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OPINION AND AWARD

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between	)	
	)	
ABM Onsite Services West, Employer	)	
and	)	[Grievant] Discharge
Stationary Engineers Local 39, Union	)	AAA Case No. 01-15-0004-3964

APPEARANCES:

For the Employer: Robert G. Hulteng, Attorney
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For the Union: Antonio Ruiz, Attorney
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PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was selected as the arbitrator by mutual agreement of the parties from a list provided by the American Arbitration Association. The matter was heard on December 9, 2015 in San Francisco, California.

The parties stipulated that the matter was properly before the arbitrator and that all steps of the grievance procedure had been met or waived. The parties also stipulated that the arbitrator retains jurisdiction for the purpose of the implementation of the remedy in the event that the arbitrator grants in whole or in part the remedy sought by the union.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. A motion was made by the Union to sequester witnesses. That motion was granted, and therefore, with the exception of the Grievant and the Company representative, witnesses were excluded from the hearing room while other witnesses testified.

Both parties were ably represented by their respective representatives. At the conclusion of the hearing, the parties chose to conclude their presentations by oral argument. Closing arguments were made at the conclusion of the evidentiary portion of the hearing and the matter was submitted for decision.

ISSUE

The parties reached a stipulated statement of the issue in this matter. The issue is as follows:

Was [Grievant] discharged for just cause? If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

Collective Bargaining Agreement – ABM Engineering Services for the Hilton San Francisco Airport Hotel and the International Union of Operating Engineers, Stationary Engineers, Local No. 39 – August 1, 2012 – July 31, 2015

Article I

Section 3 – Hiring and Discharge

(d) The Employer shall not discharge or suspend any employee without just cause.

Section 4 - Duties of Engineers

(h) All electrical work and repairs

Article V

Section 5 – Management Rights

> The Union recognizes that the management of the company and direction of its working forces including the right to fix hours of employment, hire, suspend, or discharge for proper cause; or to transfer, together with the right to relieve employees from duty because of lack of work or for legitimate reasons and to maintain the discipline and efficiency of employees, is vested exclusively in the Company.
>
> The Employer and the Union agree that the Employer has the right to make such rules and regulations not in conflict with this Agreement, as it may from time to time deem best of the purpose of maintaining order, safety, and/or effective and efficient operation of the Hotel, and/or the individual departments or outlets thereof.

FACTS

Background Information on the Employer and the Grievant: ABM Onsite Services provides maintenance engineering services to over 200 hotels and other institutions in the San Francisco Bay Area. At most of these properties, the Employer has a collective bargaining relationship with the Union. In the instant case, the Employer and Union have a CBA that covers the single hotel involved in this dispute.

The Grievant has served as a maintenance engineer at the Airport Hilton at SFO since 1983. He has been an employee of the Employer since 2010.[1] For the predecessor company, the Grievant did two stints as acting chief engineer. At the time of his discharge, the Grievant worked full time on the swing shift, with a starting time of 3:30 in the afternoon.

Also included in the bargaining unit covered by this CBA are the chief engineers. In the case of the Airport Hilton, there was a single chief engineer [Employee A]. [Employee A] played a part in the events leading to the instant proceeding, but did not testify at hearing. [Employee A] acted as the Grievant's lead and was authorized to propose disciplinary actions for the Grievant.

[Employee A]'s supervisor was [Employee B], district manager. [Employee B] was responsible for a geographical region including the San Francisco peninsula and parts of the East Bay. [Employee B]

[1] Apparently, ABM took over this account in 2010, and existing employees of the predecessor company were retained. The details of this were not part of the record of this hearing. Hence, the Union argues that the Grievant had over 30 years of service at the time of his termination, while the Employer asserts that he had five years. This opinion and award will not reach a conclusion about that aspect of the dispute.

reviewed, approved, and signed off on discipline in this matter and participated in an investigatory interview. He testified at the hearing.

[Employee C] was the branch manager, heading up the San Francisco region for ABM Onsite Services. He was [Employee B]'s supervisor and was a former chief engineer for the company. He approved and signed off on the suspension notice, participated in the investigatory interview and testified at the arbitration hearing.

The company has a policy of requiring headquarters approval for employee terminations. Witnesses testified to the review and approval of the Grievant's termination by human resources director [Employee D] and the company president. Neither of those individuals testified at hearing.

