Arbitration Decisions

Labor Arbitration Decision, Entergy Nuclear Operations, 2022 BL 87902, 2022 BNA LA 16

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LABOR ARBITRATION PROCEEDING

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of:

ENTERGY NUCLEAR OPERATIONS, INC.,

Employer,

and

UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA INTERNATIONAL UNION and its LOCAL 29,

Union

FMCS Case No. 200110-02885

Arbitrator Lee Hornberger

DECISION AND AWARD

January 24, 2022

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BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Discharge - Safety - Work rules ►118.659 ►118.25 ►118.305 ►94.554 [Show Topic Path]
Arbitrator Lee Hornberger held that Entergy Nuclear Operations properly discharged a security officer on fire tour for violating multiple safety rules when, without authorization, he opened the door to a C-40 panel control room with an arc flash warning sign, thereby jeopardizing his safety and that of electrical workers performing hot work inside the room. He rejected the grievant's hearing testimony that a supervisor authorized him by phone to open the door to see if electrical workers were inside and ask when he could enter to confirm there were no fires in the room, finding that the grievant made no such claim in his typed incident report, during fact finding, at his termination meeting, or during the grievance process, and that this claim was inconsistent with the credible testimony of two supervisors. Having found multiple rule violations, Hornberger determined that under the contract and prior awards involving the same parties he had no authority to alter the discipline assessed by the employer.

APPEARANCES

For the Employer.

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For the Union.

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INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Entergy Nuclear Operations, Inc. (Employer) and the United Government Security Officers of America International Union and its Local 29 (Union). The Union contends that the Employer violated the CBA when it discharged Grievant. The Employer maintains that it did not violate the CBA when it discharged Grievant.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on July 22, and November 30, 2021, in South Haven, Michigan. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The dispute was deemed submitted on January 12, 2022, the date the last post-hearing submission was received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients.

ISSUES

The Employer frames the issue as follows.

Whether Grievant violated an Employer rule, such that the Employer terminated his employment in accordance with the parties' CBA.

The Union frames the issue as follows.

Did Employer supervisor Joe Pillars authorize Grievant to open the door to the C-40 panel room to inquire how long it would be until Grievant could access the room to perform his required, mission-critical, time-sensitive duty of making sure there were no fires inside that room?

I frame the issue as follows.

Was there just cause for the Employer's termination of Grievant?

RELEVANT CONTRACTUAL LANGUAGE

Article I.

We are committed to the safety of Nuclear Power Generation.

Section 4.01

The Company retains, exclusively and without limitation, all of the rights and functions of Management, except to the extent that they are expressly modified or limited by the written, specific provisions of this Agreement. Without limiting the comprehensiveness of the prior sentences, these rights of management include, among others, the right to: establish or continue policies, practices and procedures for the conduct of business and from time to time change or abolish such policies, practices or procedures; . . . determine methods of work and establish standards of performance; determine the qualifications, efficiency and ability of employees; . . . discharge or otherwise discipline for[*2] just cause; . . . make and enforce rules for the maintenance of discipline, and from time to time abolish,[*2] alter or amend such rules. . . .

Section 13.4

The award of such arbitrator shall be in writing and shall be final and binding upon the Employer, the Union, and the employee or employees involved. The arbitrator may consider and decide only the particular grievance presented to the arbitrator in the written stipulation of the Employer

and the Union, and the arbitrator's decision shall be based solely upon an interpretation of the provisions of this Agreement. In the event that an arbitrator shall determine that an employee has violated an Employer rule, regulation or policy for which said employee was charged, the arbitrator shall not have the right to reduce, modify, or in any way alter the penalty assessed by the Employer. ...

Section 13.9

After completion of the probationary period, no employee shall be disciplined, suspended and/or terminated without just cause.

Section 13.10

[T]wo years after the date of issuance, documentation of any written or lower level discipline will be removed from the employee's personnel file ... and cannot be used by the Company against the employee thereafter. Documentation of suspension and/or final warnings will be removed from the employee's personnel file ... four (4) years after the date of issuance and cannot be used by the Company against the employee thereafter ... the Company, when assessing discipline, will not consider an employee's final warning if it is more than four years old, and such prior final warning will not be used or cited by either party in any arbitration proceeding.

FACTUAL OUTLINE

Précis

This case involves what did Grievant do when he was by the door to Room C-40 on May 21, 2019. The Employer says Grievant violated safety rules at that time and place and there was just cause for the Employer's discharge of him. The Union says that Grievant did not violate any rules and there was no just cause for his discharge.

List of participants

Grievant was hired by the Employer as a **Security Officer (SO)** on April 11, 2010. The Employer terminated Grievant's employment effective June 11, 2019. His work hours were three days on, two days off. He wore gun belts, rifles, pistols, and radios. There were different rotations. He did fire tour posts which lasted two hours. Security Shift Supervisor Shayne Allen was Grievant's supervisor. Grievant came to the SO position soon after his honorable discharge from the U.S. Marine Corps, in which he had served for thirteen years. While a member of the U.S. Marines, he served as a supply administrator, a position that involved accounting for, issuing and coordinating the pickup and delivery of millions of dollars of equipment while developing and maintaining the budgets of six companies of Marines.

Security Shift Supervisor (SSS) Shayne Allen has been with the Employer for twelve years. He was Grievant's supervisor. He conducts fact findings of first line[*3] supervisors. Allen reported to Security Operations Supervisor Dennis Perry.

