to customer safety, then the Arbitrator will obviously find that the Company had just cause to discharge him and that the Company acted reasonably under the circumstances. But if the Arbitrator finds that Fujioka did not act deliberately and routinely drop customer calls and that he was not indifferent to customer safety, then the Arbitrator must find that MG&E lacked just cause to discharge Fujioka and that it acted unreasonably.

The Union argues that regardless of whether the arbitrator applies a just cause test proposed by the Union or the reasonableness test proposed by the Company, the Company violated the collective bargaining agreement when it discharged Fujioka.

Turning now to the facts, it's the Union's view that the Company failed to meet its burden of proving that Fujioka deliberately dropped calls. It acknowledges that at the hearing, Fujioka admitted that he dropped some calls. However, according to the Union, Fujioka did not intentionally or deliberately drop those calls, or cause them to be dropped. In other words, he did not do it on purpose. Instead, he did so inadvertently. The Union submits that the dropped calls resulted when he was distracted or being inattentive. Building on that premise, the Union makes the following points. First, it notes that the Company's investigation showed that other CSRs besides Fujioka dropped calls. Building on that point, the Union emphasizes that Fujioka was not the only one who dropped calls; other CSRs did too. Second, elaborating on its contention that Fujioka's dropped calls resulted from his being distracted or inattentive, the Union contends that being inattentive or careless is not a sufficient basis to discharge an employee. It cites several arbitration awards where the arbitrator reversed discipline imposed upon employees who were inattentive and/or careless to their work and urges the arbitrator herein to do likewise.

Next, the Union addresses the proof which the Company offered at the hearing to substantiate its case. It first notes that in the discharge letter, the Company averred that it had discovered that Fujioka had dropped 58 calls. While Joint Exhibit 3 contains recordings of 58 calls, it's the Union's view that the disc does not provide proof that each and every call contained therein was a dropped call (i.e. one where Fujioka never greeted the caller, or gave a delayed greeting, or greeted the caller and then hung up before the caller said anything). While the Union does acknowledge that in about half of the calls on the disc Fujioka delayed his greeting, the Union emphasizes that in the majority of those calls, this greeting was delayed less than 8 seconds. The Union implies that is significant. Second the Union addresses the 15 calls which Supervisor Davis discussed with Fujioka at their August 28 meeting. The Union points out that in half of those calls it was the caller who hung up. The Union sees that as significant. As for the silence that exists on many of the calls, the Union avers that there is "no way to know" what caused the silence on the calls but, whatever it was, it was unintentional.

While neither Fujioka nor the Union can explain the silences on the calls just referenced, or explain his delayed greetings in those calls, they nonetheless offer several explanations for the calls being dropped. One theory is that Fujioka somehow inadvertently hung up on the customer. Another theory is that calls may have come into Fujioka's phone while he was on break and that this would explain why there was silence on his end of the line (meaning his phone somehow remained capable of receiving incoming calls). Still another theory is that the dropped calls could have occurred as a result of Fujioka removing his headset during a call in order to talk with another CSR.

Finally, the Union argues in the alternative that even if Fujioka was responsible for more dropped calls than the other CSRs, he should have been subjected to progressive discipline for that - not discharged. Said another way, it's the Union's view that the level of discipline which the Company imposed was excessive and unjust. Here's why. First, the Union emphasizes that Fujioka had never been disciplined before this (meaning he had not received progressive discipline). The Union notes that the purpose of progressive discipline is to give an employee a chance to modify their behavior. It argues that here though, the Employer never gave Fujioka the opportunity to correct his behavior; instead, they just piled a bunch of calls together and fired him for it. According to the Union, that defeats the purpose of progressive discipline. It cites several arbitration awards where the arbitrator reduced the discharge penalty where the employer failed to impose progressive discipline. Second, building on the last point just made, the Union contends that if Fujioka had been given the opportunity to correct his behavior before being fired (i.e. to not drop so many calls), he would have done so. However, the Company failed to give him any advance notice that his job was on the line because of dropped calls. Third, the Union disputes the Company's contention that it would face an unacceptable risk if Fujioka was reinstated. According to the Union, the Company overstated the risks associated with reinstating Fujioka. The Union also asserts that the Company did not show that Fujioka was "incurable". Fourth, the Union acknowledges that while CSRs Stevanovic and Chamberlin were discharged for dropping calls, it's the Union's view that in those cases the evidence proved that they deliberately dropped

calls. Here, though, the evidence does not show that (namely, that Fujioka deliberately dropped calls), so a lesser penalty is warranted under the circumstances. The Union therefore asks the arbitrator to reduce the penalty.