The Employer's Policy, Procedures and Practices on Electrical Repairs: The Employer has detailed policies in place regarding the performance of electrical work by its employees. Witnesses testified that additional emphasis was placed on these procedures after an ABM employee was electrocuted to death working in a southern California car dealership. The date of this incident was not clear from the record.

Several documents were introduced into the record regarding electrical safety. One, titled "Electrical Safety Program: Implementation of NFPA 70E for Arc Flash and Shock Protection" is dated September 9, 2009 and totals 58 pages. In a section titled "Lockout-Tagout Program" the document reads as follows:

> This program is used to ensure that the machine or equipment is stopped, isolated from all potentially hazardous energy sources and locked out before employees may perform any servicing or maintenance where the unexpected energization or start-up of the machine or equipment or release of stored energy could cause injury.
>
> Failure to comply with these procedures will be subject to standard discipline procedures up to and including termination.

The document has many places where it reads "*Enter designated building / site supervisor here."* This indicates that the document is a template and intended to be personalized for each worksite. There was no evidence that the document was personalized for the Hilton Airport SFO. There was also no evidence introduced indicating that the Grievant had ever seen the document or received a copy of it.

Another document introduced was a January 7, 2014 letter from [Employee E], President Onsite Services. It was sent to branch managers and "leadership teams." The letter reads, in relevant part,

> **ABM's Safety Absolutes**: All authorized work must comply with ABM's safety policy, procedures and training requirements. Under no circumstances is work permitted by employees who have not received adequate training and/or authorization on the following:
>
> - Live electrical circuits work or equipment, including maintenance or repair
> - Lockout / Tagout work

There was no evidence offered at hearing that the Grievant had ever seen this letter or been informed of its contents.

A third document was introduced entitled "No Work on Live Electrical Equipment Policy." That document reads, in relevant part:

> It is ABM Onsite Services' policy to use Lockout and Tag Out (LOTO) when performing service or repair work on any energized equipment and only to perform such work once the equipment is fully de-energized…
>
> Any employee who performs service or repair work on equipment that is not fully de-energized and locked out / tagged out will be subject to immediate disciplinary action up to and including termination.

The document includes a box at the bottom where employees can sign and date, indicating that they received and understood the policy. No documentary evidence was in the record that the Grievant received or signed for this form. Hearsay evidence was introduced that the Grievant had received the form, but the undersigned considers it non-probative.

Another undated document was introduced into the record entitled "Working with Energized Systems Frequently Asked Questions and Answers." The document includes the following:

> Here are a list of activities a site-qualified ABM employee can perform:
>
> 9. Install and/or replace light switches, dimmers, fixtures and receptacles. The system must be deenergized at the circuit breaker and confirmed as de-energized.

No evidence was introduced that the Grievant had seen this document or knew of its contents.

Finally, a document was introduced dated 1-17-2014. It was titled "All Engineering Staff: Lock Out / Tag Out" and was apparently created by chief engineer [Employee A]. It is on plain paper, with no letterhead, and reads:

> There is no reason not to lock out or tag out any electrical before working on any of the systems at this property, please ensure you are following the ABM LOTO procedures and utilizing the personal protective equipment and safety devices to keep yourself.
>
> If you use a lock from the lockout station you need to fill in the log located under the station, also the tag at the piece of equipment, breaker, etc…should be filled out as well.
>
> Please sign full name and initial indicating you have read and understand this posting, should you need further clarification please see me.

The Grievant's signature and initials are shown at the bottom of this document, along with that of [Employee A] and two other individuals. The Grievant, under cross-examination, confirmed that was his signature. He denied, however, that he ever saw or signed that document.

[Employee B] recalled that he conducted a safety meeting at the Airport Hilton in early 2013. He recalled that he told the staff, including the Grievant, not to perform any work on live electrical wires. The Grievant did recall such a meeting, but denied that live electrical work was discussed. However, the Grievant did recall his co-worker "[Employee F]" responding to [Employee B] that "this cannot be done in this building" and "you turn off one breaker…[unintelligible]"

The Grievant had Received Prior Warnings about His Work Performance: The record contains three prior corrective actions administered to the Grievant that were cited in this case. The first was a May 17, 2014 Verbal Warning concerning substandard electrical work. The document of the verbal warning cites the failure of the Grievant to adequately troubleshoot "the Reflections heat pump."