SO Nicole Briggs did a fire tour of C-40 at 10:37 a.m., May 21, 2019.

Security[*3] Operations Supervisor (SOS) William Collins has been with the Employer for nineteen years.

Electrical Repairperson (ER) Ryan McCarty worked for the Employer from January 2018 to December 2020. He now works elsewhere.

Security Operations Supervisor Dennis Perry has been with the Employer for twenty years. He supervises Security Shift Supervisors. He oversees discipline cases.

Security Shift Supervisor (SSS) Joe Pillars has been with the Employer for twenty years. He supervises the employees on the shift.

Security Superintendent (SS) Clayton Smith oversees the operations in the Security Department.

Introduction

The Employer operates the Palisades Nuclear Power Plant (Plant) in Covert, Michigan. The Plant was previously owned and operated by Consumers Energy and purchased by the Employer on April 11, 2007. At the time of acquisition, security at the plant was handled by the Wackenhut Corporation. On April 11, 2010, the Employer insourced security operations.

The Union represents the Security Officers at the Plant. There are 150 employees in the Security Department. There are 550 to 600 employees total.

According to Grievant, Grievant could call on a telephone or he could use a radio. Grievant did the post by himself. There is a fire tour. He did the fire tour alone. The tour is done on foot. The tour takes 20 to 25 minutes. On prior occasions, there has been signage concerning

danger sites work in progress. This would occur in at least one out of three tours. Grievant was told to call the phone number on the sign to see what should be done. Sometimes there is a prior briefing or telling the employees there are people standing there. He worked all the way up until when he was discharged.

According to Security Superintendent Smith, an arc flash is a release of thermo electricity. It could cause an electrical explosion. If there is an arc flash potential, the electrical employees will set up boundaries. Security employees are not trained to work in an arc flash boundary. Security employees carry a rifle, ammo, phone, and other equipment.

October 2017 five-day suspension and final warning

The October 19, 2017, suspension document concerning Grievant stated, in part,

> On 9-27-17, at approximately 1403 hours, a VA door alarm was received on Door 35. [Grievant] was dispatched by the CAS operator to respond to the door alarm. [Grievant] did not respond to the radio transmission. The CAS operator once again tried to contact [Grievant] via the radio and [Grievant] responded by asking if anyone had been contacted to look at the door to see why it was alarming so much. The CAS operator then informed [Grievant] that he needed him to respond to the door alarm and that he could call him after he responded to the door alarm. There**[*4]** was no response from [Grievant]. The CAS operator tried to contact officer [Grievant] via the radio 3 additional times. There was no response from [Grievant]. The CAS operator then attempted to call [Grievant] via phone but his phone**[*4]** rang first and it was [Grievant]. [Grievant] inquired if anyone was going to check on the door. The CAS operator informed him that he needed to respond to the door immediately and [Grievant] stated that he had already checked the door and it was good. The CAS operator coached [Grievant] that he was not responding to the door according to procedure and directed him to respond to the door correctly. In the process of responding to the door, [Grievant] communicated every more he made in a loud, sarcastic and unprofessional manner. When the door response was completed, [Grievant] was directed to call the CAS operator. He did not call as directed. The CAS operator received another alarm on Door 35 at approximately 1436. [Grievant] was dispatched to the door alarm and responded 10-4. The CAS operator attempted to contact [Grievant] 2 or more times via radio to verify that he was responding to Door 35. He did not respond.
>
> Approximately 1-2 minutes later, [Grievant] called via radio to report he was at Door 35. After the door alarm process was completed, the CAS operator called [Grievant] at his post and attempted to coach him again on proper door response. [Grievant] became argumentative and refused to listen to the CAS operators coaching. At that time, the CAS operator made the determination that [Grievant] should be removed from shift and decertified. The CAS operator contacted the Lead Security Shift Supervisor and the Secondary Alarm Station (SAS) operators so that [Grievant] could be relieved and disarmed. The CAS operator then contacted the Security Superintendent to inform him of the situation. This entire incident was witnessed from CAS by a NRC Security Inspector. During the daily inspection debrief and during the inspection exit meeting the NRC Inspector stated that this was the most unprofessional radio communication he had ever heard.
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> ...
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> [Grievant]'s actions in this incident are in violation of Security Implementing Procedure SIP-11 "Alarm Response" section 6.1.1, Security Implementing Procedure SIP-10 "Communication Systems" section 9.4.11a. and EN-NS-221 "Security Department Standards and Expectations" Section 4[10](h), (j) and (n). Section 5.3[8].
>
> ...
>
> This 5 day suspension is a final warning. We are not in a position to tolerate this again. Any future incidents will not be tolerated and will be subject for discipline including termination. Rx. 4.

10:37 a.m., May 21, 2019, SO Nicole Briggs

SO Briggs' May 21, 2019, Security Incident Report states,

> On 5/21/2019 at 10:37 I was on my way to the C-40 panel**[*5]** to do my fire tour, as I approached the door there was two individuals outside the C-40 panel room starting to hang a sign on the door. I informed them that I had to do a fire tour on the C-40

panel and got permission to enter the room. Once I[*5] was finished checking the room I informed the individuals that there would be another Officer at 11:37, 12:37 and so on, the individuals informed me that they would be done with the project by then.

When I went and got my fire tours signed off I informed SAS (Pillars) that they were working in the C-40 panel room and that I told the individuals that we would be doing fire tours on that room so it might be a problem later on in the day. Rx. 17.

