

THE LABOR RELATIONS CONNECTION

In the Matter of the Arbitration Between

THE FAIRMONT COPLEY PLAZA

LRC Case No:
544-19

-and-

UNITE-HERE, LOCAL 26

Grievant:
[REDACTED]

Arbitrator: James M. Litton, Esq.

Appearances:

Jonathan A. Keselenko, Esq.) - for the Fairmont
Allison L. Anderson, Esq.) Copley Plaza

James Hykel, Esq. - for UNITE-HERE, Local 26

OPINION AND AWARD

Stipulated Issue:

Was there just cause to discharge the grievant, [REDACTED]
[REDACTED]? If not, what shall be the remedy?

Relevant Contract Provision:

Article 17
Discipline and Discharge

Employees may be discharged, suspended, or disciplined by the Employer for just cause. The parties agree that the policy of progressive discipline shall be used in all cases where warranted. ...

Relevant Provisions of the Hotel's Employee Handbook:

...
5.20 Fairmont's Standards of Conduct

The Fairmont Copley Plaza strives to create a professional workplace that is respectful, productive and protects the safety of all Employees and Guests. By reading this Employee Handbook, you will become familiar with the expectations of the The Fairmont Copley Plaza and our Employees.

For the protection of all, the following actions will not be tolerated in our workplace, and any Employee who commits any of these actions will be subject to disciplinary action up to and including dismissal. You should be aware that conduct not specifically listed below but which adversely affects The Fairmont Copley Plaza, you, your Employee, Guests, or the public may also result in disciplinary action.

The following activities will not be tolerated by The Fairmont Copley Plaza:

3) Failure to comply with management's directions regarding work duties.

6) Inefficiency, inattentiveness or neglect of the performance of job duties and responsibilities.

7) Omission of falsification of any information/documentation related to Hotel business.

8) Misappropriation, theft, misuse, or abuse of the property of The Fairmont Copley Plaza, Colleagues, Guests or visitors, or property in the custody or control of The Fairmont Copley Plaza.

18) Engaging in any conduct at work or related to work, that is injurious to a Guest, visitor, supervisor, Colleague or to the Fairmont Copley Plaza itself.

22) Violation of the Hotel's Attendance policy (see Section 5.2)

38) Failure to keep accurate records of time worked including failing to punch before

starting work duties or punching out after concluding work duties or failing to punch out and punch in for meal breaks.

40) Punching in or out on behalf of another Colleague or falsely reporting your time worked or the time worked of another Colleague.

Facts Presented:

1. Background

The Fairmont Copley Plaza (Hotel) and UNITE-HERE, Local 26 (Union) are parties to a collective bargaining agreement (Agreement). The Agreement sets forth the wages, hours, terms and conditions of employment of certain employees of the Hotel including the grievant in this case, [REDACTED]

The Hotel has employed [REDACTED] since July 2017. It initially hired him as an Overnight Steward. [REDACTED] remained in that position until his discharge in this case in February 2019. His job duties include cleaning the kitchens and bars of the Hotel. He incurred no formal discipline during his tenure, although the Hotel had issued him at least a couple of "counselings and coachings" concerning his job performance in the months leading up to his discharge. [REDACTED] normal shift is scheduled from 10:00PM to 6:30AM including a 30-minute lunch break through which Overnight Stewards usually work. Therefore, the shift is generally considered to run from 10:00PM to 6:00AM. It should also be noted that because [REDACTED] shift is an overnight shift, it begins at night of one calendar day and ends early in the morning of the following. This fact of the calendar can and does lead to certain confusion -- including in this case. At the Hotel it is generally accepted that a given shift is denominated in terms of the day on which it commences.

Thus, a shift which begins on, say, the night of August 1 and ends on the morning of August 2 is referred to as the "August 1 shift."

██████████, and other Stewards, work within the Hotel's Stewarding Department (Department). The Department employs approximately 30 bargaining unit employees -- three to eight of whom are scheduled on any given night -- the actual number dependent upon the occupancy of the Hotel or the number of special service or bar events convened at the Hotel. A Stewarding Manager generally prepares the assignments in advance of the overnight shifts, and he leaves specific written assignments for each individual member of the team. Although there are no Stewarding Managers on duty overnight, there is a non-managerial Team Leader on duty during most overnight shifts. That person is responsible for assuring that the Overnight Stewards complete their work assignments and report his findings to management staff. During the overnight shift, the only manager on duty at the Hotel is the Front Desk Manager who is "effectively the manager in charge of all operations." During the time frame of interest in this case, the night Front Desk Manager was ██████████ ██████████. When he was not present, other Assistant Front Desk Managers filled this role, including ██████████ ██████████, the Manager on Duty (MOD) during one of the shifts at issue in this case. In addition, ██████████ ██████████ and ██████████ ██████████ were Stewarding Managers at the time of this case. ██████████ ██████████ served as the Head Manager of the Stewarding Department.

2. Relationship between ██████████ and James ██████████

██████████ is a bargaining unit member. His job title

is Overnight Team Leader. As stated in the immediately above section, a salient element of [REDACTED] job was to check on the work of Overnight Stewards and to report deficiencies to management. [REDACTED] testified that he believed that [REDACTED] inspected his work in a manner different from that which he employed when inspecting the work of other Overnight Stewards. Specifically, [REDACTED] testified that in summer 2018 -- on his first shift back at work after jury duty leave -- [REDACTED] "came to the bar and thoroughly inspected the bar and cabinets with a flashlight." He further testified that he "did not believe" that [REDACTED] used a flashlight to inspect the work of other Overnight Stewards. [REDACTED] acknowledged that in the course of one of [REDACTED] inspections of his work he called [REDACTED] a "fucking moron."

On November 5, 2018 [REDACTED] filed a complaint against the Hotel with the Massachusetts Commission Against Discrimination (MCAD). In the complaint [REDACTED] set forth a series of incidents which he claims illustrate that certain named employees of the Hotel had unlawfully discriminated against him on the basis of his race. The complaint contains no allegation against [REDACTED]

The Hotel's Position Statement which it filed with the MCAD on January 30, 2019 shed light on issues of significance to this case. Specifically, it highlighted a Discrimination & Harassment Prevention training session which [REDACTED] a corporate HR Representative, conducted in August 2018 and which [REDACTED] attended. The Hotel highlights the following in its Position Statement:

In follow-up to their August 7, 2018 meeting, [REDACTED] met with other members of the Stewarding Department team to

investigate [REDACTED] concerns. [REDACTED] held meetings with Colleagues on August 14, 2018 and August 17, 2018. Concerns raised by [REDACTED] during their August 7 2018 meeting were not validated by any other members of the Stewarding Department. On August 22, 2018, [REDACTED] notified [REDACTED] about the results of her investigation. [REDACTED] thanked [REDACTED] for following-up with him.

The Union argues that [REDACTED] testified at arbitration that "she asked no one if [REDACTED] was singling out [REDACTED] and she took no action." It argues that

Despite no investigation, she asserted under oath to the MCAD that [REDACTED] complaints were "not validated by any other members of the Stewarding Department," that she conveyed that to [REDACTED] and that he thanked her for her follow-up.