Under the section "corrective action expected" in the 5/7/14 write-up there is the following:

> It is expected that the Journeyman duties as outlined in the Local 39 / Hilton SFO collective bargaining agreement are completed in a timely and efficient manner. You are required to enroll in a Electrical Course as offered by Local 39 (or comparable equivalent) in the upcoming Fall 2014 season and complete the course.

The next Notice is dated 3/19/15. It is not clear from the document whether the Notice is a "Verbal Warning," "Documented Discussion," or a "Formal / Final Warning." The subject of the Notice is inadequate painting work

The final prior element in evidence is a Verbal Warning dated 3/27/15. It concerns an incident on 3/26/15. The Grievant is charged with not taking adequate measures to protect carpet and furniture when he was repairing a wall.

The Grievant did not attend an electrical course as he was required to do in the May 2014 Notice.

The Grievant's Work Assignment of April 1, 2015: When the Grievant reported for his afternoon shift on Wednesday April 1, 2015, he read an entry in the shift logbook. This is a book that is maintained in the engineering office at the Airport Hilton used for communication between engineers on different shifts. A photograph of the logbook entry was part of the record, but is not entirely legible. It appears to read as follows:

> [Grievant], please work on getting cord from reach in box across from ice machines off the floor and install outlet near box coming down from ceiling. Thank you, [Employee A]

The Grievant testified that this assigned work was in the kitchen. He stated that he did not turn the power off at the circuit breaker before doing this work. There was the following exchange on direct examination at the arbitration hearing:

> Q: The wires were hot, right?
>
> A: Yes.
>
> Q: Did you understand that you were required to lockout / tagout prior to working on those wires?
>
> A: No
>
> Q: Can you share with us what was your understanding about when you were required to lockout / tagout?
>
> A: Now I know that I am required to prior to working on electrical wiring.
>
> Q: Can you share with us what was your understanding on April 1.
>
> A: Get the job done. Put in an electrical outlet, get the job done. I knew where the breaker was and I got the job done. I got the outlet finished.
>
> Q: Why didn't you lock out and tag out before doing that work?
>
> A: I've worked on that building and unless it was a heat pump, AC unit, with a lot more current --- this was 110, which I knew can also kill you --- everything was already there. The reason I didn't do it was all it was was two connections and that was it. There were people working in the kitchen, they were remodeling at the time and so to get that done and finish my calls I put the outlet in and went on and finished the rest of my work.
>
> Q: Is it your understanding that locking out tagging out would have been disruptive to the other work?
>
> A: They were putting in new heat lamps, warming counters in the kitchen, they had a system running – on and off, on and off – and it was actually connected to what they

> were doing. So that they had their lighting with the power on. It just went around in a complete circle. Since they already had the system, I just went and did the same thing. I just put in one outlet.
>
> Q: Are you saying that there was other electrical work being done and it was being done hot?
>
> A: Yes. They had an outside company, remodeling the kitchen.

On cross-examination, the Grievant changed his recollection and stated that he did know at the time that he was supposed to lock out before doing live electrical work.

[Employee B] testified that he saw in a logbook that the Grievant had signed out for a lock on April 1, 2015. The Grievant stated that he did not sign out for a lock. The Grievant also claimed that there were no locks available in the lock box on April 1. However, he earlier testified that the locks were available when he returned from his medical leave in March of 2015. No logbook was introduced into evidence showing that the Grievant had signed out for a lock.

The District Manager Decides to Suspend the Grievant: When chief engineer [Employee A] arrived for his shift on April 2, he noted what he considered to be inadequate work by the Grievant on the electrical repair. [Employee A] contacted [Employee C], and the two collaborated in drafting a "Notice / Record of Corrective Action" concerning the Grievant's work on 4/1/15. That Notice, in its final form, reads in part:

> On 4/1/15, you were given a work order from the Chief Engineer, [Employee A], to install an outlet near the reach box coming down from the ceiling. Upon inspection of this work, we found the following items that were not completed in an effective and efficient professional manner, unsafe, and not compliant with electrical code:
>
> 1. Conduit coming out of ceiling was fastened directly to the reach in box which is portable (on wheels).
> 2. Conduit coming from ceiling was not properly secured and instead supported with black (zip ties) attached to other (conduit for support).
> 3. Fitting on LB not attached to conduit.
> 4. Cover not on LB leaving wires exposed due to wire nut used
> 5. Cord for reach in box wrapped around 2 gang outlet box
>
> The Following Corrective Action is Expected:
>
> You are suspended for 3 days without pay.