In sum, it's the Union's view that the Company did not prove that it had just cause to discharge Fujioka. The Union therefore requests that the discharge be overturned, that Fujioka be reinstated, and a make-whole remedy issued.

Company

The Company's position is that it had just cause to terminate the grievant's employment for dropping a high number of calls. For background purposes, the Company notes that as a CSR, the grievant's job was to service callers. Following an investigation, the Company determined that Fujioka was not doing his job. What he was doing instead was this: on some occasions he simply hung up on customers while on other occasions he ignored the customer until the customer became frustrated and hung up. The Company does not know why the grievant shirked his job responsibilities this way and dropped their calls, but the fact of the matter is that he did not service the caller. According to the Company, his dropped calls posed a threat to public safety and could not be tolerated. With regard to the level of discipline imposed, it's the Employer's view that termination was warranted under the circumstances. It makes the following arguments to support these contentions.

First, the Company addresses the standard which the arbitrator should use to review the grievant's discharge. For background purposes, it notes that at the hearing, it was the Company's position that the issue should not refer to the phrase just cause because the collective bargaining agreement does not contain a just cause provision. Notwithstanding that contention at the hearing, when the Company filed its brief, it agreed that the arbitrator could review the grievant's discharge under a just cause standard. Implicitly recognizing that arbitrators differ in their manner of analyzing just cause, the Company asks the arbitrator to apply what has become known as the DAUGHERTY standard (named after Arbitrator Carroll Daugherty). In that standard, Daugherty tried to crystalize the definition of just cause into seven independent questions. As Daugherty saw it, if the answer to all seven questions was "yes", then the Employer met its burden of proof and there was just cause for the discipline imposed.

The Company then goes through the seven questions reviewed under the DAUGHERTY standard and avers as follows. With regard to the first element (i.e. whether the employee knew of the Company's policy and had foreknowledge of the possible or probable consequences of that conduct), the Employer answers that question in the affirmative. (Note: In this case, the policy in question is the Company's policy prohibiting CSRs from dropping calls). In support thereof, it notes that in addition to being a CSR, Fujioka was also a union steward. In this capacity, he represented a coworker, Adam Stevanovic, when Stevanovic's employment was terminated for dropping calls. In handling the Stevanovic matter, Fujioka also became aware of another CSR, Tara Chamberlin, whose employment was also terminated

for dropping calls. Both were terminated without progressive discipline. As the Company sees it, this information gave Fujioka first-hand knowledge that MG&E takes the matter of dropping calls very seriously and that such conduct (i.e. dropping calls) would result in immediate termination. It also notes that when asked at the hearing whether he was aware of MG&E's policy in this regard, Fujioka admitted that he was. Aside from that, the Company notes that any CSR should know that dropping calls is a serious offense because, as their job title indicates, they are paid to provide service to customers. According to the Company, "hanging up on customers or ignoring customers for such a long period of time that they become frustrated and hang up is the antithesis of customer service." The Company opines that for reasons known only to Fujioka, "he elected to ignore a large percentage of such calls. It should have been obvious to him that doing so would jeopardize his employment." With regard to the second element (whether the Company's rule was reasonably related to the orderly and efficient operation of the Company's business), the Employer answers that question in the affirmative. In support thereof, it avers that the Company has a legal obligation to ensure its customers' safety, and it notes that at the hearing Fujioka conceded that dropping calls poses a public safety threat. Building on the foregoing, the Company believes it to be obvious, then, that MG&E's rule against dropping calls is a reasonable measure designed to ensure public safety. With regard to the third element (whether the Employer conducted an investigation to determine if the employee violated the rule), the Employer answers that question in the affirmative. According to the Company, this element essentially asks whether the employee was provided with his "day in court" before the discipline was administered. It notes in this regard that Supervisor Davis met with Fujioka and his union representative on August 28, 2008. The purpose of this meeting was to provide Fujioka with examples of dropped calls that management had discovered and allow him to explain his side of the story. According to the Company, he offered little or no explanation for the delayed greetings, long pauses, and silence in the calls. Instead, all he offered was speculation that, perhaps, something was wrong with either his phone or headset. Afterwards, MG&E did test that equipment and it was functioning properly. That testing ruled out the possibility that something was wrong with Fujioka's equipment. With regard to the fourth element (whether the investigation was conducted fairly and objectively), the Employer answers that question in the affirmative. Here's why. First, it notes that Davis and Fischer reviewed 2,100 of Fujioka's calls. Second, Davis and Fischer reviewed over 5,300 calls that were handled by other CSRs. They did this for purposes of comparing the frequency of Fujioka's dropped calls with his coworkers. After listening to 7,400 calls, they found the percentage of Fujioka's dropped calls to be "alarmingly high" when compared to the other CSRs. Third, the Company notes that during the course of the investigation, the management team in the call center was in constant contact with Human Resources about the investigation. The Company believes the foregoing facts establish that it conducted an exhausting and painstakingly thorough investigation. With regard to the fifth element (whether the Company discovered substantial evidence that the employee violated the rule), the Employer answers that question in the affirmative. It avers that it proved that Fujioka dropped an unacceptable number of calls via the summaries of its review of the dropped calls by Fujioka and the dropped calls by the other CSRs. According to the Company, those summaries substantiate Davis and Fischer's findings. The Company also points out that at the hearing, when Fujioka was questioned about the

