Labor Arbitration Awards: 1986 - Present, Wisconsin Aluminum Foundry Company, Inc. and United Steel Workers Local 301M., 23-1 ARB ¶8181, (Feb. 27, 2023)

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23-1 ARB ¶8181. LEE HORNBERGER, Arbitrator. Selected by the parties. Case No. FMCS 231027-00727. Hearing held via Zoom in Manitowoc, Wisconsin, December 22, 2022. Post-hearing briefs filed by February 20, 2023. Award issued February 27, 2023.

Headnote

Confrontations: Termination: Vacations.–
An employee filed a grievance contesting his termination for a confrontation he had with a supervisor after being informed that his vacation request was canceled. The arbitrator denied the grievance. The employee screamed profanities at the supervisor in front of other employees. He also had some serious prior discipline in his record. As a result, given the seriousness of what he said to his supervisor, the arbitrator concluded that the employer had just cause to terminate.

Sachin Shivaram for the Employer. Jason P. Wilcox for the Union.

[Text of Award]

DECISION AND AWARD

INTRODUCTION

HORNBERGER, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Wisconsin Aluminum Foundry Company, Inc. (Employer) and the United Steel Workers Local 301M (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 December 22, 2022, in Manitowoc, Wisconsin, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The hearing was transcribed. The transcript was received by me on January 17, 2023. The dispute was deemed submitted on February 20, 2023, 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.

ISSUES

Was Grievant discharged for good cause?

If not, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

Article 4 - Management Rights

Except as expressly prohibited by a specific provision of this Agreement, the Company has, retains and may exercise at its sole discretion without bargaining and/or Union approval, all management rights it had prior to this Agreement. Such rights include, but are not limited to: the rights to determine who it shall hire for any job; to combine, expand, change, or eliminate any jobs; to add to, reduce, or change the number of shifts, scheduled hours to be worked, and the size of the work force; to use temporary, student, or agency employees to perform unit work; to establish standards for work performance and productivity; to conduct performance reviews and evaluations; to layoff and recall employees in accordance with the procedures of this Agreement; to discipline, suspend, or discharge employees for just cause; to assign work in accordance with the Company's determinations of the needs of the job; to determine the need to transfer employees; to determine what products or services will be manufactured or sold; to determine or introduce new methods, techniques, and processes; to change equipment, methods and facilities; to subcontract work except where the sole purpose is to eliminate employees; to increase, decrease, relocate, consolidate, modify, discontinue, move, transfer, close, sell the work and operations in whole or in part. The Company also has, and retains the right to unilaterally make, publish, enforce, add to, subtract from, alter and/or change work rules, policies, and practices. The parties agree that their decision not to list other rights or the above rights in more specific detail is for the sake of brevity only and shall not be construed as a limitation on the Company's right and ability to unilaterally exercise such rights. The Company's rights under this Article shall survive any expiration of this Agreement.

Article 8 – Overtime

***

B. Weekend Overtime. Employees will be notified of extra-day overtime no later than 48 hours in advance if possible. The Company will first seek volunteers from those employees qualified to perform the work. If the required number of employees cannot be achieved on a voluntary basis, the Company has the right to mandate an employee or employees up to a maximum of two (2) extra-days per calendar month, absent unusual circumstances. The Company will mandate overtime assignments on a rotational basis beginning in the reverse order of seniority with the least senior qualified employee being mandated first until all employees have taken their turn working the required overtime. Volunteering will not exempt an employee from being mandated. The Company will not assign mandatory overtime for the same employee(s) two (2) weeks in a row and no more than two (2) days per calendar month.

These conditions will exempt an employee from mandatory extra-day overtime:

1. When an employee has been previously approved for vacation the day before or day after his/her extra-days.

2. Having previously worked the required mandatory overtime of the calendar month.

3. Employees will only have to work on their shift (e.g., first shift weekend for a first shift employee) and a shift shall be a minimum of four (4) hours and a maximum of eight (8) hours.

RELEVANT WORK RULES

Welcome – p. 5

> … For our represented bargaining unit employees, if there is a difference between this Handbook and the Labor Agreement, the current Labor Agreement will prevail. ….