> [Grievant] you are expected to be able to perform basic electrical work effectively and efficiently and in a professional manner. Being a journeyman level engineer you are expected to be able to perform all work covered in the CBA.

The Notice also references a History of Corrective Action. That history will be addressed later in this opinion and award. The Notice is signed by [Employee B] and [Employee C].

Neither [Employee A] nor [Employee B] interviewed the Grievant, or attempted to do so, prior to writing up the suspension notice.

[Employee B] also contacted branch manager [Employee C] about the incident and proposed suspension. [Employee C] met [Employee B] and [Employee A] at the Airport Hilton on 4/3/15. He observed the work that the Grievant had performed[2]. He testified that he conducted a "root cause analysis" and began to think that perhaps the Grievant had performed the work while the power was live.

[Employee C] also testified that he observed a logbook where the Grievant had signed out for a lock on 4/1/15. However, that logbook entry was not part of the record of the arbitration hearing.

The Suspension Meeting on April 3, 2015 Becomes an Investigatory Interview: On the afternoon of April 3, [Employee A], [Employee B] and [Employee C] gathered in the chief engineer's office at the Airport Hilton. When the Grievant arrived for his swing shift, they called him into the office. [Employee C] testified that the Grievant "was asked" if he wanted a union representative for the meeting. [Employee B] testified that someone, "I believe [Employee C]" asked the Grievant if he wanted representation. At hearing, the Grievant was not asked whether or not he requested union representation.

Opening the meeting, [Employee C] handed the Grievant a copy of the suspension notice. He informed the Grievant that he was being suspended for work he had done in installing the electrical outlet. [Employee B] recalls that he told the Grievant that the work was "subpar, dangerous the way it was installed. It could put people in harm's way the way he had fastened the electrical outlet to the movable reach-in cooler in the kitchen."

The Grievant recalls that [Employee C] told him that he "could have electrocuted himself."

[2] [Employee B] testified that he himself never saw the substandard work product because it had already been corrected when he arrived at the property. This apparent discrepancy between his testimony and that of [Employee C] was not explained.

For his part, [Employee C] recalls that he let [Employee B] do the talking, and observed that the Grievant "obviously was distraught."

[Employee C] then began questioning the Grievant about the work. Initially, [Employee C] recalls, the Grievant claimed that he locked out the electrical. But upon further questioning, he admitted that he had not shut down the power and that he had done the work on live electrical wires. [Employee C] testified as follows:

> I said to him that it was a very very dangerous thing he had done, that he could have placed himself in harm's way or possibly death, or possibly others. This was all stainless steel, that refrigerator box. Stainless steel tables. That whole table could have become energized and the workers in the kitchen could have been potentially harmed as well.

Both [Employee C] and [Employee B] recalled that they ended the meeting by informing the Grievant that was being suspended "pending further investigation." For his part, the Grievant does not recall that that he was told about the "pending further investigation" aspect of it.

The Grievant is Suspended and Then Terminated: At the conclusion of the 4/3/15 meeting in the chief engineer's office, the Grievant went immediately to begin serving his three-day suspension. He returned to duty on Tuesday April 7.

In the meantime, the Employer took steps to terminate the Grievant. [Employee B] testified that he needed to get approval from human resources and the company president for a termination. [Employee B] filled out a Termination Request Form. Under "Termination Reason," he cited "Didn't meet min std."

The termination form contains a question as follows: "explain details / reason for separation; identify what policy(ies) were violated, if any; attach documentation. Specify the final circumstance leading to termination." [Employee B] wrote "Poor Job Performance (see attached)."

Attached to the termination report were a copy of the 4/3/15 suspension notice, three photographs of the work performed by the Grievant on 4/1/15, a photograph of the logbook instruction from chief engineer [Employee A], a copy of the 3/19/15 painting write-up, and an email from [Employee A] to [Employee C] dated 4/7/15. That email recites the history of incidents for which the Grievant was verbally warned. It cites the need for having fully competent maintenance engineers. Then it describes the 4/1/15 incident as follows:

> [The Grievant] was asked to install a electrical box on 4-1-2015 for a existing reach in unit that had the electrical cord running across the kitchen floor, upon checking his work it was clear he did not get any electrical training as was asked of him a year prior.
>
> When [The Grievant] was called in for corrective action he was asked if he had locked and tagged out the circuit he had tied into, at which time he stated no, he knows he should have but did not.