Company's data, he conceded that he had no reason to believe that it was not accurate or that MG&E had somehow falsified the information. With regard to the sixth element (whether the work rule is applied evenhandedly), the Employer answers that question in the affirmative. In its view, there is no evidence of disparate treatment in the record. In fact, it asserts that the only record evidence is to the contrary, and shows that the Company has been consistent and evenhanded in its treatment of CSRs who have been caught dropping calls. It notes that Chamberlin, Stevanovic and Fujioka were all caught dropping calls, were all treated in the same manner, and their employment was terminated without recourse to progressive discipline. Finally, with regard to the seventh element (whether the discipline imposed relates to the seriousness of the offense), the Employer answers that question in the affirmative. According to the Company, this element essentially asks whether the punishment fits the crime. The Company argues that the penalty of discharge was warranted here because Fujioka's dropped calls posed an immediate and direct threat to public safety. It specifically notes in this regard that two of his dropped calls were on the gas leak emergency line. In the Company's view, it did not have to apply progressive discipline here for the following reasons. First, the Company submits it had lost trust in Fujioka's ability and desire to perform his job. Second, it avers that if it allowed Fujioka to remain employed, it would have required the Company to assign a management employee to do nothing else but monitor Fujioka's calls on a real-time basis. According to the Company, it did not believe it reasonable from both an operational and economic standpoint to employ a management employee for the sole purpose of babysitting Fujioka. Third, the Company felt that continuing to employ Fujioka would expose it to legal risk. What it is referring to is this: the Company's investigation showed that Fujioka had a propensity to drop calls and that several of those dropped calls had been on emergency lines. If the Company allowed Fujioka to remain employed and he later dropped a call that resulted in injury to a customer, the Company could be sued for negligence. The Company avers it was not willing to assume that risk.

Next, it's the Company's view that the various reasons proffered by the Union for Fujioka's dropped calls should not exonerate him. Here's why. First, the Company addresses the theory that Fujioka somehow inadvertently hung up on customers. According to the Company, this makes no sense because Fujioka would have to press a button on his phone in order to terminate a call; thus, he would have to take some overt, intentional action to terminate a call. Second, the Company addresses the theory that somehow calls came into Fujioka's phone while he was on break/away from his desk and that would explain why there was silence on his end of the line. The Company avers this theory is predicated upon a misunderstanding of how its phone system operates. For background purposes, the Company notes that when an employee leaves his or her workstation, they are supposed to enter an AUX code that explains the reason for their leaving their workstation. There are different AUX codes for different reasons why a CSR would leave his or her workstation. At the hearing, Fujioka testified that there were times when he forgot to enter the proper AUX code. However, even if Fujioka had entered the proper AUX code, his phone still could not take an incoming call. That being so, Fujioka's failure to enter the proper AUX codes while he is away from his workstation does not explain his dropped calls. Third, the Company addresses the theory that the dropped calls could have occurred as a result of Fujioka removing his

headset during a call in order to talk with another CSR. The Company contends there are two problems with this theory. First, the Union concedes that it would have been improper for Fujioka to turn his attention from a customer call in order to chat with a coworker. Second, the Union's theory is contradicted by Fujioka's own testimony that he spoke to coworkers without removing his headset.