At some time during summer 2018, the Union filed a grievance which protested what the Union perceived to be the Hotel's granting excessive overtime to [REDACTED] without regard to contractual seniority requirements. During the grievance process representatives of both the Union and the Hotel discussed the relationship between [REDACTED] and Hotel management with particular emphasis by the Union on its perception that [REDACTED] "surreptitiously" reported on fellow-bargaining unit members and even caused one or more bargaining unit members to be discharged. The ultimate settlement of the grievance included back pay for certain stewards whose overtime the Hotel had improperly assigned to [REDACTED] and a change in [REDACTED] job title from Stewarding Supervisor to Overnight Stewarding Team Leader. The job title change did not modify [REDACTED] job duty to inspect the work of others. [REDACTED] testified that at the grievance meeting a representative of the Hotel "went over

my job title/description; that I should report to my manager about what goes on overnight."

██████████ also testified that on the night after the above-described grievance meeting, ██████████ "approached me about his displeasure about my job description as ██████████ [██████████ - Fairmont's Regional Director of Talent and Culture] laid it out." He testified that ██████████ "said ██████████ was full of shit ... that ██████████ should not require me to report on other overnight employees -- that makes you a 'rat' or a 'snitch'." ██████████ also testified that "after these comments I reported them to ██████████ [██████████] and HR."

3. ██████████ alleged offenses

a. The Hotel's evidence

(i) February 6/7

██████████ testified that "on the evening of February 6/7, 2019" he arrived for work just prior to 10:00PM and parked his car on Stuart Street behind the Hotel. He testified that "██████████ had parked right behind me." He further testified that "during my rounds I could not locate ██████████." He also testified that because he could still not find ██████████ later in the shift "I went outside to check for ██████████." He testified that at that point "I noticed his car was gone." He further testified that he then went to Front Desk Manager ██████████ and asked him if ██████████ had asked to leave his shift early." ██████████ testified that ██████████ told him that he "knew nothing." He also testified that during his last rounds he "still could not find ██████████ in his assigned area." He testified that he then told ██████████ that "this was not the first case with ██████████."

On the morning of February 7, 2019 [REDACTED] sent an e-mail to the Hotel's Director of Talent & Culture, [REDACTED] It includes the following:

During last night's overnight shift [REDACTED] [REDACTED] came to me to inform me that he believes [REDACTED] had left property around 1:15AM. At that time [REDACTED] and a few other stewards had informed him they were going outside for a smoke break and that was the last time he saw [REDACTED]. [REDACTED] told me this around 2AM and mentioned a few concerning things.

- [REDACTED] was assigned to the main dish pit and to assist with the mats, the dish pit assignment was not complete and still had dirty dishes and IRD trays/tables around it. (This was verified by myself and was this way throughout the night). [REDACTED] did help bring the mats downstairs however did not help load them into the machine and was not present to help bring them back up.
- [REDACTED] parked his white BMW directly behind [REDACTED] as he saw him when they came in and knows his car. He went out to check if [REDACTED] was in his vehicle however it was no longer there.
- [REDACTED] came to speak to the [Manager on Duty] Sat. the 2nd as the same situation happened then as well however he could not get the MOD alone without [REDACTED] witnessing and he did not want to start drama and have [REDACTED] involve himself as even if [REDACTED] sees [REDACTED] go into the back office or try to speak with the MOD he supposedly goes directly to stewarding to involve himself.
- He said instead he spoke to [REDACTED] about it in the morning and [REDACTED] responded with "we have to get him to stop doing

this." And this frustrated [REDACTED] as he knows it is a repetitive action, especially given this is the second time he has recently brought it to my attention.

[REDACTED] also brought this to my attention around 3:30AM when he went to bring tea/coffee to the stewards as he came back to the FD stating that one of the other stewards told hi "[REDACTED] left hours ago" and he wanted to make sure that I was aware.

[REDACTED] testified that this e-mail initiated the investigation of this case; that this e-mail represented the first time that HR learned of any issue relating to [REDACTED] allegedly leaving his shifts early.

(ii) February 8

According to the chronology of the investigation of this case which the Hotel created, its Food & Beverage Operations Manager informed [REDACTED] that "he was being held out of service on Saturday, February 9 and Sunday, February 10."

(iii) February 10

[REDACTED] in fact, was "held out" of service on February 9 and 10, 2019. He did not report for work those two days in accordance with instructions.

[REDACTED] testified that in accordance with his habit he "went outside near the Starbucks" at approximately 5:00AM on Sunday, February 10, 2019. He testified that "a car pulled up and double parked on Stuart Street." He testified that he heard the driver of the car yell "hey, [REDACTED]." He testified that "I looked up and saw [REDACTED] and that [REDACTED] said to him '[REDACTED], did you tell the Overnight Manager that I left early the other

night? If I find out you told him, if you think it was hell in here for you before, I will really make it hell for you now." He testified that [REDACTED] also told him that he "might as well look for another job." [REDACTED] testified that after "30-35 seconds, [REDACTED] "peeled off." He testified that [REDACTED] was the driver. He called me by my name. He looked into my eyes." [REDACTED] described the car which [REDACTED] was driving as "a dark SUV-type vehicle."

[REDACTED] also testified that he immediately reported the incident to [REDACTED]. He also testified that "on Monday morning "I went to HR and spoke with [REDACTED] and [REDACTED] because I was still upset."

b. Investigation of [REDACTED] alleged early departures from work

[REDACTED] reviewed security camera footage from two shifts: February 1/2 and February 6/7. That footage shows that on February 2, 2019 at 3:41AM Ribeiro was in his work uniform at the top of a staircase walking in the direction of the employee locker room. That footage also shows that three minutes later [REDACTED] was in his street clothes walking towards the employee exit. That footage further shows that at 3:45AM [REDACTED] is exiting the Hotel in street clothes.

[REDACTED] also reviewed [REDACTED] time records. Specifically, she reviewed [REDACTED] time records for three shifts: February 1/2, February 2/3, and February 6/7. They show that [REDACTED] inputted [REDACTED] punch-out times for the February 1/2 and February 2/3 and that [REDACTED] inputted [REDACTED] punch-out time for February 6/7. [REDACTED] interviewed [REDACTED] about his added punch-out times. She learned from [REDACTED] that

when he was preparing the payroll for the week ending February 2 he realized that [REDACTED] had "missing punches." She also learned that [REDACTED] had sent a text message to [REDACTED] on the morning of February 3 at 6:58AM. That text message reads as follows:

What time do (sic) you punch out on feb 1 and last night.

[REDACTED] also learned that [REDACTED] responded as follows:

5:53 (sic) marika (sic) feb 1 and last night
I think 5:26.

c. Union evidence

[REDACTED] testified that his father had died in February 2018 and that, accordingly, the first anniversary of his father's death occurred in February 2019. He also testified that "my family typically has a gathering at a family member's house" in memory of a deceased family member and that "this year it was in Providence on a Saturday." He also testified that the anniversary of his father's death caused him anxiety which negatively effected his ability to perform his job duties. Ribeiro acknowledges that he left work early on several dates in early February 2019. Specifically, he acknowledges that he left work early on the following shifts:

February 1/2
February 2/3
February 6/7

Each of these shifts are examined as follows:

(i) February 1/2

████████ arrived at work just prior to his shift's 10:00PM start. A Hotel security camera recorded his departure at 3:41AM on the morning of February 2.