Work Environment – p. 33

> Wisconsin Aluminum Foundry is committed to providing a safe, non-threatening, comfortable, and professional workplace for all employees. We are proud of our employees, office, and equipment. We expect the full cooperation of all employees to maintain the proper work environment for the benefit of everyone.
>
> All employees are expected to conduct themselves in a professional manner at all times in keeping with their job responsibilities and all company policies.

Work Rules – p. 36

> All employees are expected to comply with the policies and procedures we have established for the safety of our employees and the profitable, efficient operation of our company. In addition to the policies and guidelines we have included above and elsewhere in this handbook, we feel it necessary to list some very basic work rules you need to know. There is no possible way that we could list every single rule employee[s] are expected to respect and follow during their employment. While most shown are simply common sense, we have listed below some of the most serious areas of concern for us as a company. We want to eliminate any possible misunderstandings during your employment with us.
>
> The following behavior or action is unacceptable and will result in appropriate disciplinary measures being taken:

***

> 7. Harassment, abusive behavior, abusive language, vulgarity, profanity, physical violence, horseplay, or other intimidating or threatening acts towards supervisors, employees, suppliers, contractors, or customers.

***

> 11. Insubordination or failure to follow work instructions or properly complete assignments as directed by your supervisor.

Progressive Discipline

> We will *generally* follow a series of progressive disciplinary steps to protect our employees and the best interests of the company.

***

Disciplinary action may include any of the following:

- Written warning
- 1-day suspension without pay
- 2-day suspension without pay
- 3-day suspension without pay
- Termination

***

> Please note that some violations may result in discharge for even the first offense. We will take the action we feel is most appropriate for the circumstances involved. When you violate work rules 1-8 you will be subject to immediate discharge. We will investigate all work rule violations and will choose the disciplinary measure that we feel is appropriate for the offense. We will consider your attendance occurrences, previous work rule violations, and overall performance when deciding on disciplinary actions.

FACTUAL OUTLINE

Introduction

The Employer is a non-ferrous foundry of aluminum, bronze and brass casting, molding and engineering, which includes markets like heavy truck, automotive, marine, oil, agricultural, and some household at its facility in Manitowoc, Wisconsin. The Union is the exclusive bargaining agent of the CBA. This case deals with the August 12, 2022, discharge of Grievant.

Participants

Grievant was employed by the Employer from September 2016 to August 2022.

Second Shift Supervisor [A] has been employed by the Employer for 27 years. Prior to being a Supervisor he was a Shop Steward.

Second Shift Foundry Supervisor [B] has been employed by the Employer for 25 years. He has been in Management for five years.

Second Shift Core Maker [C] has been employed by the Employer for five years.

Testimony of Second Shift Supervisor [A]

On August 22, 2022, **Mr. [A]** told Grievant that Grievant was working on Saturday. Grievant said that he had to have vacation. Grievant flipped out on Mr. [A]. Grievant told Mr. [A] go fuck himself and gave Mr. [A] the middle finger. Human Resources said the situation would be discussed the following day. Another employee had not returned to work from a medical relief. The Employer could only give three employees time off. Therefore the Employer needed Grievant. If there had been no blowup, they could have tried to work it out. Grievant's work history included a prior Reprimand for violation of the “no ear bud” policy. In the ear bud situation, Grievant said,

"Write me up then." Mr. [A] has never had a verbal altercation in public. Mr. [A] does not know of any grievances concerning himself. Mr. [A] does not know of any discussion about himself.

On a prior occasion, Mr. [A] had been in his office, talking with Mr. [C], a five year employee. Mr. [C] did a double flip of Mr. [A]. Mr. [C] did not say, "Go fuck yourself." Then Mr. [A] got a group of people together. They had discussion about what had happened. Mr. [C] apologized. Mr. [C] had a much better record than Grievant. Mr. [C] was written up for that incident. That incident was "behind closed doors." It was not in front of hourly employees.

Testimony of Second Shift Foundry Supervisor [B]

Mr. [A] contacted **Mr. [B]** on the radio. Mr. [A] was visibly upset. Only Messrs. [A] and [B] were supervisors on the shift. HR was emailed. Mr. [B] talked with Grievant. Mr. [B] told Grievant to apologize. Grievant said he would apologize. Grievant apologized for his actions. Grievant shook Messrs. [A]'s and [B]'s hands and apologized and left for the day.