According to Electrical Repairperson McCarty, that morning there had been a prior incident. There had been signs on the door. SO Briggs opened the door. Briggs stepped in. McCarty was just getting PP and tools out of bags. There had been no prior crossing of the boundary. A couple of times a month there is a "coming up to door." Those coming up to the door make a lot of noise to get the electricians' attention. The electricians in the room would then go to the door. Electrical work is scheduled ahead of time. According to McCarty, in the morning, the three of them had gone in the room together. This was prior to the Briggs situation. Briggs was allowed to enter the room and do her fire tour. "Hold on a minute we will let her do her tour." Supervisor David Klotz said to allow Briggs to do her job.

According to Security Superintendent Smith, McCarty wrote the Condition Report. The Condition Report said two unnamed other people had entered C-40. One of the two was SO Briggs. SO Briggs disputed this. Briggs was not disciplined. Briggs said she had permission from one of the electricians to open the door. It was determined that Briggs entered C-40 "with permission."

According to SOS Perry, Perry asked the electrical workers and supervisors about that earlier Briggs situation. Briggs' Incident Report said she received permission. There was an email stream. Perry was satisfied with the email chain. Briggs did not cross the boundary without permission. Perry wrote an ethics report because of the two SOs without permission allegation.

May 21, 2019

Grievant did a fire tour on May 21, 2019. There is a checklist. Grievant was checking for fire, smoke, housekeeping, and other situations.

According to Electrical Repairperson McCarty, on May 21, 2019, he was doing a routine preventive maintenance task. He was moving pieces of equipment from one room to another. Electrician Davis was with McCarty that day. Arc flash is the biggest hazard when doing that job. Arc flash is a rapid release of electrical energy. People have died because of this. The electricians create boundaries. The boundaries are determined by the severity of the potential arc flash. The electricians will hang a sign[*6] on the door. Qualified electrical employees can be within that boundary. The electrician would be dressed appropriately. They wear fire related clothing and gloves and helmet. There is a bank of breakers. They are in a row. There is a separate door. There are posted signs on the door itself. There would be an arc flash[*6] warning sign. Electricians McCarty and Arnold agreed on how to set up the boundary. Their supervisor agreed. It is a narrow room with a low ceiling. The door was marked with a restrictive sign. When the Electricians are done, the sign is taken down. The sign was a 8 ½ x 11 inch laminated sign hanging over the handle of the door to C-40. The mostly orange and black sign said, in large, bold, capital letters:

WARNING
ARC FLASH/SHOCK HAZARD

ARC FLASH/SHOCK PROTECTION PPE REQUIRED IN ACCORDANCE WITH FLEET ELECTRICAL SAFETY PROCEDURE FOR THE HAZARD THAT EXISTS. FAILURE TO COMPLY CAN RESULT IN PERSONNEL INJURY/DEATH.

ONLY QUALIFIED INDIVIDUALS ALLOWED PAST THIS BOUNDARY. Emphasis in original. Rx. 16.

Grievant at the door according to Grievant

According to Grievant, the phone was right outside on the wall. The phone was three or four feet from the door. Grievant reached Pillars on the phone. Grievant told Pillars that the sign was on the door, nobody was there, and there was no phone number to call. Pillars responded to Grievant by saying to open the door, see if someone just inside the door, but do not step inside. See how long it will be. Grievant then turned the door handle and the door opened. Grievant did not think he placed his head over the threshold. Grievant thinks his head was outside the threshold. Grievant peered around the corner. Grievant could see the panels inside the room. The phone was probably in Grievant's left hand. The phone call with Pillars was not ended yet. Grievant pushed the door inward, maybe 6 to 12 inches. This was just enough to see inside. Grievant took a step closer to the door. His feet were still outside of the door. Grievant positioned his head where he could see a little bit into the room. He could see the panel. He saw someone in an arc flash protection suit. He could see two people. One had the arc flash suit on. The employee behind the arc person was wearing hardhat, glasses, shirt, and

pants. The hard hat was a different color than Grievant's. Glasses were different than Grievant's. The employee was kneeling.

Grievant further testified that one employee in the C-40 room was on his knee manipulating one of the breakers. The other employee was leaning over that employee's shoulders. One of the employees in the room said something, a single word. Grievant does not know which employee said the single word. The word was "seriously" or something like that. Grievant did not speak again with Pillars on the telephone. The older employee walked[*7] out 10 to 20 seconds later. This employee asked what do you need? He said "OK, then you [Grievant] go ahead." The employee went back in. The employee was still inside. Grievant then went into the room. The other electrician was still on his knees. Grievant did the back first. Then Grievant went through the other door to check the rest of the room. There was no signage on the second door.[*7] The fire tour was now complete. Grievant left via the second door. Grievant called Pillars by radio. Pillars said something affirmative. Pillars asked no questions.

Grievant at the door according to SSS Joe Pillars

According to SSS Pillars, there is a base station telephone. One phone call came. Grievant had not yet opened the door to see inside C-40. Pillars told Grievant to stand by. Pillars then called Bracy Means. He is not 100% sure that did not say "how long" to Grievant. But no way that Grievant would know. Then Pillars called Bracy Means in the Control Room. Then Grievant called Pillars via radio and said that he had got it checked. Pillars did not tell Grievant to crack the door and find out. Testimony to the opposite would be wrong. Pillars could be disciplined for saying that. Grievant called Pillars back. Before Means could answer Pillars' question. Pillars told Grievant to stand by. Sign tells Pillars. There is something going on in there. Arc flash is a warning side.