(ii) February 2/3

████████ arrived, again, just prior to 10:00PM. He testified that he informed Stewarding Manager ██████████ that his anxiety was increasing. He testified that ██████████ told him to "do what you can do." ██████████ was assigned to the main dishwasher, performed both his assignment and that of another overnight steward. At 4:22AM ██████████ sent ██████████ photographs of his work together with a text message that he "did all the glasses and most plates and organized 1 queen." He then left work without clocking out.

████████ testified that at 6:58AM -- 2 1/2 hours after his departure from work -- he received a text message from ██████████. He testified that the text awakened him from sleep. As referenced above, ██████████ text read as follows:

What time do (sic) you punch out on Feb 1
and last night?

Ribeiro responded as follows:

5:53 (sic) marika (sic) feb 1 and last night
I think 5:26.

Within approximately one hour ██████████ added two punches to ██████████ time records. He entered the following:

For February 1 5:50AM
For February 2 5:57AM

(iii) February 6/7

██████ testified that he again left work early. He testified that he informed ██████ that he would do so. He left at approximately 2:00AM.

(iv) February 8/9

██████ testified that he again needed to leave work early. He testified that he looked for ██████ but could not find him. He testified, therefore, he told then Stewarding Manager ██████ ██████ that he was going to leave early. ██████, in turn, at 4:02AM on February 9 sent the following e-mail to ██████

██████ showed up just before his overnight shift started and explained to me that he wasn't feeling well. He also asked if he could leave at 10:30PM. I told him that I didn't believe that it would make sense to only stay for 30 minutes. I suggested that he either goes home or he tries to pull through and help the team. Shortly after our convo he request to leave at 10:02PM. He said he would check in with the front desk before leaving.

██████ denied that he told ██████ that he would report his early departure to the front desk.

(v) ██████ held out of work

The Union agrees with the Hotel that ██████ telephoned ██████ on the morning of February 9 and told him not to report to work until after a meeting on Monday, February 11.

(vi) The alleged threat

██████ testified that although his family memorial event

was in Providence, he returned to the Boston area by 11:00PM. He testified that he was "asleep in bed" at 5:00AM on the morning of February 10, 2019. He testified that he did not drive to the Hotel that morning. He categorically denied threatening [REDACTED] and rejected his claim completely.

5. Discipline

a. Suspension

[REDACTED] interviewed [REDACTED] on February 11, 2019. At 12:00PM she presented to [REDACTED] an "Employee Discussion Form" on which she recorded the "details of event" which resulted in his suspension. It included the following "Details of Event":

On Wednesday, February 6, 2019 [REDACTED] was scheduled to work as a Steward on the overnight shift from 10:00PM to 6:30AM [REDACTED] was missing from his assigned work area at approximately 2AM. [REDACTED] was assigned to the main dish pit as well as assigned to assisting with the cleaning of the floor mats. The manager on duty that evening attempted to locate [REDACTED] but was unsuccessful. [REDACTED] was unaccounted for, did not complete his job duties as assigned, and did not notify management before leaving Hotel property. Additionally, [REDACTED] failed to punch in or out on the time clock for his shift.

After reviewing security footage, it was discovered that [REDACTED] entered the men's locker room in uniform at 1:08AM and then exited the locker room at 1:11AM in street clothes. [REDACTED] proceeded to leave the Hotel through the loading dock at 1:13AM. As noted above, [REDACTED] failed to punch in or out for his scheduled shift on Wednesday, February 6.

A further review of Hotel payroll records

revealed that [REDACTED] also failed to punch out of his scheduled shift on Saturday, February 2, 2019. [REDACTED] manager responsible for submitting payroll contacted [REDACTED] to verify his missed punch. [REDACTED] stated that he left the Hotel at 5:26AM. After reviewing security footage, it was discovered that [REDACTED] entered the men's locker room in uniform at 3:41AM and then exited the locker room at 3:44AM in street clothes. [REDACTED] proceeded to leave the Hotel through the loading dock at 3:45AM, almost two hours earlier than the out punch time he stated to his manager. [REDACTED] did not notify the manager on duty on February 2nd of his early departure from the Hotel nor did he record the correct departure time by punching out or notifying his manager during payroll close.

...

[REDACTED] actions are in direct violation of Fairmont's Standards of Conduct. Specifically:

- 3) Failure to comply with management's directions regarding work duties.
- 6) Inefficiency, inattentiveness or neglect of the performance of job duties and responsibilities
- 8) Misappropriation, theft, misuse, or abuse of the property of The Fairmont Copley Plaza, Colleagues, Guests or visitors, or property in the custody of The Fairmont Copley Plaza.

The "Employee Discussion Form" does not refer to the threat which [REDACTED] alleges [REDACTED] made to him the day before.

(b) Discharge

The Hotel discharged [REDACTED] on February 19 -- at 4PM. Again [REDACTED] presented an "Employee Discussion Form" to [REDACTED]. The "Details of Event" were the same details as

appeared on the suspension form with the following paragraph added:

On Monday, February 11, 2019 an investigation was initiated due to a complaint citing specific allegations of unprofessional and inappropriate comments and behavior of a threatening nature exhibited by ██████████ towards a fellow colleague. ██████████ was given an opportunity to respond to the allegations made against him during a meeting in the Talent & Culture office on Monday, February 11, 2019 and denied the allegations. The investigation revealed that the complaint received is credible and information supports that ██████████ exhibited threatening behavior towards another Colleague.

In addition, the second Employee Discussion Form -- the discharge form -- added to the initial suspension Employee Discussion Form the following violation of the Hotel's Standards of Conduct:

18) Engaging in any conduct at work or related to work, that is injurious to a Guest, visitor, supervisor, Colleague or to the Fairmont Copley Plaza itself.

Opinion:

Position of the Hotel

The position of the Hotel is that it had just cause to discharge ██████████. The Hotel argues that ██████████ "was caught leaving work without authorization on two occasions in one week, ██████████ lied to his manager about the time he left in order to be paid for time he did not work, and during his suspension related to his time theft offense, he approached [██████████] in the dark, on a street outside the Hotel, and made a threat

against him because he had reported [his] absences to management." It argues that "these offenses, either on their own or together, are sufficient for immediate termination."

The Hotel argues that "a fundamental principle of arbitral law is that certain conduct is dischargeable, even for a first offense." It further argues that "if there were any doubt, the Hotel maintains policies authorizing it to immediately discharge employees who neglect their job duties, falsify their time cards, engage in theft, and act in harmful ways toward coworkers." It argues that "rules such as these have been 'widely, if not universally, recognized as being reasonable by arbitrators." Specifically, the Hotel argues that "arbitrators have found discharge penalties appropriate for threatening and intimidating behavior that does not result in physical violence, even on the first offense."

With respect to the case at issue here, the Hotel argues that "[REDACTED] threatened his fellow bargaining unit employee, [REDACTED], based on [REDACTED] suspicion that [REDACTED] had reported him for unexcused absences." It argues that "not only was the substance of his comment threatening (he said he would make his life hell), but the environment amplified the sinister nature of his remarks." Specifically, it argues that "[REDACTED] was alone on a street in the dark, and he had reason to believe he was being watched or would be approached." It further argues that "then out of nowhere, [REDACTED], who has long held a grudge against him, suddenly appeared and started hurling threats." It argues that "common sense says this is a frightening situation, even if [REDACTED] did not expressly threaten physical violence." The Hotel argues that "most people would feel terrorized by someone threatening to make their life hell." It further argues that "indeed, [REDACTED] told his manager, [REDACTED], that he was

scared that [REDACTED] would come to his house." It argues that [REDACTED] and [REDACTED] also testified that [REDACTED] was trembling when he reported the threat and that [REDACTED] said that he had tears in his eyes." The Hotel also argues that "on top of that, [REDACTED] menacing conduct occurred while he was on suspension for other misconduct." It argues that "his disregarding direction to stay away from the Hotel is its own form of insubordination which, when added to the threat, constituted serious misconduct."