There was no evidence or testimony in regard to what duties the Grievant performed between his return to duty on April 7 and his termination. On April 17, 2015, the Grievant was called into the chief engineer's office and terminated. "They did a roll call of my painting, dust on the floor, and the electrical outlet" the Grievant recalls.

The Union Files a Grievance On the Termination: On April 24, 2015, the Union filed a grievance concerning the termination of the Grievant, stating that he was terminated without just cause. The Union cited Article I Section 3 (d) of the CBA and any and all appropriate sections of the agreement.

It is that grievance that is now before the arbitrator.

EMPLOYER'S POSITION

The Employer contends that the prior discipline is not contested.

The Employer argues that the work performed by the Grievant on 4/1/15 was "grossly substandard" and forms the basis for the Grievant's termination.

The Employer does not accept the characterization of the Union that the Grievant was subjected to double jeopardy. The company representatives did not know going into the suspension meeting of 4/3/15 that the Grievant had failed to lock out. The suspension had already been decided upon and was for his shoddy work, not for the much more serious infraction of performing work on live electrical. The termination, based on facts learned at the suspension meeting, was for that egregious infraction. And, moreover, the company representatives notified the Grievant that he was being suspended pending further investigation.

The Employer also refutes the argument raised by the Union that the company failed to conduct a proper investigation. There was no need to interview the Grievant about the original suspension charge – the shoddy work spoke for itself. As for the termination, the Grievant's admission during the suspension meeting that he had failed to follow key safety procedures was investigation enough.

The Employer is confident that there was just cause for the termination. However, in the event that the arbitrator finds that some remedy is in order, the Employer asks the arbitrator to consider the lack of credibility of the Grievant in his testimony. His shifting explanations, discrepancies, and denials of facts in evidence should disqualify the Grievant from any remedy in this matter.

The Employer asks the arbitrator to uphold the termination and deny the grievance.

UNION'S POSITION

The Union asks the arbitrator to take into account the Grievant's long years of service as a maintenance engineer at the Hilton SFO. The Union also contends that the prior discipline cited was only verbal discussions.

The Union contends that the Employer failed to conduct a proper investigation. There was no attempt to interview the Grievant prior to the decision to impose a three-day suspension.

The Union also argues that the Grievant was subjected to double jeopardy under the classic definitions of that term. He was disciplined twice for the same core events.

There is insufficient evidence that the Grievant was made aware of the importance of the lockout / tagout policies, the Union asserts. Nor is it clear that the policies were properly implemented in the Grievant's workplace.

Moreover, the company's policy states that the employee is to be disciplined "up to and including termination." Under these circumstances, for this senior employee, termination is not the appropriate penalty.

The Union requests that the Grievant be reinstated and made whole, and that the grievance be sustained.

DISCUSSION

Just Cause Exists for the Termination of the Grievant: The Grievant committed an unsafe act on April 1, 2015. It was a most serious unsafe act. He relocated an electrical outlet in the kitchen at the Hilton Airport SFO without shutting off the power. In his own words, doing so "can kill you." Moreover,

according to unchallenged testimony from management witnesses, he placed others who were working in the kitchen in harm's way due to his unsafe work.

His transgression was not merely failure to lock out and tag out the circuit breaker box after disconnecting the circuit he was working on, so that it could not be inadvertently turned back on while he was working on the outlet. That alone would have been a violation of company policy. His decision to work on "hot wires" was an even more serious breach.

Given the Grievant's classification as a maintenance engineer and not a journeyman electrician, it seems to the undersigned that he should have been even more cautious doing work that may have been outside his area of specialization. Fortunately, no injuries resulted from the Grievant's work on that date.

Despite some inconsistencies in the record, the preponderance of the evidence is that the Grievant was forewarned of the company's policy about working around live electrical power and the consequences of not following that policy. While there is no evidence that the Grievant ever saw or received a copy of the headquarters policy documents, his signature is on a document prepared by his chief engineer. That document spells out the lockout / tagout policy. His denial that his signature indicates that he signed for that document lacks credibility.

Moreover, [Employee B] testified that he spoke to the Hilton SFO engineering staff about working on live electrical at a meeting in 2013. The Grievant's account of this meeting – denying that the subject was raised but also recalling a co-worker's response on that subject – also lacks credibility.

