

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
ST. FRANCIS IN THE PARK HEALTH AND REHABILITATION CENTER

and

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
WISCONSIN COUNCIL 40, LOCAL 1330, AFL-CIO**

Case 29
No. 69497
A-6395

Appearances:

Mr. Joseph J. Roby, Jr., Johnson, Killen & Seiler, Attorneys At Law, 230 West Superior Street, Suite 800, Duluth, Minnesota 55802, appeared on behalf of the employer.

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, appeared on behalf of the Union.

ARBITRATION AWARD

On January 19, 2010 the Wisconsin Employment Relations Commission received a request from St. Francis in the Park Health and Rehabilitation Center and the American Federation of State, County and Municipal Employees, Wisconsin Council 40, AFL-CIO to have the Commission appoint William C. Houlihan, a member of the Commission's staff, to hear and decide a dispute pending between the parties. A hearing was conducted on May 5, 2010 in Superior, Wisconsin. No formal record was taken. Post-hearing briefs were filed and exchanged by June 14, 2010.

This Award addresses the termination of M.W.

BACKGROUND AND FACTS

St. Francis in the Park Health and Rehabilitation Center operates a nursing home in Superior, Wisconsin. It employs Registered and Licensed Practical Nurses, Certified Nursing Assistants, Dietary, Laundry, Housekeeping, Maintenance, and Clerical employees. The grievant, M.W. was a Dietary Aide. Many of St. Francis employees, including the grievant, are represented by Local 1330, AFSCME. The Union and St. Francis are signatories to a collective bargaining agreement, the relevant portions of which are set forth below.

Royalton Manor is an apartment building that stands immediately next to the St. Francis Home. The first floor of Royalton Manor has a kitchen which prepares food for the residents of St. Francis Home. The two buildings are connected by a tunnel. While some St. Francis employees live in Royalton Manor, the residential quarters of Royalton Manor are not a part of the St. Francis operation.

M.W., the grievant, was hired, as a Dietary Aide, by the Royalton Manor Dietary Department, on May 28, 1985, following his graduation from High School. The grievant continued to work for Royalton Manor, essentially preparing and delivering food to the residents of St. Francis Home. In 2002 the food service operation of Royalton Manor was acquired by St. Francis. Prior to the acquisition, the Royalton Manor employees worked as unrepresented, non union employees. Following the acquisition, the Royalton Manor employees were brought into the Union that represents the St. Francis Home employees. The grievant was hired by St. Francis on August 5, 2002. He has been covered by the provisions of the collective bargaining agreement since about that same time. The grievant's job did not change as a result of St. Francis' acquisition of the Royalton Manor food preparation operation. The residential facilities of Royalton Manor continue to operate independently of St. Francis.

St. Francis employees are provided an unpaid lunch break, during which they are permitted to leave the premises. Employees are also provided with paid 15 minute breaks. The employer has a work rule, set forth below, which requires prior supervisory approval to leave the premises. Under the work rule, employees who leave the premises during paid time without prior approval are subject to termination.

The events giving rise to this termination occurred during the week of September 7-11, 2009. During that week, the grievant had contractors working on a duplex he owns, which is located a short distance from the St. Francis Home. JoAnne Wicklund is a Cook employed by St. Francis Home, and is also a union officer who resides at Royalton Manor. Linda Burke is the Dietary Manager who supervises the dietary employees of St. Francis, including the grievant and Wicklund. It was the testimony of Wicklund, produced under subpoena, that she was outside the building smoking when approached by Burke who asked if she had seen the grievant. She replied that she didn't know where he was, but that his car was gone from the parking lot. Wicklund indicated that she swiped the grievant's magnetic time card to confirm that he was not punched out.

Burke testified that Wicklund reported to her that the grievant had left the building. Burke testified that she was concerned over the information because employees are to stay on premises without permission to leave, and she had not provided any such permission. Burke went to payroll to see if the grievant had punched out, and determined that he had not. It was her testimony that the next day, Friday, September 13 she monitored the grievant's actions to see if he was leaving the building. ¹ On Friday, September 13 Burke positioned herself to

¹ Note: time records indicate that the grievant did not work on Thursday, September 12. I believe that Burke had

watch the grievant come and go. It was her testimony that the grievant left the building at 12:05 proceeded to his car and drove away from the facility. She testified that he returned at 12:32. She confronted him and he acknowledged that he had left. She indicated that he needed permission to leave during paid time and he indicated that he knew that and that he had workmen working on his duplex and went over to check on how they were doing. He apologized, and said that it would never happen again. Following the exchange, he returned to work.