If there were an issue, Mr. [A] would also take an employee into a room, even call for a Union Steward.

Grievant said he regretted his actions. Interactions with Grievant were on good terms. Grievant apologized to Messrs. [A] and [B]. Mr. [B] was not present on the plant floor when the incident happened.

Testimony of Second Shift Core Maker [C]

Mr. [A] is **Mr. [C]'s** supervisor. They have a bumpy relationship. Mr. [A] has had run-ins on the floor. Mr. [C] had a run-in with Mr. [A] in the office. In that situation, Mr. [C] felt Mr. [A] was lying to Mr. [C]. Mr. [C] could not get Mr. [A] to admit it. This made Mr. [C] mad and upset. There was swearing going on back and forth. According to Mr. [C], it was "mainly me." Sometimes this happens. Sometimes they vent and explode. Mr. [C] got upset with Mr. [A] in Mr. [A]'s office. Mr. [C] told Mr. [A] to "fuck himself" and flipped Mr. [A] off. Mr. [C] got a write-up for this. Mr. [B] was also in the office. According to Mr. [C], there were "just the three of us." Mr. [C] apologized to Mr. [A] for Mr. [C]'s actions. Mr. [C] was not a Union leader at the time. Mr. [C] has not had attendance issues or any other disciplines.

Testimony of Grievant

Grievant was hired in September 2016. The incident was on August 22, 2022. Grievant was scheduled to have a "pre-approved vacation" day off. Mr. [A] approached Grievant to cancel that vacation. This was just before the break at approximately 5:00 p.m. Mr. [A] came up to Grievant. Mr. [A] told Grievant that Grievant was working on Saturday. There were no discussions of other options. Grievant brought it up that Grievant had vacation scheduled. Mr. [A] responded, "No, you don't." At that point, according to Grievant, Grievant "lost it." Grievant regretted this action half an hour later.

On another day, Mr. [A] was yelling. They were yelling "fuck" at each other. According to Grievant, that is "something that's normal."

CONTENTIONS OF THE PARTIES

a. For the Employer

According to the Employer, there are several questions that must be considered when determining whether there was just cause to discharge Grievant. Did the alleged acts occur and was there intent on Grievant's part to conduct the acts? *American Red Cross*, 132 LA 1277 (Riker, 2013). Did Grievant's actions violate the Employer's policy with regard to work-related performance or behavior standards? Was progressive discipline properly followed? The answer to these questions is a resounding "yes."

The Employer discharged Grievant because on August 11, 2022, he told his Supervisor to "go fuck himself" and gave his Supervisor the middle finger, while also telling him that "he wasn't working" when the Supervisor told

him he would be. During the arbitration hearing, Grievant admitted telling the Supervisor “to go fuck himself” and that he also “flipped [the Supervisor] off.” Tr. 55. He also told the Supervisor “that he wasn't working” after the Supervisor told him he had to work the following Saturday. Tr. 18-19. The first element of the just cause analysis is satisfied.

The Employer's work rules declare that “[h]arassment, abusive behavior, abusive language, vulgarity and profanity, physical violence, horseplay, or other intimidating or threatening acts towards supervisors” are unacceptable in its workplace. Telling one's supervisor to “fuck off” and giving him or her the middle finger constitutes, all at once, abusive behavior, abusive language, vulgarity and profanity. Grievant's conduct violated the work rules.

The CBA does not include any provisions concerning progressive discipline. As a result, the Employer's work rules control the subject. Those rules are clear. The “Progressive Discipline” work rule makes clear that violations of rules 1 through 8 will subject employees to immediate discharge. This includes rule 7, the prohibition of “[h]arassment, abusive behavior, abusive language, vulgarity and profanity, physical violence, horseplay, or other intimidating or threatening acts towards supervisors[.]” Employees who tell their supervisors to “fuck off” and give them the middle finger are subject to immediate termination. This work rule is unambiguous.

Grievant's prior conduct reinforced the discharge decision. While employed for less than six years, Grievant accumulated numerous write-ups for violations of attendance requirements, safety rules, and other work procedures. Tr. 22. This included an incident where Grievant violated the Employer's prohibition from wearing earbuds while working, to which he responded “well, write me up then.” *Id*. While Grievant's actions were grounds for discharge, in and of themselves, when combined with his prior actions, the Employer rightly decided it was time for his employment to end.