In his Security Incident Report, dated May 22, 2019, Pillars wrote,

I Joe Pillars was the SAS operator when I received a phone call from

> [Grievant] who was performing the Fire Tour patrol. [Grievant] said there as an Arc Flash Warning sign on the door leading to the C-40 PANEL and that we needed to get the fire tour inside that room. I asked if he had any idea how long it would be. I could hear Bracy (Means) talking to another person in the Control Room when [Grievant] communicated via radio that he completed the fire tour. Rx. 3.

According to SOS Collins, Pillars told Collins about the situation. Pillars told Collins, while on phone, that it sounded like it had been taken care of.

Grievant at the door according to Electrician McCarty

According to Electrical Repairperson Ryan McCarty, the SO entered C-40. McCarty was in front of the cubicle by the break button. McCarty heard some commotion. McCarty said, "Can't come in here." The SO shut the door. There was security equipment on the SO. The SO then left. McCarty stopped working. He closed the panel doors. Electrician Arnold then talked with Grievant. Arnold was in between Mr. McCarty and the open door. The panel doors were open. There was a higher risk. McCarty did not hear the person who opened the door saying anything. Arnold talked. The door closed right away. McCarty did not talk at all. McCarty shut the panel fairly quickly. Arnold said, "Let us stop here and let the[*8] SO come in." Someone got the SO. Probably Arnold did this. McCarty stayed there. Arnold was then outside of C-40. Arnold talked with the SO. McCarty does not know what was said. Then the SO returned to the room. Both came back into the C-40 room. The sign was still on the door. The SO then did his fire round. McCarty stood up and got out of the way.

Grievant's handwritten Security Incident Report

According to Grievant, Pillars signed off on the second tour. When the electrical employee came out of C-40, Grievant does not recall him saying there was anything wrong. Based on their[*8] initial reactions, Grievant thought something was awry. That is why Grievant did the handwritten Incident Report. Grievant had done Incident Reports before. He went to Collins to fill out an Incident Report. Collins got the form. Grievant filled it out and took a copy. So did Collins. Grievant hand wrote the Incident Report. He signed it. Grievant never typed an Incident Report. Collins did not think it would be a big deal but would keep a copy on file. It was put in Grievant's employee file and his locker. Grievant does not have the document today.

According to Collins, Grievant hand wrote an Incident Report. Collins got a copy and forwarded it to Allen. Once the Incident Report was typed, the handwritten report was destroyed.

Grievant's typed Security Incident Report

Grievant's typed Security Incident Report states,

> Upon arriving at the C-40 panel door in the RCA I encountered a sign that stated WARNING ELECTRICAL SHOCK HAZZARD. There were no danger signs or tape in the area and nobody was posted at the door. I opened the door and poked my head in to inquire if it was safe to enter. One electrical worker yelled "seriously" and the other told me to leave and that I couldn't open the door. I closed the door and contacted SAS to see what I should do. A couple minutes later one of the workers opened the door to tell me it was safe to enter. I informed him that I was sorry but did not see a danger sign or barrier of any type. He turned and started reading the sign off to me and I stated that I was under the understanding that warning signs and danger signs were different but I would double check. Rx. 3.

According to SOS Collins, Collins knows Grievant typed the Incident Report. Grievant was sitting with Collins in front of the computer. The typed Incident Report was printed and given to Allen. Grievant did not say Pillars told Grievant to open the door.

According to SSS Allen, Allen reviewed Grievant's typed Incident Report. Allen then added administrative data to the Incident Report and dated and typed in his name. Allen does not edit or change an employee's Incident Report. Allen discusses the incident in question with the employee during the fact finding.

May 24, 2019, fact finding according to Grievant

According to Grievant, the next day Allen said he wanted to do a fact finding. Allen asked Grievant a list of pre-scripted questions. Allen said it[*9] would just be paperwork and be filed away. Grievant told Allen Grievant had already filled out an Incident Report the day before and Grievant had a copy. Grievant did not give Allen a copy of Grievant's report. Grievant never typed an Incident Report. According to Grievant's testimony at the hearing, Grievant told Allen that Grievant had called Pillars, and Grievant cracked door open. Pillars "said I could do it so I did it. ... I think he said crack the door and see if anyone[*9] in the immediate inside." Grievant believes he put this in his handwritten report. During the fact finding, Grievant does not remember if he did say "crack the door." He might not have.

May 24, 2019, fact finding according to Allen

According to Allen, Collins told Allen of the incident. Perry asked Allen to do the investigation. There is a procedure to follow. Allen made sure that the fact finding form was filled out. There are the pre-scripted questions. Allen does fact findings when one of Allen's direct reports is involved. He lets the employee talk with the Union Steward. An Incident Report is "typed in." There is a computer in the NCS room. The Incident Report is done before fact finding. During the fact finding discussion, Allen could not understand what Grievant was saying. Grievant said there was a sign on the door and a bunch of signs inside the room. Allen said Grievant could take a photo. Grievant did that and sent the photos to Allen via text. Allen was Grievant's direct supervisor. Grievant was then on the computer, filling out his Incident Report. This was the same day as the fact finding. Allen submitted the fact finding to Perry. Perry asked for Allen's recommendation. Allen recommended termination.