Burke interviewed employees as to the facts and she reviewed the grievant's record. Following her investigation Burke recommended termination. A meeting was convened on September 14 where the grievant was terminated for leaving the premises during paid time without permission. The grievant worked three full days between the September 11 incident and the September 14 meeting. A step one grievance meeting was held on September 23, 2009 and the termination was confirmed by letter dated September 29, 2009. A grievance was filed on October 8, 2009 and subsequently denied.

The Step I denial provided the following:

September 29, 2009

Dear M.

On 9/23/2009 the Step I grievance meeting was held to discuss your termination from the facility. You were terminated on 9/14/2009 for leaving the premises during paid work hours on 9/11/2009. When your supervisor told you that she saw you get into your car and leave the facility, you informed her that you knew it was inappropriate for you to leave on a paid break. You apologized and said that it wouldn't happen again. Leaving the premises during paid-time is a violation of the facilities' time card regulation policy.

The employee handbook clearly states that any employee "leaving the premises during paid work hours" will be terminated. Article 19, Section 2, #7 states that "falsification of own or another's time card" is grounds for termination.

Unfortunately, the Step I grievance meeting did not provide any information that would allow me to deviate from the previous decision. Your dismissal stands.

Respectfully,

Linda Burke /s/
Linda Burke
Dietary Manager

The matter was appealed, and denied by the following letter:

October 29, 2009

Dear M.

On 10/20/2009, the Step II grievance meeting was held to discuss your termination from the Facility. You were terminated on 9/14/2009 because your supervisor caught you leaving the premise while on the clock on 9/11/2009. During our meeting, I provided you with the opportunity to present your side of the story. You admitted to me that you knew that leaving the premises during company time was wrong, and that you knew that you were not supposed to do it. However, you left the premises.

Your actions violated Article 19, section 2 of the current bargaining agreement, which states "falsification of own or another's time card" is grounds for termination. In addition, the employee handbook states that any employee who leaves the premises on company time, without permission of their supervisor, will be terminated. On 8/29/2002 you acknowledged that you received the company handbook and that you, "understand the guidelines contained in it. . .I fully understand the guidelines governing my employment with the Facility and I agree that I will conform to these guidelines."

I appreciate the time that you and Ms. Androsky spent discussing this issue with me. However, I am in agreement with the discharge issued by Ms. Burke. The dismissal stands.

Respectfully,

Jim Laine /s/
Jim Laine
Administrator

The grievant has received discipline prior to the termination. He received a warning on May 20, 2004 for having 3 unexcused absences over a 12 month period. On August 16, 2004 the grievant received a second warning for having an unexcused absence. On November 28, 2004 he was given a third warning and 1 day suspension for another unexcused absence.

The Union offered uncontradicted testimony that a former Environmental Services (housekeeping) employee, Diane Sexton, worked in St. Francis Home and lived in Royalton Manor. For a period of time a number of co-workers would take their paid break and accompany Ms. Sexton to her apartment for a smoking break. When supervision found out the employees were smoking in the apartment, the employees were told not to go. The practice stopped. This occurred in approximately late 2005.

Both Wicklund and Burke testified that Wicklund, who worked in the food service operation (Royalton Manor) went to her apartment in Royalton Manor 3-4 times per week during her paid break. When the grievant was terminated, Burke advised Wicklund that she should not take her paid breaks in her apartment, and Wicklund stopped. Burke testified that she was aware, prior to the grievant's termination, that Wicklund took breaks in her apartment. She indicated that she was unaware that the environmental services employees did the same.

ISSUE

The employer believes the issue to be:

Did St. Francis have just cause to discharge Mr. W..? If not, what should be the remedy?

The Union regards the issue to be:

Did the Employer have Just Cause to terminate the Grievant? And if not: the appropriate remedy is for the Employer to reinstate the Grievant to his position and to make him whole for any and all lost wages and benefits.

The parties agree on the underlying question to be addressed. They disagree only on the remedy, if any, to be awarded. The basis of the remedy is addressed in the Award.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 9 - SENIORITY

Section 1. Unit-wide seniority is defined as the length of continuous, uninterrupted service by the employee with the Employer and shall not be diminished by temporary lay-off due to lack of work or shortage of funds, authorized Leaves of Absence or any other contingency beyond the control of either party to this Agreement. . .