Grievant might argue there was no just cause for his termination because another employee, [C], was not terminated despite similarly giving the Supervisor the middle finger and telling him to “go fuck himself.” Tr. 47. The two situations were quite dissimilar. Mr. [C]'s conduct occurred in the Supervisor's office, whereas Grievant swore at and disrespected the Supervisor on the shop floor in front of other employees. Tr. 46. Mr. [C]'s behavior occurred during an extended interaction that became heated, while Grievant's outburst happened almost immediately after he was told when he would have to work. Tr. 46-47, 54-55. While Mr. [C] testified that he told the Supervisor to “fuck off,” the Supervisor testified that Mr. [C] had not uttered such a phrase. Tr. 62. Mr. [C] had no prior disciplinary history, as opposed to Grievant, who had been disciplined previously on several occasions. Tr. 50-51. Mr. [C]'s situation is distinguishable from Grievant's situation and in no way contradicts the fact that the Employer had just cause to discharge Grievant.

Grievant might argue that his behavior was somehow excused because of a cancellation of scheduled vacation. Tr. 50-51. Any such argument is irrelevant. Grievant only grieved his termination, not anything to do with vacation time. In addition, his actions immediately followed the Supervisor's mention of Grievant's work schedule. Grievant did not leave any time for any reasonable dialogue or other options as to the vacation issue. He reacted in the manner he chose, i.e., with anger, vulgarity and disrespect, and that reaction effectively thwarted any potential exploration of other options.

The Employer requests that the Grievance be denied.

b. For the Union

According to the Union, Grievant was a six year employee. His job classification was Core Molder. On August 11, 2022, he was working the second shift when the Employer informed him that his pre-approved vacation would be canceled in an untimely fashion while not exploring other options. This of course upset Grievant because he did everything correctly according to the CBA. He was leaving the next day for a wedding in Minnesota. CBA, Art. 8 – Overtime, Sec. 6, Assignment of Overtime, at the bottom of sub sec B, states, “These conditions will exempt an employee from mandatory extra day overtime.” #1. When an employee has been previously approved for vacation on a Friday or Monday of that Saturday or Sunday.” Grievant should have

never been approached about canceling his vacation. Should Grievant have handled it better? Sure, but some leniency is due here. The Employer used disparate treatment when handing down the discipline. The Union put a witness on the stand who testified to a very similar situation and that witness was given just a warning. In addition, the Employer has been warned on multiple occasions about this supervisor and the language used. Based on the Employer giving no consideration to such options as a Last Chance Agreement, anger management, or an unpaid suspension, Grievant should not have been discharged. The Employer did have a reason to discipline Grievant. The situation did not rise to the level of discharge.

The Supervisor testified that he approached Grievant to let Grievant know he was working that Saturday, which is what started the incident. Grievant informed the Supervisor that he had vacation scheduled which prompted the Supervisor to respond with “Oh, no you don't. You'll be inside.” That led to Grievant growing frustrated and getting upset to the point where he responded by telling the Supervisor to “go fuck himself and flipped him off.” Tr. 55.

The Employer did not have the right to cancel Grievant's vacation and force him to work the day in contention. In Art. 8 – Overtime Sec. 6 (B) Weekend Overtime, continued on p. 9 it reads:

These conditions will exempt an employee from mandatory extra-day overtime:

1. When an employee has been previously approved for vacation on a Friday or Monday of that Saturday or Sunday.
2. Having previously worked two extra days' overtime of the calendar month.
3. Employees will only have to work on their shift (e.g., first shift weekend for a first shift employee) and a shift shall be a minimum of four (4) hours and a maximum of eight (8) hours.

CBA Art. 8, Sec. 6, protects Grievant from having his earned vacation time canceled. The Employer made no effort to find other options even though the Supervisor stated “We could have worked with him. We could have, you know, made some kind of an agreement where, yeah, okay you can't come in this Saturday, but could come in the following Saturday or the following Saturday after that. We've done that with employees in the past. They've all been fine with it.” Tr. 20-21.