Finally, the Company responds to the Union's assertion that Fujioka did not intentionally drop calls and that he had no motivation for doing so. The Company asserts there is evidence which calls this claim into question. What the Company is referring to is this: in the course of representing Stevanovic, Fujioka learned that MG&E had the technology to detect dropped calls that lasted less than seven seconds. For comparison purposes, the Company notes that Fujioka's dropped calls routinely lasted more than seven seconds. The Company wonders aloud whether this was merely a coincidence. In any event, even if the arbitrator accepts Fujioka's assertion that he did not intentionally drop calls, it does not matter because Fujioka was, at a minimum, grossly negligent in the performance of his job duties. It notes that arbitrators routinely uphold terminations where employees have been grossly negligent, especially when such negligence poses a risk of harm to others. As for Fujioka's motivation for dropping calls, the Company avers that the most obvious possible motivation is that he did not want to work hard. According to the Company, this is the same motivation that prompts employees to secretly sleep on the job, spend hours on the internet, etc. The Company characterizes it as "the most common motivation of them all."

In sum, the Company believes it had just cause to terminate Fujioka for his dropped calls. The Company urges the arbitrator not to reinstate Fujioka, as doing so would subject MG&E and its customers to risks that they should not have to bear.

DISCUSSION

At issue herein is whether the Company had just cause to terminate the grievant's employment. I answer that question in the affirmative, meaning that I find the Company had just cause to terminate the grievant. My rationale follows.

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 Company 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. Some apply the seven-step DAUGHERTY standard. (That's the standard the Company asks me to apply here). Others apply a standard which consists of a two-prong analysis: the first element is whether the employer proved the employee's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was commensurate with the offense given all the circumstances. Of these two approaches, I'm going to apply the latter here (i.e. the two-prong analysis). I only apply the DAUGHERTY standard if the parties agree to it, and that did not happen 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. Attention is now turned to making that call.

...

Before I review Fujioka's actions though, I'm going to comment on the following matters for the purpose of context.

First, when employees are discharged, one common reason is chronic job performance problems. That was not the situation here. The grievant had no history of job performance problems, and in particular, no known history of dropping calls. Another common reason that employees are discharged is because they have an extensive disciplinary history with an employer. That was not the case here either. The grievant had a clean work record (meaning no prior discipline) until the events here unfolded.

Second, what started the ball rolling, so to speak, was Fujioka's August 26, 2008 phone call with the Madison School District employee. Supervisor Davis listened to that call in real time and felt that Fujioka's response to the caller was inappropriate and constituted poor customer service. Management subsequently decided to investigate Fujioka's handling of recent calls to determine if his poor customer service in the August 26 call was an isolated incident, or part of a pattern of conduct. Supervisor Fischer then started listening to some of Fujioka's calls for the express purpose of finding instances of poor customer service. While he found some, he found something else that he considered more troublesome than poor customer service. What he found were about a dozen instances over several days where Fujioka dropped incoming customer calls. At that point, the focus of the Company's investigation shifted from finding poor customer service calls to finding dropped calls. Rhetorically speaking, was the shift in focus permissible? Yes it was. Employers can monitor employee's work activities if they want. In doing that, employers sometimes put employees under the proverbial microscope. Oftentimes, that occurs after an employee gives the employer reasons to scrutinize their conduct. That happened here, of course, when Fujioka was rude to the Madison School District employee, left that caller on hold for six minutes after they asked to speak to a supervisor, and then hung up on the caller. That conduct certainly gave the Company an objective factual basis to probe further into Fujioka's calls looking for questionable behavior on his part. That's exactly what it did.

Having reviewed that background, the next part of the discussion deals with what the Company discovered during their investigation and chose to rely on.

What the Company discovered during their investigation was that Fujioka had dropped a high number of calls. In these calls, he did not service the customer. Instead, he did the following. In some calls, he failed to greet the customer at all. In other words, he ignored the customer and did not say anything. In these calls, he was completely silent. In other calls, Fujioka greeted the customer, but he delayed his greeting. When this happened, the length of

his delay varied. Sometimes the delay was less than seven seconds while othertimes it was more than 20 seconds. In this time period before Fujioka gave his greeting, there was complete silence on the line. As a result, the customer had no idea that a CSR was actually on the line. Following the silence or the delayed greeting, these phone calls ended. Sometimes it was Fujioka who hung up while sometimes it was the customer who hung up. From the Company's perspective, it did not matter who hung up. When the caller hung up though, they no doubt did so because they had become frustrated that a CSR had not answered their call.