. . .

Section 4. An employee's seniority shall deem to have been terminated by:

b). Termination for just cause by the Employer.

. . .

ARTICLE 18 MISCELLANEOUS

Section 1. Break and Lunch Periods

- a). Each full-time employee shall receive two (2) breaks during his/her shift. Each break shall be fifteen (15) minutes in duration.

...

Section 4. All rights, practices and benefits enjoyed by the employees but not specifically referred to herein, shall continue in full force during the term of this Agreement. All items not addressed by this contract will be guided by the current employee handbook/facility policies.

...

ARTICLE 19 DISCIPLINE

Section 1. The parties recognize the authority of the Employer to discipline, discharge or take other appropriate disciplinary action against employees for just cause.

Section 2. The following shall be the sequence of disciplinary action:

- a). Oral reprimand
- b). Written reprimand
- c). Written reprimand with a one (1) day unpaid suspension as scheduled by the Employer
- d). Written reprimand with a two (2) day unpaid suspension as scheduled by the Employer
- e). Discharge

The above sequence of disciplinary action shall not apply in cases where the infraction is considered just cause for immediate suspension or discharge.

The following lists some of the common infractions and their disciplinary actions. In general, any conduct, which exhibits disregard for the goals of St. Francis in the Park Health and Rehabilitation Center or the health and well being of its residents, may be grounds for immediate dismissal. **This list does not contain all actions that may call for disciplinary measures, but it is intended to be a guide, to help you avoid activities that are opposed to the goals of St. Francis Home.**

Infractions for which you may be dismissed immediately include, but are not limited to:

1. Failure to obey legitimate directions from a person in authority.
2. Failure to fulfill the requirements and responsibilities of your job as required by your job description.
- ...
7. Falsification of own or another's time card.
8. Falsification of records or information.
9. Theft or misappropriation of home, employee or resident property or any form of dishonesty. Unauthorized possession or use of St. Francis in the Park Health and Rehabilitation Center's, resident's or another employee's property.

RELEVANT PROVISIONS OF THE EMPLOYEE HANDBOOK

PAYROLL PRACTICES

...

TIME CARD REGULATIONS

It is important that accurate records of hours worked are kept so that paychecks will be correct. Non-exempt (hourly) employees are required to punch/swipe in and out on the time clock. Please observe the following rules: **Exempt, salaried employees are required to submit bi-weekly time records showing actual hours worked.**

Kronos time cards will be issued to new employees once they have successfully passed their orientation period.

All employees are responsible to maintain an accurate record of time worked. This includes, but is not limited to:

- a.) Employees may only punch/swipe in their own time cards
- b.) Employees may not punch/swipe in or out more than five minutes before or after the hours of their assigned shift.
- c.) Employees must immediately notify their Department Head or designated RN Supervisor for the Department Head/Supervisor's

manual completion of the time card when the employee fails to punch/swipe their time card, i.e. correct time written in and initialed by Department Head/R.N. Supervisor to verify correctness.

Non-exempt employees (those paid hourly) are required to use the home's time clock to reflect the start and end of the shift, as well as, any unpaid time. Unpaid may include, but is not limited to, lunch and leaving company premises with the prior approval of the Department Head/RN Supervisor.

Exempt employees, (salaried) are required to punch/swipe the time clock once a day to verify presence.

All time cards must be completed and turned into the Payroll Clerk by the Monday following the Sunday payroll ending date.

Any employee found punching/swiping in and/or out for another employee, altering or falsifying a time card, or leaving the premises during paid work hours without the prior permission of the Department Head/R.N. Supervisor will be terminated.

...

PROBLEM SOLVING, DISCIPLINE AND TERMINATIONS

...

DISCIPLINARY ACTION

The following lists some of the common infractions and their disciplinary actions. In general, any conduct that exhibits disregard for the goals of St. Francis Home in the Park or the health and well-being of its residents may be grounds for immediate dismissal. **This list does not contain, of course, all actions that may call for disciplinary measures, but it is intended to be a guide, helping you to avoid activities that are opposed to the goals of St. Francis Home in the Park.**

Infractions for which you may be dismissed immediately include, but are not limited to:

1. Failure to obey legitimate directions from a person in authority.
2. Failure to fulfill the requirements and responsibilities of your job as required by your job description.

...