June 2019, termination

The June 11, 2019, termination notice said, in part,

> On 5-21-19 at approximately 1435 [Grievant] was on a Fire Tour patrol when he came upon an ARC FLASH/SHOCK HAZARD warning sign that was hung on the door knob on the door that separates the C-40 panel room and the Auxiliary Building stairwell. Without permission [Grievant] opened the door anyway and asked the two workers inside if he could walk through (in order to complete that portion of his Fire Tour patrol). The two electrical workers coached [Grievant] immediately. [Grievant] then contacted the SAS operator (SSS Joe Pillars) to see if he had permission to cross the boundary. SSS Pillars contacted the Control Room and while he was on the phone with a Control Room supervisor, [Grievant] told him over the radio that he had completed the Fire Tour in question.
>
> ...
>
> EN-IS-101 Section 4.0 Item 12b; EN-IS-111 Section 4.2 Items 1 through 4; EN-IS-111 Section 7.2. Item 2. Rx. 7.

According to Security Superintendent Smith, Smith reviewed the entire packet. Smith considered the prior history. Grievant's prior five day suspension stood out the most. A five day suspension is the highest discipline[*10] the Employer would give other than a termination. Grievant was terminated for disregarding the arc flash warning and going into the area after having previously received a five day suspension.

According to Grievant, Grievant learned of the termination out of the blue. Perry called Grievant and told Grievant to come to the training room. Grievant requested a Union person. Perry said he was instructed not to answer any questions. Grievant turned his badge in. Perry asked, "Do you know why you're here ?" No one else spoke. Grievant[*10] tried to ask questions. The Employer would not answer. Grievant had a list of about 17 questions. Perry asked if Grievant wanted a copy of the termination notice. Grievant said yes. Grievant left the meeting.

According to Perry, Perry attended the discharge meeting. He brought the termination notice to that meeting.

June 28, 2019, Grievance

The Union grieved the termination on June 28, 2019, and the parties proceeded through the grievance steps before the Union requested arbitration.

CONTENTIONS OF THE PARTIES

a. For the Employer

According to the Employer, Grievant violated multiple Employer rules on May 21, 2019. Under the CBA, Grievant's rule violations, by specific CBA language, constitute just cause for his suspension and final warning. Sec. 13.4 states: "In the event that an arbitrator shall determine that an employee has violated an Employer rule, regulation or policy for which said employee was charged, the Arbitrator shall not have the right to reduce, modify, or in any way alter the penalty assessed by the Employer."

Grievant violated multiple Employer safety rules by opening a door that had been marked with an arc flash warning sign, thereby breaching the arc flash boundary that had been marked for his safety and that of the electrical workers performing hot work inside the room. An arbitrator has no contractual authority under Sec. 13.4 to change the discipline assessed by the Employer for Grievant's rule violations. According to the Employer, the Grievance must be denied.

b. For the Union

According to the Union, this employee discharge arbitration ultimately turns on a simple factual issue: Did Employer supervisor Joe Pillars authorize Grievant to open the door to C-40 to inquire how long it would be until Grievant could access C-40 to perform his required, mission-critical, time-sensitive duty of making sure there were no fires inside that room? The Union submits that the "clear and convincing evidence" standard sets the appropriate quantum of proof to apply in determining whether the Employer has carried its burden of proving the facts necessary to establishing "just cause" for Grievant's discharge. While at hearing Pillars testified that he gave Grievant an affirmative instruction — to "stand by" — while Pillars contacted the Control Room. That is not likely[*11] what occurred, and the Union asks the Arbitrator to conclude, either a) that Pillars did not give that instruction, or b) the Employer has not proved, to the necessary degree of certainty, that he gave that instruction.

Given the seemingly undisputed evidence that Grievant appropriately called Pillars **before** Grievant opened the door to C-40, the Employer's "rule violation" claim turns on whether, as Grievant reported, Pillars **told** him to open the door slightly to see if there was an employee in the immediate vicinity who could tell him how long the work inside would take. The Employer's burden was to prove, by clear and convincing[*11] evidence, that Pillars did not. The Union submits the Employer fell well short of proving, to the level of factual certainty here warranted, that Pillars did not make that statement. While at hearing Pillars denied giving Grievant that instruction. That only framed the issue of which account was more likely to be the historically accurate one. Because Grievant violated no work rules, there is no call in this case for the Arbitrator to parse the parties' intent with respect to the arguably authority-limiting CBA Sec. 13.4 provision. The Employer may point to the local union's grievance papers as evidence of inconsistency and may contend that Grievant's in-hearing account of the call and his permission from Pillars was not mentioned. But the fact is that Grievant had been terminated by the time those grievance forms had been drafted by the Local president, and there is no evidence that Grievant participated in or contributed to either of them. While it is true that in those papers the Union made the primary argument that the electrical workers had failed - by their sign selection - to properly alert Security to the fact that they were not supposed to even open the C-40 door, the fact they did so does not mean that Pillars had not also authorized the entry. The record generated in the evidentiary hearing shows that the door-opening **was** authorized. The Arbitrator

should conclude Grievant violated no Employer rules and thus there was no just cause for any discipline and grant the Grievance in full.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably[*12] be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that the Employer did not violate the CBA when it discharged Grievant.

Scope of the dispute before me

This[*12] is a discharge case that I heard for two days (18 hours) of hearing. During the course of the hearing, many issues were touched upon. In light of the Post Hearing Briefs, the factual issue for me to determine is whether Pillars authorized Grievant to open the door to C-40. Employer Post-Hearing Brief, p. 1.

The emphasis on this issue impacts on my need to discuss Sec. 13.4 "In the event that an arbitrator shall determine that an employee has violated an Employer rule, regulation or policy for which said employee was charged, the arbitrator shall not have the right to reduce, modify, or in any way alter the penalty assessed by the Employer."