I've decided to begin my analysis of that conduct with the following preliminary comments.

First, in some disciplinary cases, the employee denies the factual allegation made against them by the employer. Here, though, that did not happen. What happened here is that Fujioka admitted at the hearing that he dropped "some" calls. He did not specify a number though. The discharge letter puts the number of dropped calls at 58. At the hearing, the Union poked at that number (i.e. 58), and got it reduced by four. That happened when Supervisor Davis acknowledged that four of the calls on Jt. Ex. 3 were not dropped calls. That puts the number down to 54 calls (from 58). In the great scheme of things though, that reduction from 58 to 54 doesn't really matter because 54 is still a high number. As will be noted in more detail later, that number was substantially higher than his co-workers generated. That leaves the question of whether the remaining 54 calls contained on Jt. Ex. 3 were dropped calls. I find that they were. The calls on Jt. Ex. 3 are similar to the calls that were reviewed with Fujioka on August 28, 2008. Those were dropped calls. So were the balance of the calls contained on Jt. Ex. 3.

Second, in some disciplinary cases, there's a dispute between the parties about whether the conduct in question constitutes misconduct or acceptable workplace conduct. In this case, that's not an issue because the Union acknowledged that CSRs are not supposed to drop customer calls. The Union further acknowledged that dropped calls pose a threat to public safety. That's particularly the case where, as here, two of the calls which Fujioka dropped came in on the gas leak emergency line. Building on the foregoing then, it is apparent that dropped calls constitute workplace misconduct.

Third, the question of whether Fujioka intentionally dropped these calls (as the Company alleges), or inadvertently dropped these calls (as the Union alleges), will be addressed later.

Fujioka and the Union offered several defenses for the dropped calls in question. As they see it, these defenses should exonerate him.

One defense is that there was something mechanically wrong with the Company's phone line and/or equipment (specifically Fujioka's call start indicator, his phone, or his headset). After Fujioka raised this defense at the August 28, 2008 meeting, the Company tested his call start indicator, his phone and his headset, and found that that equipment was

functioning properly. That testing ruled out the possibility that something was wrong with Fujioka's equipment. As a result, there's nothing mechanical that explains all of Fujioka's dropped calls.

A related defense is that Fujioka somehow inadvertently hung up on customers. I find that theory unpersuasive because in order to terminate a call, a CSR who uses the "manual-in" method – like Fujioka did – would have to press a button on his/her phone in order to end the call. Thus, it takes an overt, intentional act to terminate a call. It doesn't happen on its own.

Another related defense is that calls may have come into Fujioka's phone while he was on break and his phone received the calls. According to the Union, this would explain why there was silence on his end of the line (i.e. he wasn't there). The following background about the Company's phone system is relevant to this defense. When a CSR leaves their workstation, they are supposed to enter an AUX code that explains the reason for their leaving their workstation. There are different AUX codes for different reasons why a CSR would leave his or her workstation. These codes allow the Company to track the reasons why CSRs may not be available to receive incoming calls. At the hearing, Fujioka testified that there were times when he forgot to enter the proper AUX code. Regardless of whether Fujioka entered the proper AUX code or not, his phone still could not take an incoming call without him pressing a button indicating he was there and ready for another call. Thus, the theory that Fujioka failed to enter the proper AUX code when he was away from his work station does not explain his dropped calls.

Another defense is that the dropped calls could have occurred as a result of Fujioka removing his headset during a call in order to talk with another CSR. The undersigned can't tell from the record if a CSR's removal of their headset cuts off a caller. However, even if it would, that still does not explain Fujioka's dropped calls because he testified that he typically spoke to his co-workers without removing his headset. Since he typically kept his headset on, this theory does not explain the dropped calls either.

Fujioka's final defense is that when he encountered silence on the line, he thought it was acceptable to hang up without repeating his greeting. If that's what he thought, he was just plain wrong. The record establishes that the Company's standard CSR training procedure is that if a CSR encounters silence on the line, they are supposed to repeat their greeting a second time. If there is still no response from the customer, and the CSR still encounters silence on the line, then the CSR is supposed to say they will be ending the call, at which point they can end the call (i.e. hang up). Fujioka repeatedly jumped the gun, so to speak, because when he encountered silence on the line, he did not repeat his greeting, but inexplicably hung up. He should not have done so.