7. Falsification of own or another's time card.
8. Falsification of records or information.
9. Theft or misappropriation of home, employee or resident property or any form of dishonesty. Unauthorized possession or use of St. Francis Home in the Park's, resident's or another employee's property.

...

TERMINATIONS

As previously indicated, your employment is at will. Therefore you can be terminated at the discretion of St. Francis Home in the Park without cause. In such event you will be given notice consistent with the notices we request of you. Your job may also be terminated for occurrences listed below.

POSITIONS OF THE PARTIES

It is the view of the employer that the collective bargaining agreement allows it to skip progressive discipline under certain circumstances. It is the view of the employer that the grievant began work for St. Francis in the summer of 2002 when St. Francis acquired the food production facility. It is the view of the employer that the Employee Handbook plays a central role in this proceeding. The collective bargaining agreement authorizes the employer to establish reasonable policies and procedures. It further provides that "All items not addressed by this contract will be guided by current employee handbook/facility policies." As such, the employer contends that the Handbook operates with the same force and effect as does the labor agreement.

This applies to the dispute at hand in that the Handbook provides: "Any employee found punching/swiping in and/or out for another employee, altering or falsifying a time card, or leaving the premises during paid work hours without the prior permission of the Department Head/R.N. Supervisor will be terminated."

It is the view of the employer that the grievant committed two distinct infractions, either one of which warranted discharge. He is alleged to have falsified his time card by not punching out when he left the premises, and he left the premises without permission. The conduct is not in dispute. The only question presented is whether this Arbitrator should mitigate the penalty imposed by the employer. It is the view of the employer that the plain language of the contract and the employee handbook authorize the penalty imposed by St. Francis.

It is the view of the employer that the employee left the facility without punching out. Thus, the timecard was falsified. He did so without permission, in violation of the Handbook. The Handbook is clear as to the consequences of such an act. It is the view of the employer that the undersigned lacks the authority to reverse the decision of the employer. Arbitral authority is cited for the above analysis.

The employer contends that the Unions' mitigation arguments should fail. It is the view of the employer that such claims invite me to ignore the words of the contract, and I am not free to do so. The grievant knew he was not supposed to leave the premises, and did so. He did not believe the penalty for doing so would be so severe. In fact, the employer points out, the Handbook specifies the penalty.

The employer contends the "everybody does it" defense must fail because there is no evidence that anyone else did what the grievant did; i.e. leave the property by car. The employer called a number of bargaining unit witnesses who testified that it was well known that employees are not free to leave the premises during paid break time. The employer argues that the comparison to employees who left the work site to smoke in the Royalton Manor fails for the reasons set forth below:

- Going to an apartment in the same building where the smokers work is not "leaving the premises" in the same sense that Mr. W. left the premises. At least the smokers could be located and summoned back to work if the need arose.
- At the time, no one in management knew that the smokers were taking their breaks in the apartment. There was no evidence that management condoned or tolerated what the smokers were doing.
- Later, or at about the time of Mr. W.'s discharge, when management found out what the smokers were doing, management gave orders for it to stop. None of the smokers was disciplined because no specific employee(s) had been caught doing it. All management knew was that some employees had been taking breaks in the apartment.
- There was no evidence upon which a reasonable employee could conclude, based on what the smokers were doing, that anyone could go anywhere and do anything while on the clock without punching out and without supervisory permission. If it is otherwise, St. Francis has lost control of the workforce.
- Mr. W.'s own timekeeping estimate shows that he used at least five minutes more than allowed under the labor contract for breaks. Ms. Burke's more reliable timekeeping shows that he used 12 minutes more than allowed. There is no evidence that the smokers extended their breaks beyond the labor contract limit.

- Mr. W.'s use of a vehicle while punched in exposed St. Francis to heightened risks of worker's compensation and tort claims in the event Mr. W. injured himself or someone else in a vehicle accident. The risks flow from the fact that Mr. W. would be on the clock when the accident occurs, and from the fact that (according to Mr. W.) St. Francis condoned and tolerated the use of break time in any manner and in any place. *See e.g. A. Larson, The Law of Workmen's Compensation* §15.54 (1994) ("close questions continue to arise on the compensability of injuries occurring off the premises during rest periods or coffee breaks. . .when the employer pays the employee during the rest period or coffee break this. . .argues for coverage").

The situation with the smokers is so different that it affords no basis on which to mitigate Mr. W.'s penalty.

The employer disputes the Union's claim that the grievant should be treated as a long term employee. It is the view of the employer that the grievant became an employee of St. Francis in 2002.