The Hotel also argues that [REDACTED] theft of Company time warranted his discharge." It argues that [REDACTED] admitted at the hearing that he left his shift early on February 2 at 3:45AM." It argues that [REDACTED] "also admitted that he told his manager that he left at 5:53AM." It argues that because his shift was scheduled to continue until 6:00AM "the undisputed fact is that he stole two hours of Company time." It argues that "the Union has tried to excuse his behavior by pointing to extraneous facts about his personal life and the Hotel's dealings with other employees in dissimilar circumstances."

The Hotel further argues that "on top of that, [REDACTED] admitted to leaving work without permission on multiple nights within the same week." Specifically, it argues that [REDACTED] "testified at the hearing that he left work early on his shifts of February 2/3 and February 6/7 without notifying the overnight Front Desk Manager of his departure." The Hotel notes that [REDACTED] "did not deny doing the same on his shift of February 1/2 (the shift where he admitted to lying to his manager about his clock out time)." Thus, it argues that "at best he left twice without permission and at most three times." It argues that "either way, his pattern of leaving work whenever he felt like it was against Hotel policy."

The Hotel also argues that "the Union's claim that a lesser punishment was appropriate for the above misconduct comes from its mistaken belief that progressive discipline means that an employee can only be terminated after multiple rule violations and after progression through various levels of discipline." It further argues that "however, it presented undisputed evidence that in the one other case where an employee (1) stole Company time and (2) threatened a co-worker, the Hotel discharged this employee -- just like [REDACTED]." It argues that "given the past practice, the Union attempted to differentiate the prior incident by saying that this other employee's misconduct was worse than [REDACTED] because his threat was physical in nature, which justified a harsher penalty." It further argues that "but the Hotel's policy, and arbitral law generally, does not differentiate between physical and non-physical threats in determining whether there is just cause for termination." The Hotel argues that "it is the making of the threat that matters, not the character of it."

The Hotel argues that "the Union's other evidence that two other employees were written up (rather than terminated) for leaving work without permission and failing to clock out is not comparator evidence." Specifically, it argues that "neither of these employees falsified their time records or threatened colleagues, and neither did both around the same time." It argues that "in sum, the only evidence in this case relating to past practice is that when an employee steals time and threatens his co-workers, the Hotel terminated that employee."

The Hotel also argues that "even if progressive discipline applied, [REDACTED] termination should still stand." It argues that [REDACTED] committed three discrete acts of misconduct." It

argues that "each of these acts would have, and has in the past, resulted in disciplinary warning." It argues that "it so happens here that [REDACTED] misconduct happened in quick succession, and the Hotel stacked the discipline and progressed [REDACTED] to immediate termination." It argues that "this is entirely consistent with the Hotel's handling of prior, similar misconduct."

The Hotel also argues that "there are no other mitigating factors that warrant deviating from the discharge issued in this case." It argues that [REDACTED] was a short-term employee who had worked at the Hotel about a year and a half at the time of his discharge and otherwise held the same position during his time on the job." It argues that "prior to his discharge [REDACTED] was written up and had been reported for calling [REDACTED] a 'fucking moron' (which [REDACTED] admitted to at the hearing) and for threatening [REDACTED] for being 'a rat' (i.e., doing his job by reporting to management the job performance of the Overnight Stewards)." It argues that [REDACTED] also "had a pattern of challenging anyone who dared to monitor his work, including confronting a manager on four separate occasions to question his authority." It argues that [REDACTED] was no stellar employee and deserves no leniency, particularly given the egregious nature of his misconduct."

The Hotel also argues that "the Union's defenses as to [REDACTED] threat are incredible and belied by the overwhelming record evidence." It argues that [REDACTED] testimony was consistent and substantiated; [REDACTED] was not." It argues that "the overwhelming evidence demonstrates that on February 10 around 5:00AM, during [REDACTED] suspension, he came to a street adjacent to the Hotel and threatened [REDACTED] that he would make his life hell if he found out that [REDACTED] had told management

he left early." It argues that "[REDACTED] provided detailed testimony at the hearing describing the time of the threat, the location, what [REDACTED] said, what his demeanor was like, and how [REDACTED] responded." It argues that "in addition, two Hotel managers independently testified to the same critical facts: the day after the incident [REDACTED] -- who appeared shaken and trembling -- came to the hotel and separately reported identical details about the threat to each of them." It argues that "both witnesses testified to the same facts without any variation, and both described [REDACTED] as shaking at the time he reported the threat to them." The Hotel argues that "this evidence alone shows that [REDACTED] should be believed."

The Hotel argues that "the consistent testimony from the Hotel's witnesses is further substantiated when considering the other record evidence in the case." It highlights the following:

1. Stewarding Manager [REDACTED] contemporaneous e-mail to Brewster describing the details of [REDACTED] threat in the same manner as the witnesses testified to at the hearing;
2. [REDACTED] interview of Union Shop Steward [REDACTED] within a few days of the incident describing these same facts, and
3. E-mail records from Hotel security confirming that [REDACTED] was standing outside the hotel (in the area where he was threatened) at the exact hour he said he was outside.

The Hotel further argues that "the circumstances surrounding the threat substantiate the Hotel's already consistent evidence." It argues that "the evidence showed that [REDACTED] had developed a longstanding grudge against [REDACTED]"

because [REDACTED] job included reporting to management on bargaining unit members' job performance." It argues that [REDACTED] (and seemingly the Union as well) believed that [REDACTED] was a 'rat' who should not have reported to management despite the Union agreeing in a prior grievance that this was part of his job." It argues that "[REDACTED] decision to come to the Hotel on the morning of February 10 was motivated by his grudge and was consistent with his prior conduct of threatening [REDACTED] for doing the same thing just a few months prior (which [REDACTED] admitted to at the hearing)."

The Hotel also argues that "the timing of the threat makes perfect sense." It argues that it "had suspended [REDACTED], pending investigation, because he had left work early without authorization on February 7." It argues that [REDACTED] was angry about his suspension and determined to seek retribution against the person who he had held a grudge against and who had just reported him for leaving early." It argues that [REDACTED] "correctly assumed it was [REDACTED] and made a point of frightening [REDACTED] into not doing it again."

The Hotel argues that "the only contradictory evidence in this case is [REDACTED] own testimony which is unsubstantiated and incredible." It argues that "[REDACTED] admitted at the hearing that he had no alibi." It argues that "he said he went to Rhode Island the day before the threat (February 9) but acknowledged that he was back in Boston at the time the threat happened." It argues that "by his own admission he had ample opportunity to come to the Hotel at the time of the threat." The Hotel argues that although "he testified that he did not do it, he has every incentive to lie." The Hotel argues that even though "Union counsel promised in his opening that that the

Arbitrator would hear evidence that [REDACTED] was in Rhode Island at the time of the threat," the Union produced no such evidence.