Counsel for the Union accurately points out that the policy does not automatically require termination of the offending employee. Therefore, the arbitrator is duty-bound to examine possible mitigating – and exacerbating – factors.

Long service is often viewed by arbitrators as a mitigating factor in just cause determinations. The parties disagree about how to measure the Grievant's longevity. However, the nature of the Grievant's infraction places it squarely in the category of cases where length of service is not determinative.

At hearing, the Grievant was provided an opportunity to explain his April 1 work. He justified his working on live electricity with, in essence, four defenses. The first is that he "just wanted to get the job done." In other words, it would have taken more time to walk over to the circuit breaker and shut down the power before commencing the work.

Second, the job was small – "just two connections" – so did not warrant the safety precautions. Third – shutting down the power would have disrupted the work of the outside contractors who were installing heat lamps in the kitchen at the same time.

And, fourth, he implied that the fact that the outside contractors were performing the work with the power on was a justification for him doing the same.

These four factors – when looked at as a whole – constitute a post facto rationalization of the unsafe work by the Grievant. They do not provide mitigation, but merely enforce the appropriateness of the discharge penalty. Nowhere in this explanation did the undersigned arbitrator hear any awareness of the seriousness of the breach (except for a fleeting mention of the possibility of being killed by a 110 line) nor a modicum of remorse for the Grievant's decisions on April 1, 2015.

The Grievant's testimony was laced with inconsistencies, a further indication that even now he is not willing to own up to his part in the events that resulted in his discharge. His shifting explanation about the lock box is an example of that. He testified that he had not signed out for a lock on April 1. When faced with testimony from management witnesses who claimed to have seen his signature in a log book signing out a lock, the Grievant denied that locks were even available on April 1. However, earlier the Grievant had testified that he noticed the lock box and locks in March 2015 when he returned from leave.

While the act of working on live electrical wires constitutes sufficient cause for the discharge penalty, this is reinforced by the prior warning of May 2014 concerning substandard electrical work. At that time, he was instructed to attend an electrician course. The undersigned considers it an exacerbating factor that the Grievant did not follow up on this directive.

Finally, the items detailed in the April 3, 2015 suspension notice regarding the Grievant's sloppy and unsafe electrical work reinforce the discharge penalty.

In short, there was just cause for the discipline of the Grievant for his work on April 1, 2015. Due to the seriousness of the infraction and all the exacerbating factors outlined above, discharge is the appropriate penalty.

Serious and Consequential Errors of Due Process Were Committed by the Employer: In the process of discharging the Grievant, the Employer committed several procedural errors that deprived the Grievant of due process. Those errors were not merely technical, but had consequences for the Grievant, the Union, and ultimately the parties' collective bargaining relationship.

The errors fall under three headings: failure to conduct a proper investigation, double jeopardy, and failure to adequately specify the reason for the discharge.

1) The Investigation: The company failed to interview the Grievant prior to reaching the decision to issue a three-day suspension to the Grievant for his April 1 work. Testimony from all witnesses was consistent in this regard.

Once the Employer did decide to interview the Grievant, they did so in a manner that violated his Weingarten rights. Management witnesses asserted that, during the suspension meeting, they offered him the right to have a union representative. But their recollections of this were vague: [Employee C], using the passive voice, testified that the Grievant "was asked" about whether he wanted a Union representative present. [Employee B] testified that someone, "I believe [Employee C]" asked that question.

Under the U.S. Supreme Court's Weingarten ruling, the Employer is not required to ask the employee if he / she wants a union representative present. But the Employer is required to provide one if asked. However, the ruling applies to investigatory interviews, not meetings to simply notify an employee of discipline already decided upon.

What makes this case troublesome in this regard is that the Grievant was called in to a meeting that's purported, and initial, purpose was to hand him his three-day suspension notice. It morphed into an investigatory interview when management representatives (for the first time) began questioning the Grievant about his work on April 1. The Grievant was, understandably, "distraught" about having received the suspension notice, as [Employee C] testified. During that questioning, he then admitted that he had not locked out or tagged out on April 1.

The Grievant's Weingarten rights were violated because the purpose of the meeting was obfuscated by management's actions. The Grievant should have been informed of the purpose of the meeting from outset, and given an opportunity to decide if he wanted to answer questions with his Union representative present.