It reduces the need to discuss Entergy Nuclear Operations, Inc., FMCS Case No. 1550411, at 13 (Glazer, 2017) (Sec. 13.4 prohibits arbitrator from reducing a disciplinary penalty once a violation is proven. Once a violation was established, the discharge penalty, as a matter of contract, cannot be reduced.). Because the Employer established that the grievant in that case had violated an Employer rule, Arbitrator Glazer upheld the discharge penalty and denied the grievance. *Id.* at 12-13 ("Once a violation of either/or the photograph or integrity rule was established, the discharge penalty, as a matter of contract, cannot be reduced."). Arbitrator Kathleen Opperwall interpreted Sec. 13.4 to mean "where the employee has violated an Employer rule, regulation, or policy . . . the arbitrator has no authority to reduce or modify the penalty." Entergy Nuclear Operations, Inc., FMCS Case No. 18035-02158, at 7 (Opperwall, 2018). Arbitrator Mario Chiesa upheld Grievant's own five-day suspension and final warning for violating the Employer's alarm response and radio communication procedures. Entergy Nuclear Operations, Inc., FMCS Case No. 180306-02193, at 24-25 (Chiesa, 2019) ("[P]ursuant to 13.4 my authority and responsibility is limited to determining whether the grievant violated a charged rule, regulation or policy. I do not have the authority to quantify an established violation and thus evaluate the level of discipline imposed.").

Burden of proof

This being a discipline case, the Employer bears the burden of proving the elements of its case. *Wackenhut Corp.*, *124 LA 1257* (Kenis, 2007)("In a disciplinary case, arbitral authority has long held that the burden rests upon the employer to establish just cause for discharge."). See generally Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

The Union argues that I should apply the clear and convincing standard. The Union submits that the "clear and convincing evidence" standard sets the appropriate quantum of proof to apply in determining whether the Employer has carried its burden of proving the facts necessary[*13] to establishing "just cause" for Grievant's discharge. As one arbitrator has explained,

> [b]ecause the parties have in the contract specifically required a showing of just cause, there is reflected an intent that the necessary proof be more than merely a "preponderance of the evidence" as might apply to general contract disputes. This is appropriate because discharge is often described as "capital punishment" in regard to

employment. ... A substantial majority of arbitrators require that proofs be clear and convincing ... . *Ingham Regional Medical Center*, **122 LA 471, 478** (Daniel, 2005).

According to the Union, the Employer has[*13] the burden of moving forward and, at a minimum, establishing a *prima facie* case. The quantum of proof may vary according to the charges involved. In general, arbitrators apply the preponderance of evidence standard in determining whether the employer has established the necessary just cause. Many arbitrators require a higher degree of proof where the alleged conduct is of a type recognized by criminal law or carries a similar stigma that affects the reputation of the accused and results in the discharge of the grievant. Elkouri & Elkouri, p. 15-26, n 124, citing *Professional Med Team*, **111 LA 457** (Daniel, 1998) (clear and convincing evidence for discharge cases in general), and *JR Simplot Co*, *103 LA 865* (Tilbury, 1994) (standard of proof for discharge for acts of industrial sabotage should be clear and convincing evidence, which is something more than preponderance and means that the trier of fact must find more than a slight tilt on the scale of justice). The clear and convincing standard has been applied in cases where the offense of which the employee is accused is "seriously criminal, especially opprobrious, or shameful so as to stigmatize the employee and likely to prevent the employee from obtaining other employment." Elkouri & Elkouri, *How Arbitration Works*, 2010 Supplement (2010), at 348, n 26, citing *United Parcel Service*, **121 LA 207** (Wolff, 2005) (employer must prove by clear and convincing evidence that it had just cause to discharge employee for dishonesty, because dishonest conduct, if proven, would mark employee's discharge for conduct that was opprobrious or shameful and make it difficult for employee to find other employment). The Union requests that I require the Employer to carry the burden of demonstrating by clear and convincing evidence the reasons that would justify its termination decision.

I will apply the preponderance of evidence standard in determining whether the Employer has established just cause. As indicated by Professor Abrams, "**the employer must convince the arbitrator what occurred**." Abrams, p. 208. Emphasis added.

Discipline

Grievant was disciplined for allegedly violating "EN-IS-101 Section 4.0 Item 12b; EN-IS-111 Section 4.2 Items 1 through 4; EN-IS-111 Section 7.2. Item 2." Rx. 7.

The Employer contends that Grievant violated these rules. The Union contends that Grievant did not violate these rules.

CBA Sec. 13.4 provides,

> In the event that an arbitrator shall determine that an employee has violated an Employer rule, regulation or policy for which said employee was charged, the arbitrator shall not have the right to reduce,[*14] modify, or in any way alter the penalty assessed by the Employer.

EN-IS-101, Section 4.0, item 12b, provides,

> Entergy Employees are responsible for complying with all Industrial safety rules, procedures and safe work practices.

EN-IS-111, Sec. 4.2, items 1 through 4, of EN-IS-111, provides,

> 1. Everyone is individually and collectively responsible for their safety and the safety of their co-workers.
> 2. Everyone is responsible for knowing and complying with all procedures, policies and instructions that are provided to ensure safety of work and operations....
> 3. Everyone is responsible for making[*14] safe decisions on the job; preventing unsafe acts; recognizing, communicating and correcting unsafe conditions; to immediately stop work that they observe to be unsafe; and for reporting all accidents, injuries and near-misses to their supervisor.
> 4. Always stop when unsure and contact supervision.