The Hotel argues that "the Union's and [REDACTED] resentment of [REDACTED] is irrelevant to this case." It argues that "nothing about the Union's gripe with [REDACTED] job duties impacts his credibility as it relates to the threat [REDACTED] made on February 10." It argues that "if anything, the Union's sideshow confirmed that [REDACTED] job includes reporting on employees' job performance and that [REDACTED] did just what was expected of him when he told the overnight manager on duty that [REDACTED] left without permission during his shift of February 1/2 and February 6/7."

The Hotel argues that "the Union's defenses regarding [REDACTED] theft of time are red herrings." It argues that [REDACTED] admitted at the hearing that

1. He left work early for his shift of February 1/2, and
- (2) he lied to his manager about his departure time effectively stealing two hours of work.

It argues that "the Union responded to this admission by presenting a variety of defenses which were nothing more than distractions." First, the Hotel argues that "the Union put on witnesses to testify that there was confusion about the shifts at issue in the case and, therefore, he should not be disciplined for stealing Company time." It argues that "specifically, the Union pointed to [REDACTED] disciplinary documents citing that he left early on 'February 2' and claimed it was unclear if this referred to his shift of February 1/2 or February 2/3." It argues that "but the Union's confusion is

irrelevant since ██████ admitted he knew exactly what he was doing." It argues that ██████ "admitted at the hearing that he left early during three shifts (February 1/2, 2/3, and 6/7)." It argues that "he also admitted that for one of these shifts, February 1/2 he told his manager that he left at 5:53AM when video footage shows him leaving at 3:45AM." It argues that "in other words, he lied so that he would be paid for time not worked." The Hotel further argues that ██████ admission at the hearing that he left early the next shift (February 2/3), and happened not to have been caught, does not change the fact that he misrepresented his time the night prior." The Hotel argues that "what the Union really seems to be complaining about is that it came up with an entire story to explain why ██████ left early on February 2/3 only to realize it was focusing on the wrong night." It argues that "the Union's confusion is its own and cannot justify ██████ stealing Company time." It further argues that "there was no confusion on the part of the Hotel about the dates at issue." It argues that Manager ██████ had reported to ██████ that ██████ was seen leaving early on February 1/2 and 6/7." It argues that "based on this report, ██████ investigated ██████ early departures for those two shifts and ultimately disciplined him for his misconduct on those two nights."

The Hotel rejects the Union's argument that "██████ should have received a lesser penalty because he allegedly had permission to leave early." It argues that "██████ testified that for his shift of February 2/3 his manager said 'do what you can' at the start of the shift which he took to mean leave whenever you feel like it." It argues that "for his shift of February 6/7, ██████ testified that he told ██████ he left early." It argues that "this defense is not only implausible based on the other record evidence in the case, but irrelevant

since it does not explain why he lied about his clock-out time and tried to get paid for time he did not work." It argues that "[REDACTED] told Brewster during her investigation that he had informed [REDACTED] to notify the overnight manager whenever he needed to leave early since [REDACTED] was not on shift during the overnight." It argues that [REDACTED] alleged 'do what you can' remark relating to the February 2/3 shift could not reasonably have been interpreted to excuse [REDACTED] from following protocol." The Hotel argues that "as to the February 6/7 shift [REDACTED] obviously did not tell [REDACTED] he was leaving or [REDACTED] would not have asked the night manager multiple times if he had seen him leave."

The Hotel further argues that "in any event, whether [REDACTED] told anyone he was leaving early ignores a principle issue in this case: [REDACTED] misrepresented his time for his shift of February 1/2." It argues that "at the hearing [REDACTED] conveniently could not recall whether he told anyone he was leaving early on his shift of February 1/2." It argues that "the payroll records show that he never clocked out." It argues that "the camera footage shows him leaving at 3:45AM. It argues that "[REDACTED], the overnight manager on duty that night, testified that [REDACTED] never told her he was leaving." It argues that "[REDACTED] told [REDACTED] during the investigation that he was not contacted by [REDACTED] that night either." The Hotel argues that "the only reasonable conclusion from this uncontroverted evidence is that [REDACTED] left during his shift of February 1/2 without authorization." It argues that "then when asked by [REDACTED] what time he left, [REDACTED] lied and said he worked the entire shift (until 5:53AM)."

The Hotel also argues that "the Union's next excuse centers on the fact that [REDACTED] manager entered a different clock-out

time in the payroll system than the one [REDACTED] texted him." Specifically, it argues that [REDACTED] told [REDACTED] via text message that he left work on February 2 at 5:53AM and that he left work on February 3 at 5:26, but [REDACTED] inputted the time as 5:50AM and 5:57AM, respectively." It argues that "the minor differences, which had the effect of giving [REDACTED] eight hours paid time for each shift, do not excuse [REDACTED] lying about his clock-time." It argues that "[REDACTED] independent, after-the-fact time entries in no way caused or contributed to [REDACTED] misrepresentation of time."

The Hotel further argues that "[REDACTED] testimony that he would have corrected his falsified timecard if he had an opportunity to review it before it was finalized for payroll is a lie." First, it argues that "[REDACTED] could have corrected his time (1) at his suspension meeting; (2) at his termination meeting; (3) after he got his paycheck; or (4) at any of the grievance meetings." It argues that [REDACTED] "never tried to make a correction, debunking any claim that his lie was unintentional." Second, it argues that "[REDACTED] knew his manager was asking him for his clock-out times via text on a Sunday in order to close payroll, and [REDACTED] chose to lie anyway." It argues that Stewarding Manager [REDACTED] who provided uncontroverted testimony on this point, testified that when employees fail to clock out, the stewarding managers routinely contact employees via text or phone to get the information so employees can be paid on time." The Hotel also argues that [REDACTED] testified that the self-reported clock-out times are regularly relied on to complete employees' weekly timecards." It argues that "this makes sense" because "asking someone what time they left -- either on a piece of paper or by text -- is the next best thing to having the employee clock out." Third, the fact that the Hotel has a policy for using a time record

adjustment form, and that form was not used here, does not justify [REDACTED] lying." It argues that [REDACTED] texted his manager his clock-out time" and, thus, "using a form would just have been for back-up." Finally, it argues that "[REDACTED] admitted that a form was not always used for double-checking the punch-out time that he gave to his manager."

The Hotel also argues that it "conducted a fair and thorough investigation." It argues that

[REDACTED] conducted six interviews within three days including speaking to [REDACTED] on the first day of the investigation. She also reviewed security footage as to [REDACTED] departure time and his payroll records as well as asked [REDACTED] for the back-up text messages to verify [REDACTED] clock-out times. [REDACTED] created a detailed investigatory summary describing exactly what the witnesses reported to her and how their accounts of what happened fit into the overall investigation.

It argues that "not a single piece of evidence suggests that the investigation was biased or inadequate in any way."

Position of the Union

The position of the Union is that there was not just cause to discharge [REDACTED]. The Union argues that its grievance "must be sustained because the Hotel abandoned some of its original allegations and disingenuously changed others." It argues that "the evolution of the Hotel's reasons for discharge raises substantial concerns about [REDACTED] credibility but, even without such concerns, it is simply impermissible to assert different reasons for discipline after it is imposed." It argues that "it is axiomatic that an employer's decision to discharge 'must stand or fall upon the reason given at the time

of discharge' and an employer cannot add other reasons when the case reaches arbitration."