Grievant's only other disciplines were for absenteeism and wearing his earbuds instead of ear protection. Rx. 1. The Supervisor testified “… there's a history of challenging authority …”, Tr. 22-23, but the Employer only produced one incident of maybe challenging authority. Grievant acknowledged he was wrong when confronted about the ear plugs and knew what the discipline would be so he said write me up. None of this adds up to a history. A good comparison for this case is Labor Arbitration Decision, 165785-AAA, 2014 LA Supp. 165785 (Fraser, 2014), in which the arbitrator ruled in favor of the grievant.

The Employer did not have cause to discharge Grievant. The Union requests that I sustain the Grievance, the discharge be removed from Grievant's record, and he be made whole for all lost wages and benefits.

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 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.

Discipline

The August 12, 2022, Employee Warning Notice of Termination stated:

Remarks. Harassment, abusive behavior, abusive language, vulgarity, profanity, physical violence, horseplay, or other intimating or threatening acts toward supervisors, employees, suppliers, contractors, or customers

(#7)

On 8/11/22, [Grievant] informed that he was mandated to work overtime on Saturday. After [Grievant] was informed, he was very disrespectful to the supervisor. He flipped off the supervisor and told him to go fuck himself.

The CBA provides in Art. 4 “Management Rights” that:

Except as expressly prohibited by a specific provision of this Agreement, the Company has, retains and may exercise at its sole discretion without bargaining and/or Union approval, all management rights it had prior to this Agreement. **Such rights include, but are not limited … to discipline, suspend, or discharge employees for just cause** …. **The Company also has, and retains the right to unilaterally make, publish, enforce, add to, subtract from, alter and/or change work rules, policies, and practices.** …. Emphasis added.

The Employer's Employee Handbook provides the following.

Welcome – p. 5

… For our represented bargaining unit employees, if there is a difference between this Handbook and the Labor Agreement, the current Labor Agreement will prevail. ….

Work Environment – p. 33

Wisconsin Aluminum Foundry is committed to providing a safe, non-threatening, comfortable, and professional workplace for all employees. … We expect the full cooperation of all employees to maintain the proper work environment for the benefit of everyone.

All employees are expected to conduct themselves in a professional manner at all times in keeping with their job responsibilities and all company policies.

Work Rules – p. 36

All employees are expected to comply with the policies and procedures we have established for the safety of our employees and the profitable, efficient operation of our company. In addition to the policies and guidelines we have included above and elsewhere in this handbook, we feel it necessary to list some very basic work rules you need to know. There is no possible way that we could list every single rule employee[s] are expected to respect and follow during their employment. While most shown are simply common sense, we have listed below some of the most serious areas of concern

for us as a company. We want to eliminate any possible misunderstandings during your employment with us.

The following behavior or action is unacceptable and will result in appropriate disciplinary measures being taken:

***

7. Harassment, abusive behavior, **abusive language, vulgarity, profanity**, … or other intimidating or threatening acts towards supervisors ….

***

11. Insubordination or failure to follow work instructions or properly complete assignments as directed by your supervisor.

Progressive Discipline

We will *generally* follow a series of progressive disciplinary steps to protect our employees and the best interests of the company.

***

Disciplinary action may include any of the following:

- Written warning
- 1-day suspension without pay
- 2-day suspension without pay
- 3-day suspension without pay
- Termination

***

Please note that some violations may result in discharge for even the first offense. We will take the action we feel is most appropriate for the circumstances involved. When you violate work rules 1-8 you will be subject to immediate discharge. We will investigate all work rule violations and will choose the disciplinary measure that we feel is appropriate for the offense. We will consider your attendance occurrences, previous work rule violations, and overall performance when deciding on disciplinary actions. Emphasis added.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

Grievant knew of the Employee Handbook

The Employer has an Employee Handbook which is provided to the employees and contains the work rules. Jx. 4. There is no evidence that Grievant was not aware of the Handbook and its work rules. In addition, Grievant knew or could reasonably be expected to know that saying “fuck you” to a Supervisor on the plant floor in front of other hourly employees could result in discharge. Elkouri & Elkouri, p. 15-78.

The Employee Handbook advised Grievant that a violation of rule 7 could result in discharge, even without any preliminary or progressive disciplinary steps. Jx. 4, p. 38.