The questioning of the Grievant on April 3 was also incomplete. Once the Grievant admitted to not following the policy, no follow up questions were asked. Had the company asked "how" and "why" questions at that meeting, then the explanations that surfaced at the arbitration hearing could have emerged eight months earlier. The investigation was inadequate.

2) Double jeopardy: Counsel for the Employer argued that the three-day suspension and subsequent termination for the same incident did not constitute double jeopardy because the decision to suspend had already been made prior to the Employer learning of the more serious infraction of not following the lockout / tagout policy. What is critical here is that the suspension itself had not been served when the company learned more about the incident.

Whatever the Grievant's transgressions may have been, he did not withhold information during the investigation. The questions simply were not asked. It was the inadequacy of the company's original investigation that put it in the position of learning more at the suspension notice meeting.

From a due process standpoint, the company's decision to proceed with the suspension after the April 3 meeting was a consequential breach. There were other options available – such as suspending the Grievant pending investigation – that were not utilized. Employer's counsel asserted that the 3-day suspension was a suspension pending investigation, but it was not. It was not, because the Grievant was allowed to return to duty after the initially-assessed penalty of three days and resume his normal duties. It also was not a suspension pending investigation because no additional investigation was done during that time period leading up to the Grievant's termination on April 17. The delay was caused by getting the required approvals through company channels, not from further investigation.

Disciplining employees only once for the same core events is a bedrock of just cause analysis. In the instant case, the Grievant was disciplined twice for his April 1 work.

3) <u>The Reason for Discharge was not Specified</u>: When the Grievant was terminated on April 17, he was provided with nothing resembling a notice of discharge. Rather, he was provided with an internal company request for termination. The reason cited was that his job performance was poor and it did not meet minimum standards. Attached to the form was an email from the chief engineer (not a manager, but a bargaining unit employee) referring to the Grievant's failure to follow the lockout tagout procedure.

What makes this breach more significant in the instant case is that the only notice of charges contained in the termination packet was the three-day suspension notice. That notice omits the critical charge about the Grievant's failure to follow the policy about working on live electric wiring.

There was little evidence that there was even a verbal delivery of the message that the termination was due to the live electrical breach. Management witnesses did not address the April 17 meeting, and the Grievant recalls a "roll call" of his inadequate work performance.

Most significantly, there was no evidence in the record that the Union was provided with any additional information about the reason for the termination, other than the information in the internal request. Such lack of specificity can easily result in misunderstandings and potentially unnecessary (and costly) grievance and arbitration proceedings.

In sum, the employer committed a consequential due process error by failing to specify the reasons for the discharge of the Grievant.

<u>The Severity of the Due Process Errors Require a Financial Remedy:</u> The undersigned considered reinstating the Grievant because of the serious due process errors committed by the Employer.

However, this would not be the correct decision. The Grievant's testimony, and the arbitration record in general, point clearly in the direction of discharge as the appropriate outcome consistent with the just cause standard.

At the arbitration hearing, with the full and capable representation of the Union, the Grievant had his opportunity to view and hear the evidence assembled against him. The reasons for the termination were out in the open and available for inspection. The Grievant had the unfettered chance to give his side of the story.

It is therefore the view of the undersigned that the due process errors were remedied by the arbitration process itself. This leaves, however, the nearly eight months between his termination and the arbitration hearing. During that time, the due process errors – inadequate investigation, double jeopardy, and failure to specify the reasons for discharge – stood unremedied.

These errors deprived the Grievant of his due process rights. Moreover, and most significantly for the collective bargaining relationship between the parties, the due process errors potentially deprived the Union of the necessary information to fully and fairly carry out its statutory duty of fair representation.

For these reasons, the facts of this case warrant a financial remedy for the Grievant. The ordered remedy is to compensate the Grievant for his lost pay and benefits for the period of time between his termination on April 17, 2015 and the date of the arbitration hearing on December 9, 2015.

AWARD

1. The discipline of the Grievant was for just cause.
2. The termination of the Grievant is upheld.
3. The Grievant shall be made whole from the date of his termination April 17, 2015 until the date of the arbitration hearing, December 9, 2015. The parties shall meet and confer over the calculation of back pay, utilizing standard metrics.
4. The arbitrator retains jurisdiction over the implementation of the remedy.

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Paul D. Roose, Arbitrator

Date: January 12, 2016