EN-IS-111, Sec. 7.2, item 2, provides,

> Only qualified employees shall be allowed or assigned to work on or near (within the limited approach boundary) exposed energized electrical equipment at Entergy.

Grievant knew the work rules

Grievant received training on these work rules. Rx. 11 and 12. Grievant took Entergy Fleet Plant Access Training several times. Rx. 12. Grievant was aware of the applicable rules. Grievant knew or could reasonably be expected to know that opening the C-40 door in violation of the posted sign violated the rules.

The policy was a reasonable work rule

Management has the right to establish reasonable work place rules not inconsistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, the Employer's work rules were reasonable. See generally, Abrams, p. 261.

There was a fair and objective investigation

There was an appropriate investigation.

"Industrial due process … requires management to conduct a reasonable inquiry or investigation before assessing punishment." Elkouri & Elkouri, p. 15-49. It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id.* at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, **901 F.2d 1494** (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, **613 F.2d 716, 718** (8th Cir.), cert. denied, **446 U.S. 988** (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness).

Abrams, p. 211, states:

> … [T]he concept of "due process" is inherent in the just cause provision.
>
> … [a]arbitrators prefer seeing evidence that management … offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

Arbitrators "often overturn otherwise valid discharges**[*15]** where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

Arbitrator Goldstein indicated at *State of Illinois*, **136 LA 122, 129-130** (2015),

> [A]n employer's obligation to a predisciplinary investigation is determined by context. … [T]he level of discipline involved is an important consideration … in determining whether the underlying investigation by the employer was fair and reasonable.

The Grievant was given a meaningful opportunity to tell the Grievant's side of the story before discipline was imposed. There was an adequate check against the possibility of an incorrect decision.

The rules[*15] were applied evenly and without discrimination

There is no argument in the Post-Hearing Briefs that the rules were not applied evenly and without discrimination.

Did supervisor Pillars authorize Grievant to open the door to C-40 to inquire how long it would be until Grievant could access C-40?

The Union argues that Pillars authorized Grievant to open the door. The Employer argues that Pillars did not authorize Grievant to open the door.

At the hearing, the Union and Grievant maintained for the first time that, contrary to the typed Security Incident Report attributed to him, Grievant contacted Pillars before opening the door to C-40, and only opened the door when Pillars instructed Grievant to look inside and ask how long it would be before he could enter, and that someone else must have written the contradictory typed Security Incident Report.

Grievant told a different recollection at the hearing than the recollection described in his typed Security Incident Report on which the Employer relied when conducting its Fact Finding. Grievant testified at the hearing that he called Pillars before opening the door to C-40, and only opened the door after Pillars instructed him to open the door, but not enter the room, to see if someone inside could tell him how long it would be before he could enter. The electrical workers inside C-40 yelled "really?!" or "seriously?!", when Grievant opened the door. Grievant then closed the door and told Pillars he did not know how long it would be. Pillars then told Grievant to

stand-by while Pillars called the Control Room. The electrical workers then left C-40 and cleared Grievant to enter C-40 and complete his fire tour.

Grievant testified that, although he believed he had followed Pillars' instructions and done nothing wrong, he wanted to write a Security Incident Report after completing his fire tour due to the electrical employees' initial reaction to his opening the door, "just in case" they said anything about it. According to Grievant, he hand-wrote, rather than typed, a Security Incident Report near the Lead SSS desk area just after completing his fire tour. According to Grievant, after hand-writing a Security Incident Form detailing this recollection of events, he placed his handwritten copy in his locker and never saw it again. He did not give[*16] it to Allen during the fact finding, nor did Grievant ask to retrieve it from his locker after his termination. Grievant testified that he never typed up a Security Incident Report, implying that the report attributed to him and attached to the Employer's fact finding summary must have been created by someone else.

Grievant's recollection at the hearing was inconsistent with the recollection that Grievant provided to the Employer during fact finding. Allen did the fact finding. Consistent with his fact finding procedure, Allen instructed Grievant to type up on a computer near the Lead SSS desk area a Security Incident Report regarding what had[*16] transpired. Both Allen and Collins, who was the Lead SSS at the time, testified to seeing Grievant typing up his Security Incident Report on a computer near the Lead SSS desk. Collins recalls reviewing Grievant's typed Security Incident Report, at Grievant's request, to confirm that it contained a sufficient level of detail. Collins testified that the typed Security Incident Report attributed to Grievant matches what Collins recalls reviewing over Grievant's shoulder on the computer near the Lead SSS desk area.

Grievant's typed Security Incident Report states,

> Upon arriving at the C-40 panel door in the RCA I encountered a sign that stated WARNING ELECTRICAL SHOCK HAZZARD. There were no danger signs or tape in the area and nobody was posted at the door. **I opened the door and poked my head in to inquire if it was safe to enter. One electrical worker yelled "seriously" and the other told me to leave and that I couldn't open the door. I closed the door and contacted SAS to see what I should do**. A couple minutes later one of the workers opened the door to tell me it was safe to enter. I informed him that I was sorry but did not see a danger sign or barrier of any type. He turned and started reading the sign off to me and I stated that I was under the understanding that warning signs and danger signs were different but I would double check. Emphasis added. Rx. 3.