It is the view of the Union that the grievant is a 24 year employee of the employer, who is entitled to far greater consideration than he was given. The Union contends that the act of leaving the facility's premises during paid breaks was a common practice. It is the view of the Union that the employer has singled out the grievant.

The Union argues that the grievant never believed leaving could lead to such a drastic result. He watched others do it for years. The Union points out that the grievant never attempted to conceal his actions, and when confronted by his supervisor immediately admitted he had left, apologized, and assured the supervisor that it would never happen again.

The Union contends that the punishment was disproportional to the offense and did not follow progressive discipline. The Union points out that in the second investigatory meeting the grievant advised management that many employees leave the premises, and the response from Ms. Burke was that she was going to warn those employees that such behavior would result in termination. It is the view of the Union that such a warning should have been provided the grievant. The Union points to the progressive discipline provision of Article 19, Section 2 and contends that the employer should have followed progressive discipline.

The Union argues that the grievant is a long term employee, with a good disciplinary record. In summary, the union asks that the grievance be granted, that the grievant be reinstated and made whole for any and all lost wages and benefits.

DISCUSSION

The employer points to the provisions of the collective bargaining agreement and notes that there is authority to invoke discharge without progressive discipline under certain circumstances. There are certain infractions for which an employee may be dismissed, including "Falsification of own or another's timecard". This is one of the basis cited in the discharge letter. I agree with the contention that certain infractions, including "Falsification of own or another's time card" can lead to termination without resort to the sequence of progressive discipline. However, I also believe that discipline remains subject to the just cause standard set forth in Section 1 of Article 19. If the falsification constitutes egregious behavior, the employer is not required to follow the disciplinary sequence.

Here, the grievant did not manipulate his time card in order to create a timecard record that he worked more hours. He did nothing with his time card. He was scheduled to be paid for the hours reflected on the time card. He left the premises during his paid break. He took more than the time allotted for the break. Those are his transgressions. He should be held accountable for those acts. I do not believe it suffices to label the actions Falsification of time card for the purpose of moving it from one category of discipline to another.

The second basis for the termination was leaving the premises during paid time. The employer points to the Handbook, and its provision that "Any employee found...leaving the premises during paid work hours without the prior permission of the Department Head/R.N. supervisor will be terminated." The employer argues that the Handbook provides notice that leaving during work hours is prohibited and punishable by termination. The employer called a series of bargaining unit witnesses, each of whom testified that it was common knowledge among employees that they were not permitted to leave during paid work hours. The grievant acknowledged that he knew that he was not supposed to leave during his paid break. In his defense, the grievant testified, credibly, that for a variety of reasons, he did not regard the conduct as dischargeable behavior.

The employer points to Article 18, Section 4 of the collective bargaining agreement which provides "All items not addressed by this contract will be guided by current employee handbook/facility policies." It is the view of the employer that the Handbook's proscription on leaving the premises during paid time operates in a contractually unaddressed area and so has the force and effect of the contract itself. I disagree. Many of the provisions of the Handbook address matters addressed by the collective bargaining agreement. For example, the Handbook provides that employees are employees at will. That stands in stark contrast to the just cause provision contained in the collective bargaining agreement. The Handbook's prohibition on leaving the premises, subject to termination exists in the context of the at will status of employees regulated by the Handbook.

The collective bargaining agreement provides for a just cause standard against which to measure discharge. This matter is a discharge. The fact that the contract does not specifically address leaving the premises while in pay status does not mean that he just cause standard is

not operative. If that were the case, the employer would be free to repeal the just cause standard by expanding the scope of dischargeable offenses in the Handbook. The collective bargaining agreement subjects discharge to the just cause standard. It does not carve out exceptions. This is not a matter that is “not addressed by this contract.”

It is the employer’s view that the conduct of the grievant, leaving without permission and taking more than 15 minutes on his break, constitute dischargeable offenses. The employer contends that the efforts of the Union to argue mitigation should fail. The grievant testified that while he realized that he should not leave the premises during paid time, he never dreamed it could result in his termination. The employer sets forth a number of reasons why that belief was unwarranted. I think the grievant was on notice that he was not to leave during work. He admitted that he knew. However, his belief that no significant discipline would be forthcoming was a product of his experience at work. He personally observed the housekeeping staff leave the building to go smoke in the Royalton Manor apartments. No discipline was forthcoming. When supervision discovered the practice, the employees were warned. The grievant was aware that Wicklund regularly took her breaks in her apartment. It is true that her apartment is in the same building as is her kitchen worksite. It is also true that the apartment is not a part of the St. Francis facility. The grievant’s belief that leaving the facility during paid breaks was somewhat tolerated has its basis in fact.