The policy was a reasonable work rule

Management has the right to establish reasonable work place rules consistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, Employer rules 7 and 11 are reasonable. Abrams, p. 261.

The rule was applied evenly and without discrimination

The Union argues that at least one other unit employee violated rules 7 and 11 but was not discharged.

The Union has the burden of proof concerning the similarly situated issue. “Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee.” Elkouri & Elkouri, p. 15-84. A recognition that not every employee is treated exactly the same does not justify a charge of invidious discrimination against any employee or any other intentional discrimination. To show disparate treatment strong enough to overcome management's decision requires the Union to show by clear and convincing evidence purposeful discrimination. *Ohio Department of Rehabilitation and Corrections*, 93 LA 1186 (1990) (denying grievance and explaining that each employee's total work record, longevity, and past discipline are important considerations, particularly where there is no indication that the employer was out “to get” the employee). *City of Alton*, 121 LA 1288 (Pratte, 2005) (denying grievance and rejecting instances of alleged disparate treatment lacking evidentiary support and without evidence regarding the prior disciplinary records of others).

Mr. [C] was not “similarly situated” to Grievant. Grievant had a more serious prior discipline record than Mr. [C]. Grievant said “fuck you” to the Supervisor on the workroom floor in front of other unit employees. Mr. [C] did not do that. Mr. [C] testified that in the within-the-office situation, he “told [Mr. [A]] to go fuck himself ….” Tr. 47. However, Mr. [A] testified that Mr. [C] did not say “Go fuck yourself.” Tr. 62. When considering the totality of the circumstances, the two employees are not comparable.

There is a preponderance of proof that there was a violation

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.

> Furthermore:
>
> The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run.” Abrams, p. 202.

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. Similarly, where the burden of proof was not strong enough to justify a

discharge, some arbitrators have found it strong enough to justify a lesser penalty. Elkouri & Elkouri, pp. 15-28 to 15-29.

> The Rule 7 violation is evidenced by the testimony of Grievant and Mr. [A].
>
> Mr. [A] testified:
>
> I had gone down to the Osborne to get guys to work for Saturday. And I had told [Grievant] that he was working Saturday.
>
> He said that he had had vacation. I said that it had been denied at the time. And at that moment he flipped me off, told me to go fuck myself and that he wasn't working. Tr. 19.
>
> Grievant testified:
>
> I told him to go fuck himself and flipped him off. Tr. 55.
>
> Based on the testimony in the case, I find that Grievant violated rule 7.
>
> The Union cites Labor Arbitration Decision, 165785-AAA, 2014 LA Supp.

165785 (Fraser, 2014). In 165785-AAA, Arbitrator Fraser stated:

> The relevant facts of the case are straight forward: In response to an appropriate request on the work floor by Supervisor B _____, S _____ responded with “T'm in the process. **Fuck off**.” Such a direct challenge to authority is clearly an act of insubordination. At issue is if this retort by S _____, in the overall context in which it was uttered, was sufficient to warrant discharge. The immediate context was that there is no evidence that S _____ refused to do as asked, **only** that he directly belittled his supervisor with the profanity he uttered. His response was **limited to a verbal act** (“I am doing as you requested. Leave me alone.”) and there was no associated aggravating gesture to make it more serious. In addition, this was the first instance on record of S _____ using profanity directly towards a supervisor. The general context was that of a workplace that, according to testimony, tolerated profanity from all quarters. And, although there was apparently a zero-tolerance policy which was begun in Spring 2013, no one seems to have learned of it. Moreover, by Fall 2013, the use of profanity had reached the point where women in the workplace complained to the HR director. Finally, although everyone was aware that the language in the workplace should become more civilized, it was never established if S _____ was aware that using profanity in response to a supervisor's request constituted insubordination. The Handbook does not go into detail on this point and there was no evidence that he was counseled on it. There is no question that S _____ response to B _____ was offensive on October 30, 2013. However, it is not clear if S _____ realized that his remark could be taken as insubordinate. Therefore, given the circumstances surrounding the act, I believe he deserves another, final chance. Emphasis added.
>
> The Arbitrator Awarded that,
>
> The Company did not have just cause to terminate S _____ …. He shall be reinstated without back pay or benefits, and put on a Final Warning for two years.