With Collins and a Union representative present, Allen asked Grievant questions on the fact finding summary form, typed in the responsive information, and typed up some notes regarding his discussion with Grievant. Neither Collins nor Allen recall Grievant saying that Pillars instructed Grievant to open the C-40 door or ask the electrical employees when he would be able to enter. Allen's notes from his fact finding interview with Grievant do not indicate that possibility. Grievant testified that he does not recall telling Allen and Collins that Pillars had told him to open the C-40 panel room door.

The recollection in Grievant's typed Security Incident Report is consistent with Pillars' Security Incident Report and testimony. Pillars received a phone call from Grievant as Grievant was performing a fire tour on May 21, 2019. Grievant told Pillars that there was an arc flash warning sign on the door[*17] of C-40. Pillars told Grievant to stand-by while Pillars called the Control Room and asked how long it would be before security personnel could safely enter C-40. Before the Control Room personnel provided an answer, Grievant communicated to Pillars via radio that Grievant had been able to complete the fire tour. Pillars testified that he did not instruct Grievant to open the door to C-40 or to ask the electrical employees inside how long they would be.

In order for Grievant's hearing testimony that he called Pillars before opening the C-40 door and Pillars instructed him to open that door, and that he never typed up the Security Incident[*17] Report attributed to him that says otherwise to be accurate, the recollections of Pillars, Allen, and Collins would have to be inaccurate. In addition, an unknown individual would have had to create the typed Security Incident Report with Grievant's name on it and put it into the investigation file.

If Pillars instructed Grievant to open the C-40 door, then Grievant's recollection would have been noted in Grievant's typed Incident Report, the fact finding investigation, the termination meeting, the Grievance, or the Step proceedings.

Grievant did not say anything to Allen or Perry about authorization from Pillars at Grievant's termination meeting, even after reading through the termination notice that states that Grievant only called SAS after he had already opened the C-40 door "[w]ithout permission."

Grievant violated Employer rules

Neither Employer nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility … . [It has been suggested that] neither the

discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible … ." Elkouri & Elkouri, p. 8-97.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98. See generally WD Mi Civ JI 2.07.

The Union argued that "Application of the relevant factors supports the conclusion that, as a matter of historical fact, Pillars did — as [Grievant] testified — tell the [G]rievant to open the door slightly, which means that [Grievant] **could not have violated** the listed company rules." Emphasis in the original. Union Post Hearing Brief, p. 29. This argument does not control. Grievant failed to say or do something on prior occasions that matches what he said while testifying. The alleged Pillar authorization to open the door was not communicated by Grievant in his typed Security Incident Report, during fact finding, at the termination meeting, in the Grievance, or during the step proceedings. Grievant's testimony was contradicted by other evidence that I find believable. Pillars'[*18] testimony was believable. Allen's Fact Finding Summary said, in part, "[Grievant] stated that he did not see any harm in opening the door and asking someone if he could pass through because there was no one posted at the door (only a sign)." Rx. 3. In addition, Grievant denied that he typed the Security Incident Report. Allen and Collins gave credible evidence concerning Grievant's typed Incident Report. Collins testified that he knows Grievant typed the Incident Report. Collins looked over the Incident Report. It was OK. Grievant was sitting with Collins in front of the computer. The typed Incident Report was printed and given to Allen. Allen[*18] testified that he reviewed Grievant's typed Incident Report. Allen then added administrative data to the Incident Report and dated and typed in his name.

An arbitrator may require a high degree of proof in one discharge case and at the same time recognize that a lesser degree may be required in others. Elkouri & Elkouri, pp. 15-28 to 15-29.

"[A]rbitrators frequently give employers significant latitude in disciplining employees who … have jeopardized workplace safety." *Id.* at 16-3.

Grievant violated EN-IS-111, Sec. 4.2, items 1 to 4, and Sec. 7.2, item 2, which says "Only qualified employees shall be allowed or assigned to work on or near (within the limited approach boundary) exposed energized electrical equipment at Entergy." Rx. 8, at 9.

Grievant violated Sec. 4.2, items 1 to 4, of EN-IS-111, which state:

> 1. Everyone is individually and collectively responsible for their safety and the safety of their co-workers.
> 2. Everyone is responsible for knowing and complying with all procedures, policies and instructions that are provided to ensure safety of work and operations....
> 3. Everyone is responsible for making safe decisions on the job; preventing unsafe acts; recognizing, communicating and correcting unsafe conditions; to immediately stop work that they observe to be unsafe; and for reporting all accidents, injuries and near-misses to their supervisor.
> 4. Always stop when unsure and contact supervision. *Id.* at 6.

Grievant violated EN-IS-101, Sec. 4.0, item 12b, which states,

> Entergy Employees are responsible for complying with all Industrial safety rules, procedures and safe work practices. Rx. 9, at 8.

Grievant violated an Employer rule, such that the Employer terminated his employment in accordance with the CBA. Pillars did not authorize Grievant to open the door to C-40. There was just cause for the Employer's termination of Grievant.

Conclusion

The crucial points in this case include:

1. When viewed together, the Post Hearing Briefs present the sole operative factual issue of whether Pillars told Grievant to open the C-40 door;
2. Grievant did not present his recollection that Pillars said Grievant could open the C-40 door recollection in Grievant's typed Security[*19] Incident Report, during fact finding, at the termination meeting, or during the Grievance process;
3. Grievant's recollection concerning Pillars telling Grievant to open the door and Grievant's use of such a recollection, is inconsistent with the testimony of Pillars and Allen;
4. The totality of the circumstances; and
5. The CBA.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the Grievance.

Dated: January 24, 2022

Lee Hornberger
Arbitrator
Traverse City, Michigan