The Union further argues that "until the first day of arbitration, the Hotel consistently asserted that [REDACTED] discharge related to his conduct on February 2 which every document shows and every witness understood to refer to his February 2 shift." It argues that "documents unrelated to the discharge refer to shifts by their start date." It argues that "documents related to the discipline refer to February 2 and 6 which the Hotel accepts should be read consistent with its practice for February 6 (the February 6 shift into the 7th) but now asserts should be read differently for February 2." The Union argues that "the only apparent reason for doing so appears to be the Hotel mistakenly pulled surveillance related to the wrong shift and did not catch its error until after Step 2 of the grievance process." It argues that [REDACTED], [REDACTED], and [REDACTED] all testified that they understood the issue was the February 2 shift and made sure to verify that fact given the often confusing nature of overnight shifts and [REDACTED] ambiguous text message." It further argues that "as [REDACTED] further considered [REDACTED] e-mail referring to 'Saturday night' (i.e.; February 2 into February 3) to be confirmation of what occurred during 'February 2' it is clear that the Hotel believed [REDACTED] was being disciplined for the February 2 shift." It argues that "even if it simply was an honest mistake ... changing the basis for discharge is fatal to the Hotel's case. The Union argues that "the prejudice is evident in this case, as [REDACTED] was called to recount what occurred on a different day than that which he was originally accused." It argues that "the passage of time made that impossible, precluding now the Union's ability to present a full defense." The Union also argues that because "the Hotel's discharge

related to the February 2, 2019 shift, and it adduced no evidence about when he left that day, the Hotel obviously cannot show he left at the time alleged or that he left at a time different than the 5:26AM (sic)."

The Union also argues that "the alleged threat was an afterthought." It argues that "the discipline states that 'his actions are a serious violation of Company policy and considered theft of time and grounds for termination'." It argues that "at the Step 2 meeting, [REDACTED] only mentioned the alleged threat as a last minute add-in." It argues that "the Step 2 response again codifies that '[REDACTED] was terminated for serious violations of Fairmont's standards of conduct and theft of time', citing the February 2 and 6 dates and later describing the alleged threat not as a violation of the standards of conduct, but as 'a serious violation of the Hotel's Discrimination & Harassment Prevention Policy.'" The Union argues that "while the Hotel obviously had the alleged threat in mind, the documents and testimony make clear that the Hotel's main concern was the alleged theft of time."

The Union argues that "to the extent the alleged threat was considered, the Hotel has virtually conceded that it cannot prove the alleged threat (in any of its iterations) was 'injurious' or 'a threat of violence' as alleged in the notice of discipline." It argues that "the discipline categorized [REDACTED] alleged threat as a violation of the 18th item under 'standards of conduct' which prohibits 'conduct ... that is injurious to a Guest, visitor, Colleague or the Hotel itself', but a threat is not 'injurious'." The Union argues that "it is not surprising that the Hotel ignored its 'Violence in the Workplace' policy, as that policy repeatedly refers to 'threats

or acts of violence'." It argues that the Hotel's Violence in the Workplace policy "provides" the following example:

An angry Guest raising their voice towards you is not considered 'violence in the workplace' if you do not believe that you are at risk of physical injury.

It argues that "[REDACTED] undoubtedly recognized the Hotel's inability to meet this standard and never described [REDACTED] conduct as a threat of violence, as 'injurious' to anyone or anything, or as a violation of the Hotel's standards of conduct."

The Union also argues that "the Hotel abandoned the allegation that [REDACTED] did not perform all of his work on February 6 as it presented no evidence that he failed to complete his work." Specifically, it argues that "[REDACTED] said he was 'not sure whether [REDACTED] completed his work that night.'" Thus, the Union argues that "the only allegation that permissibly remains before the Arbitrator is [REDACTED] alleged failure to notify a manager before leaving on February 6, 2019 and failing to clock out." It argues that [REDACTED] "was paid appropriately for the hours he worked that shift and therefore did not engage in any misrepresentation of time or theft of time.

The Union argues that "[REDACTED] did not engage in theft of time." It argues that "[REDACTED] did not make any statements with the intent of defrauding the Hotel." It argues that "like most allegations for which employers seek summary discharge, the crux of such severe punishment is the grievant's intentionality."

The Union further argues that it "endures extreme prejudice because of the Hotel's change of date." It argues that "the

Union will address both February 1 and February 2 insofar as sufficient evidence exists to prove he did not engage in theft of time for either the date originally alleged or alleged for the first time at hearing."

The Union argues that "the Hotel's own policy prohibits relying upon ██████████ text message to adjust his punches." It argues that "recognizing the importance of accurate time records, Hotel policy requires that an employee is given an opportunity to review the change and sign an exception report attesting to its accuracy." It argues that neither ██████████ nor ██████████ were aware of this policy before Union Counsel presented it to them during their testimony." It argues that ██████████ was unable to explain why the exception forms existed." It argues that "the urgency of submitting payroll on time cannot deprive ██████████ of a full and fair opportunity to review his time records before attesting to their accuracy, particularly when he has been presented that report in the past and where the Hotel is claiming the right to summarily end his employment based upon representations about his time."

The Union argues that "even in the absence of the policy, ██████████ text message cannot honestly be described as a confident assertion of his actual work time." It argues that ██████████ "woke ██████████ from his sleep after he left work due to feeling anxious." It argues that

it is anyone's guess what "5:53 marika feb 1" means, as even ██████████ could not make sense of it. "Last night I think 5:26" is ambiguous in terms of what "last night" means but clear in that he left early at some approximate ("I think") time. [cf. ██████████ "did not disclose leaving early at any time when asked about his missing punch." Even ██████████ acknowledged she did

not know what "last night" meant as she could not "speak for [REDACTED]."

The Union argues that [REDACTED] admission "alone confirms [REDACTED] overreached by treating this text as an unambiguous representation to defraud the Hotel."

The Union further argues "even if [REDACTED] text message could be understood as a crystal clear, policy-compliant representation of his work hours, [REDACTED] did not rely upon it when he entered [REDACTED] time and therefore it cannot be the basis of discipline." It argues that "it is almost comical that [REDACTED] testified that his managers would never enter a different time than what an employee represented as [REDACTED] suggested two times (5:53 and 5:56), and [REDACTED] entered neither." The Union argues that "[REDACTED] misrepresentation resulted in [REDACTED] overpayment, yet [REDACTED] was not even asked why he put the times he did, which is particularly concerning if [REDACTED] had already advised [REDACTED] that [REDACTED] left early." Thus, the Union argues that "it is inappropriate to discipline [REDACTED] when the evidence is that nothing [REDACTED] said to [REDACTED] affected what [REDACTED] put into payroll."

The Union argues that "the undisputed evidence shows that [REDACTED] appropriately advised his manager ([REDACTED]) he was leaving early on February 2 and had permission to do so." It argues that "[REDACTED] testified without contradiction that he informed [REDACTED] at the beginning of his shift that his anxiety was acting up and he needed to leave early." It argues that [REDACTED] "told him 'to do what he could', a fact that was confirmed by [REDACTED] during the grievance process and which [REDACTED] did before texting [REDACTED] pictures of the work he performed at 4:22AM."