The 165785-AAA case is not controlling in the case before me for a number of reasons. First, the expletive in 165785-AAA was “fuck off.” The expletive in the case before me is “fuck you.” There is a difference. “Fuck you” is more personal, offensive, and blunt than “fuck off.” Second, saying “fuck you” to one's supervisor on the work room floor in front of peer employees is more than “limited to a verbal act.” In connection with such an articulation, there does not have to be an “associated aggravating gesture to make it more serious.” It is

"more serious" in and off itself. Third, Mr. [B] testified that "Mr. [A] was visibly upset of what just transpired over there." Tr. 32. Fourth, work rule 7 proscribes "… abusive language, vulgarity, profanity, … or other intimidating or threatening acts towards supervisors …." Fifth, Grievant had a discipline record which included:

> August 6, 2021, Employee Warning Notice – ear buds (reprimand day off); August 6, 2021, Employee Warning Notice – ear buds (written reprimand); August 29, 2018, Employee Warning Notice - leaving work early (2 days off); December 12, 2016. Employee Warning Notice - left early (written reprimand); November 1, 2016. Employee Warning Notice - left early (written reprimand).

An employee's past record is often a major factor in the determination of the proper penalty in a discipline case. Elkouri & Elkouri, p. 15-69.

The Union argues that "based on the Employer giving no consideration to such options as a Last Chance Agreement, anger management, or an unpaid suspension, Grievant should not have been discharged." This does not control. Grievant violated work rule 7 and had a prior discipline history. As indicated at *Universal Stainless & Alloy Products*, 116 LA 90, 96 (Franckiewicz, 2001):

> A [LCA] is just that, an "agreement." … L[CA]s have often succeeded in preserving an individual's employment while also avoiding the expense and uncertainty of arbitration. But one key to that success is that a [LCA] is entered only where both parties believe that it will be mutually beneficial in a particular case. If the parties were forced to choose between using [LCA]s "always" or "never" most likely they would never use them. Few employers would accept a [LCA] if they understood that doing so would require them to make the same offer in every future case. Thus, if arbitrators required employers to extend the opportunity for a [LCA] in every case simply because they had done so in some cases, the most likely effect would be that the [LCA] would disappear from the labor relations landscape.
>
> Furthermore, the Employee Handbook provides that:
>
> … **[S]ome violations may result in discharge for even the first offense.** We will take the action we feel is most appropriate for the circumstances involved. **When you violate work rules 1-8 you will be subject to immediate discharge.** … **We will consider your attendance occurrences, previous work rule violations, and overall performance when deciding on disciplinary actions.** Emphasis added.

The Union argues that the overtime directive from Mr. [A] to Grievant was inconsistent with the CBA Art. 8 overtime provisions. This does not control. Once Grievant spoke the expletive, the work rule violation situation had to be reviewed and resolved. Mr. [A] was only doing his job when he notified Grievant that Grievant would have to work overtime. There is no evidence that Mr. [A] was out to get Grievant or had any animus towards Grievant. A situation that would allow an employee to have a one-bite-of-the-apple "fuck you" articulation on the work room floor in front of other unit employees is inconsistent with work rule 7.

Penalty

It has been indicated that the remedy to be fashioned will be fact specific. An arbitrator can consider mitigating circumstances. Arbitrators may reduce the penalty if, given the facts of the case, it is clearly out of line with generally accepted industrial standards of discipline. Elkouri & Elkouri, pp. 18-46 to 18-49. "Absent a specific provision establishing that violation of a provision [of the CBA] results in [a certain level of discipline], the arbitrator has broad leeway to determine whether the discipline imposed fits the charge of misconduct." Farrell,

"Due Process/Just Cause Issues," *References For Labor Arbitrators* (American Arbitration Association, 2005), p. 32.

Given the totality of the circumstances, including (1) Grievant's length of service with the Employer, (2) Grievant's prior record, and (3) the seriousness of the offense, discharge was an appropriate discipline.

Conclusion

The crucial points in this case include:

1. The Employer has the burden of proof;
2. The seriousness of the offense;
3. The discharge was consistent with just cause;
4. The totality of the circumstances;
5. Employee Handbook rule 7; and
6. 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.