Having reviewed all the explanations and defenses offered by both the grievant and the Union, I find that none of them can account for the dropped calls.

The focus now turns to whether Fujioka dropped the calls intentionally or inadvertently. I find, just as the Company did, that Fujioka dropped the calls intentionally. Here's why. The Company's investigation of Fujioka's 19 fellow CSRs showed that more than half of them had no dropped calls at all. The remaining CSRs that did have dropped calls dropped, on average, a call or two. That's it. If Fujioka's numbers had been close to his co-workers, then he'd still be a CSR. However, his numbers weren't even close to his co-workers. Not by a long shot. As previously noted, he dropped at least 54 calls. Overall, his dropped call ratio was 2.5% while his co-workers averaged an overall dropped call ratio of .36%. That's a substantial difference.

Turning now to the matter of motive, it's a mystery to me why Fujioka dropped so many calls. Only Fujioka knows why it happened and he didn't say why it happened at the hearing. In any event, given the substantial difference in dropped calls between Fujioka and his fellow CSRs, I find that Fujioka's dropped calls cannot be attributed to his being distracted, careless or inattentive. Instead, I find – as the Company did – that Fujioka dropped a large number of calls deliberately and intentionally.

It is therefore held that the grievant did what he was accused of doing – namely, dropping a large number of calls. That was indefensible misconduct which warranted discipline.

...

The second part of the just cause analysis being used here requires that the Company establish that the penalty imposed for the employee's misconduct was appropriate under all the relevant facts and circumstances. In reviewing the appropriateness of discipline under this standard, arbitrators oftentimes consider the notions of due process, progressive discipline and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. discharge). These matters will be addressed in the order just listed.

The Union's only due process claim dealt with the Employer's investigation. In their opening statement, the Union alleged that the Company's investigation was flawed. The Union did not address the matter further in their brief. I find that the Company's investigation, wherein Davis and Fischer listened to over 7,400 phone calls, was sufficiently thorough. It therefore passes arbitral muster.

The focus now turns to progressive discipline. It is noted at the outset that the normal progressive disciplinary sequence in non-cardinal offense situations is for employees to receive written warning(s) and suspension(s) prior to discharge. That did not happen here. In this case, the Employer skipped those steps and proceeded directly to discharge. The Union argues that discharge was too severe under the circumstances and it asks the arbitrator to reduce the level of discipline. The following reasons preclude me from doing that here. First, it is noted that nothing in the parties' collective bargaining agreement requires that a lesser form of

discipline had to be issued in this particular case. Some labor agreements specify a particular sequence that must be followed by the employer when it imposes discipline (for example, a written warning must be imposed before a suspension). This collective bargaining agreement does not contain such language. Second, the Company averred at the hearing that it considers the offense of dropping a large number of calls to be so serious that the discipline it imposes in all such situations is discharge, even if the employee has not been previously disciplined. There is nothing in the collective bargaining agreement that precludes the Employer from taking that position. Third, Fujioka's misconduct is indicative of what could happen if he continued to work for the Company. The Company felt that were that to happen, it would have to have a supervisor monitor all of Fujioka's calls to ensure he didn't drop them. The Company considers that prospect unappealing and the undersigned is hard pressed to disagree.

Finally, with regard to the third matter referenced above (disparate treatment), it is noted at the outset that the principle of equal treatment dictates that an employer must enforce rules and assess discipline in a consistent manner; employees who engage in the same type of misconduct are to be treated the same unless a reasonable basis exists for variations in the assessment of punishment. 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. In this case the Union did not establish that anyone else dropped as many calls as Fujioka did, and was not fired for it. In fact, only record evidence shows that the Company has been consistent and evenhanded in its treatment of CSRs who have been caught dropping calls. Chamberlin and Stevanovic were caught dropping a high number of calls and they were treated in the same manner – they were terminated without recourse to progressive discipline. Fujioka was treated the same way. As a result, the Union did not prove that Fujioka was treated unfairly. I therefore find that Fujioka was not subjected to disparate treatment in terms of the punishment imposed.

Based on all the circumstances then, it is held that the severity of the discipline imposed here (i.e. discharge) was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was commensurate with the grievant's proven misconduct. The Company therefore had just cause to discharge him.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That Madison Gas and Electric Company had just cause for terminating Chris Fujioka. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 28th day of October, 2009.

Raleigh Jones /s/

Raleigh Jones, Arbitrator