The Union further argues that [REDACTED] lack of testimony on this (and other) points is fatal to the Hotel's position." Specifically, the Union argues that "the Hotel provided no direct evidence to rebut [REDACTED] testimony." It argues that "[REDACTED] internal notes of [REDACTED] interview are inherently untrustworthy as they directly contradict [REDACTED] testimony and her assurances during the grievance process that [REDACTED] did recall telling [REDACTED] to 'do what he could do.'" It argues that "the internal notes also claim [REDACTED] denied knowing [REDACTED] left early despite [REDACTED] claim (not repeated during his testimony) that he spoke to [REDACTED] that night and [REDACTED] said 'we have to get him to stop doing this'." The Union argues that "the Hotel cannot meet its burden that [REDACTED] did not authorize [REDACTED] departure without [REDACTED] testimony to make sense of these vastly different versions."

The Union argues that "the Hotel claims [REDACTED] was required to get the MOD's permission to leave, but that fact was disputed by [REDACTED], [REDACTED], and even [REDACTED] who testified that it was sufficient for employees to tell him ([REDACTED]) before leaving." It argues that "the Hotel's reliance upon [REDACTED] conversation with [REDACTED] on February 8 fails to recognize that [REDACTED] was a Stewarding Manager at the time, and that [REDACTED] only spoke to [REDACTED] because he could not find [REDACTED] who acknowledged [REDACTED] was looking for him that night."

The Union also argues that "given the Hotel's mistake in pulling the wrong surveillance video there is simply no evidence of when [REDACTED] left his February 2 shift." It argues that "[REDACTED] text messages show he was at the Hotel at 4:22AM, sending photos to [REDACTED]." It argues that "it is, therefore, impossible that he left at 3:45AM as the Hotel alleges in its discipline."

The Union also argues that ██████ "did not abandon his shift on February 6." It argues that ██████ credibly testified that he spoke with ██████ before leaving his February 6 shift because he was not feeling well." It argues that "every employee who testified (██████, ██████, ██████ and ██████) testified that checking with the Lead on the overnight shift was sufficient notice." It argues that "██████ testified that he has done that in the past and, despite the many issues between him and ██████, ██████ has never accused him of leaving early without permission." The Union argues that ██████ does not have an issue with leaving early as demonstrated by months of pay records that show ██████ clocking out at the appropriate time." The Union acknowledges that "admittedly ██████ did leave work early several days around February 6 which was due to an increase in anxiety associated with the anniversary of the death of his father." It argues that "██████ checked in with ██████ on February 2 and ██████ on February 8 which shows ██████ was dutifully notifying the Hotel during that difficult week when he needed to leave early." The Union argues that "it does not make sense that the would notify the Hotel on some days and not others."

The Union argues that "Brewster's inadequate investigation failed to establish ██████ did not speak with ██████. It argues that ██████ e-mail identifies multiple witnesses who could have commented on ██████ absence that night including the 'few other stewards' who allegedly informed ██████ they were going outside with ██████ for a smoke break, and ██████, who allegedly 'wanted to make sure [██████] was aware' that ██████ 'left hours ago'." The Union argues that "assuming there were a 'few other stewards' present when ██████ spoke to ██████, they could have confirmed what ██████ told ██████ when he

left." It argues that "as [REDACTED] was apparently aware of [REDACTED] situation, he could have provided his understanding of why [REDACTED] left or why he felt he needed to inform [REDACTED]" It argues that "it is also highly suspicious that [REDACTED] knew, at 2:00AM, that [REDACTED] left the property for good around 1:15AM." It argues that "the most plausible explanation for this precise knowledge is that [REDACTED] told [REDACTED] he was leaving because he was not feeling well" and that [REDACTED] then waited, checked [REDACTED] car was gone, then reported him missing."

The Union argues that "[REDACTED] testimony was not credible in general because of the many material differences between his testimony and prior statements which includes his testimony about February 6. It argues that "in addition to more nuanced differences, like why he went to check [REDACTED] car, [REDACTED] claimed he could not find [REDACTED] after two separate rounds which is both absent from [REDACTED] e-mail and is unlikely given the short time (45 minutes) between when [REDACTED] left the property and [REDACTED] complaint." It argues that [REDACTED] also testified he only told [REDACTED] to let [REDACTED] know if he saw [REDACTED] which is very different than the list of complaints that [REDACTED] recited in his e-mail and would have allowed the possibility of [REDACTED] return." The Union argues that "if [REDACTED] or [REDACTED] genuinely did not know why [REDACTED] left or if he was okay, they would have reached out to [REDACTED] that night." It argues that "the most plausible conclusion is that [REDACTED] knew exactly when and why [REDACTED] left and his conversation with [REDACTED] intentionally deceptive."

The Union argues that "even if [REDACTED] did not check in with [REDACTED], [REDACTED] and [REDACTED] both testified that overnight employees will sometimes make the independent decision to leave and check in with the manager in the morning." It argues that

"this is often done if the employee cannot find the Lead to let them know they are leaving but, in any event, employees are given the discretion to leave before the end of their shift given the lack of management presence on overnights."

The Union also argues that ██████ did not threaten ██████." It argues that "the Hotel cannot meet its burden that ██████ engaged in threatening behavior based upon the internally contradictory testimony of an employee who has a long, contentious relationship with ██████." It argues that "when compared to ██████ credible, consistent testimony to the contrary, the only conclusion is that ██████ did not threaten ██████."

The Union argues that "█████ is an honest, credible person and witness." It argues that "█████ has never denied misconduct that he legitimately engaged in, including calling ██████ a 'fucking moron,' telling him he should not report on his fellow bargaining unit members, or potentially leaving early on February 2 or 6." It argues that ██████ admitted to the allegations against him for a non-disciplinary coaching and counseling in December 2018, albeit he was frustrated with the discipline's lack of honesty about who reported him." It argues that "in his conflicts with ██████, ██████ always engaged the appropriate channels when he had concerns, raising them with ██████, ██████, Corporate HR when ██████ ignored his concerns, and finally a state administrative agency when the Hotel continued to ignore him." The Union argues that "as a general principle, it is not believable that ██████ would drive home from his father's memorial service the night before, then wake up early to make a special trip to the Hotel, in a car that was not his, to make a threat that was entirely out of his character."

The Union argues that [REDACTED] is a demonstrably dishonest person whose dishonesty about what happened [during the night of the alleged threat] is apparent from the direct evidence." It argues that "as a matter of course, [REDACTED] conceals his role in reporting on and disciplining employees, including [REDACTED] in this case, and the Hotel facilitates that deceit through its own misleading description of how it comes to learn of [REDACTED] complaints." It argues that [REDACTED] did not explain why he did not call or text [REDACTED] that he was threatened if this occurred literally during their texting." It further argues that "although [REDACTED] noted that he was texting [REDACTED] at 5:17AM which would have been after this alleged threat occurred (after the timing was adjusted based upon review of surveillance), and [REDACTED] still did not inform him of the threat at the time." The Union argues that "contrary to [REDACTED] assertion, [REDACTED] had every reason to lie, including a lengthy history of negative interactions recently rising to the level of multiple e-mails to managers and specifically naming [REDACTED] (sic) in an MCAD charge." It argues that [REDACTED] also was becoming paranoid about [REDACTED] 'trying to split and divide the team' and told [REDACTED] that he felt [REDACTED] was turning the Stewarding Department against him." The Union argues that "on February 7 [REDACTED] saw an opportunity to make a complaint about [REDACTED] leaving early, which [REDACTED] knew from personal experience would not result in termination, then doubled down with an allegation of a threat."