The employer contends that the grievant’s conduct in leaving the facility in his car is different in kind than is the conduct of other employees who went to Royalton Manor. It is the employers view that when employees went to Royalton Manor they did not leave the premises and could be located and summoned back to work if necessary. Those employees who left the St. Francis Home went to a different building. They did leave the premises. Wicklund simply went upstairs. I agree that the employees could be summoned back to work, if the employer knew where they were. The record indicates that supervision did not know the Housekeeping employees were leaving the facility. If that was the case, the employer would not know how to summon the workers back. The record relative to whether or not the employer knew where Wicklund was taking her breaks is less clear.

What is clear is that when management discovered that the Housekeeping employees were taking their breaks off premises, the employees were warned. When the grievant’s discipline arose, Burke, the supervisor who initiated the grievant’s discipline, warned Wicklund to stop taking her breaks in her apartment.

What is most troubling about this matter is why the Housekeepers and Wicklund were issued warnings and the grievant was terminated. I regard it as wildly disparate treatment. The employer has a rule that employees on paid time are to remain on premises. Ostensibly the rule exists so that the employer has control of the employees during those hours it is paying their wages. If an emergency arises or their services are otherwise needed during a paid break, the employer has prompt access to the employee. When the Housekeepers went to a different building to smoke, the employer was unaware of where they were. When Wicklund went upstairs to smoke the employer may or may not have known where she was. In either

event the employees were not on premises. They could not promptly be called upon. The break is a 15 minute break. At a minimum, time would be needed for employees to react to a call back to work, if the supervisor knew where to call.

I think that driving away is different from going to an apartment in Royalton Manor. However, both involve leaving the premises.

When Burke was advised that the grievant was leaving the premises, she set up a stake out to determine if that was true. When she personally observed the grievant leave, she confronted him and initiated discipline. The employer argues that other employees were not disciplined because they were not caught. However, when management found out that housekeepers were leaving to smoke there was no effort to observe their behavior and invoke discipline. Rather, they were warned. The same is true for Wicklund. No one was caught because management determined to issue warnings rather than treat those employees as it did the grievant.

The grievant took more than his allotted break. There is no indication in the record that others did the same. The contract is clear on the amount of break time. I believe this to be a disciplinable offense. It may be that the employer is exposed to greater liability or risk due to accident or injury. That is beyond the scope of this award. I believe the employer is free to require employees to stay on premises during paid time. I believe the employer is free to enforce such a requirement. Concern over liability or tort risk may be factors that the employer considers in insisting that employees stay on premises. I do not believe the employer is free to administer discipline in so disparate a fashion.

The parties disagree over how much deference is due the grievant for his length of service. The employer points to the date St. Francis took over the food service operation in 2002. Technically, the employer is right that the grievant did not become an employee of the employer until 2002. His contractual rights, which sit at the core of this dispute, did not arise until he became an employee of St. Francis. The Union would look back to his original date of hire in 1985. The Union points to a seniority list which lists the grievant's date of hire as 1985. The grievant took his job as he graduated from high school. This has been his only job as a working adult. The food service operation was sold or transferred. When that occurred he became employed by a new employer. His job did not change. His work site did not change. None of the changes that occurred were caused by him. The traditional consideration provided senior employees is based upon the notion of loyalty and service to the employer. He has evidenced those traits. He did not switch jobs. The employer was changed on him.

I believe the discipline was too severe for the offense. I also believe that the grievant was treated far more severely than were other employees who engaged in very similar behavior. The grievant immediately apologized for his behavior and promised that it would never happen again. The employer had previously warned other employees not to leave the premises, and there is no explanation in the record why such a warning would not have been effective in this instance. I believe the same to be true of the extra time taken on the break.

AWARD

The grievance is sustained.

REMEDY

The employer is directed to reinstate the grievant and to make him whole for lost wages and benefits. The employer is free to offset back pay with Unemployment Compensation and interim earnings, if any. The employer is free to issue a written warning relating to leaving the premises and to taking more than 15 minutes for a break.

Dated at Madison, Wisconsin, this 28th day of June, 2010.

William C. Houlihan /s/

William C. Houlihan, Arbitrator