The Union argues that [REDACTED] surreptitious investigation confirms her lack of certainty in [REDACTED] complaint." It argues that [REDACTED] did not provide the obvious reason for keeping two sets of investigatory notes, concealing the one with more detail and attached evidence from

the Union until the Hotel Counsel unwittingly revealed its existence during the arbitration." It argues that "these documents reveal several facts that ██████ did not want the Union to see including ██████ specific reference to 5:17AM text messages in his e-mail that ██████ was texting to ██████ at the time of the threat that ██████ claimed to have spoken to ██████ that morning, ██████ acknowledgment of his terrible relationship with ██████, and ██████ e-mail from February 7 revealing ██████ other complaints and witnesses." It argues that ██████ understood information in her report undermined ██████ credibility, so she did not share it." The Union argues that "even more alarming, her notes do not accurately reflect what ██████ told her, as she admitted during testimony and the Step 2 meeting that ██████ recalled telling ██████ 'do what you can do' but her notes say 'I don't remember him telling me that he doesn't feel good'." It argues that ██████ played the same game in August, lying to placate ██████ about his complaint then." It argues that "she lied in ██████ disciplinary notice about how she became aware of the February 2 complaint." It argues that "she attempted to distinguish ██████ discipline by lying about whether he was on property when the disciplinary notice clearly states he was not." It argues that "within days of submitting her MCAD response, she took the unprecedented step of placing ██████ out of service the moment she received a complaint about him because she had already determined his fate."

The Union argues that ██████ "disregard for the truth deprives her of credibility when she stated she believed ██████ because he 'looked scared'." It argues that "she consistently sided with ██████ on every issue that either he or ██████ ever raised, with or without an investigation." It

argues that "as [REDACTED] was forced to tacitly concede in her Step 2 response, there is simply no way to explain how [REDACTED] could find that [REDACTED] engaged in a 'threat of violence' other than a predisposition to a particular result."

Finally, the Union argues that "the alleged conduct has never resulted in discharge." It argues that "as codified in the Hotel's policy and practice, employees are not summarily discharged for theft of time or threats of violence." It argues that "regardless of what the violation is called, alleged theft of time has never resulted in immediate discharge." Specifically, it argues that "[REDACTED] did not receive formal discipline for leaving Hotel property for 45 minutes at the end of his shift" and "[REDACTED] received a verbal warning for not keeping accurate time records including leaving his shift early and never returning." The Union argues that "reliance upon [REDACTED], whose actual discipline it did not seek to provide, is misplaced as he was only discharged because 'as discussed, any further violation of Hotel policy [after his Last and Final warning] will result in termination of employment.'" It also argues that "[REDACTED] also admitted to a much more serious and direct threat than what [REDACTED] was alleged to have said and was not discharged." Specifically, the Union argues that "despite telling a co-worker 'I will fucking snap your neck', an actual threat of violence, [REDACTED] received a Last and Final warning." It argues that "the much more nebulous allegation of 'I'll make your life a hell' is not a threat of violence." It argues that "in context, it is nothing more than a promise to continue complaining about the treatment that [REDACTED] was enduring." It argues that "even if it were a threat of violence, it would not result in discharge."

The Union argues that "based upon the only actually comparable conduct, ██████ should have received a verbal warning even if he engaged in the conduct alleged."

Discussion

I conclude that there was not just cause to discharge the grievant, ██████. Even if ██████ either left work early on the overnight shift beginning on February 1, 2019 and later lied to ██████ about the precise time at which he had departed, the penalty of discharge is too severe. Even if Ribeiro left work early on the overnight shift beginning on February 6, 2019 without notifying anyone in supervision or his early departure, the penalty is too severe. Even if ██████ confronted ██████ outside the Hotel on Stuart Street and stated words to the effect that if he found out that ██████ had reported to management that he had left work early, he would "make his life hell," the penalty of discharge is too severe. I arrive at this conclusion primarily on a theory of disparate treatment. Specifically, I conclude that in prior cases the Hotel has not discharged employees who leave early without permission and receive pay for time not worked. Similarly, the Hotel failed to discharge an employee who subjected a coworker to a far more pointed threat of violence than that which it contends ██████ directed at ██████ in the early morning hours of February 10, 2019.

The Hotel set forth the reasons for its discharge of ██████ in the second Employee Discussion Form which it issued to him on February 11, 2019. Specifically, it states that ██████' actions are in direct violation of Fairmont's Standards of Conduct which states:

For the protection of all, the following actions will not be tolerated in our workplace, and any Employee who commits any of these actions will be subject to disciplinary action up to and including dismissal.

18) Engaging in any conduct at work or related to work, that is injurious to a Guest, visitor, supervisor, Colleague or to The Fairmont Copley Plaza itself.

3) Failure to comply with management's direction regarding work duties.

6) Inefficiency, inattentiveness or neglect of the performance of job duties and responsibilities.

8) Misappropriation, theft, misuse, or abuse of the property of The Fairmont Copley Plaza, Colleagues, Guests or visitors, or property in the custody of The Fairmont Copley Plaza.

That form also provided detail of the charges against [REDACTED] as follows:

... [REDACTED] falsified Company Records and left Hotel property on two occasions without notifying or receiving management's permission. ... Due to the severity of his actions on February 2 2019 and February 6, 2019 combined with a credible threat of violence, [REDACTED] is being terminated effective February 19, 2019.

Each of the three charges against [REDACTED] is examined as follows:

1. February 1/2 and/or February 2/3 2019

Overnight shifts often create great confusion even for those familiar with the concept of overnight staffing. It is

clear that the practice of the Hotel and the Union is to refer to an overnight shift by the date on which it begins. Thus, the parties refer to the date of an incident which occurs in the morning of an overnight shift as an incident which occurred on the prior calendar date -- the date of the day prior to the day on which the incident occurred. Thus, an event of interest which occurs on the morning of an overnight shift which runs from February 1 to 2 would be considered to have occurred on the February 1 shift.

In this case, when -- after it learned of [REDACTED] departure from work prior to the scheduled end of his February 6/7 shift -- the Hotel researched [REDACTED] then-recent attendance records. It discovered via security camera footage and time card punch records that [REDACTED] had departed the Hotel at 3:45AM on the morning of February 2, 2019. Although the parties generally consider the morning of the overnight shift to be part of a shift denominated as the February 1 shift because that is the date on which the shift commenced, it treated this "February 2 alleged early departure as though it occurred on overnight shift commencing on February 2. The Hotel disciplined [REDACTED] for shift abandonment which occurred on February 2 -- rather than on the shift which commenced on February 1 and included the morning of February 2. The Hotel asserted throughout this case -- until arbitration -- that it had disciplined [REDACTED] for his conduct which occurred on "February 2, 2019." The Union reasonably understood that to mean that the Hotel disciplined [REDACTED] for having abandoned his February 1 shift before its scheduled end at 6:00AM on February 2, 2019.

At the hearing in this case the Hotel entered into evidence photographs of security footage dated February 2, 2019 which showed [REDACTED] leaving the loading dock in street clothes at 3:45AM -- approximately two hours before the end of his shift.

I agree with the Union, however, that although the footage may well show that ██████ left work early on February 2, 2019, it is not the February 2 shift on which the phrase in the Employee Discussion Forms of February 11, 2019 claims his disciplinable conduct occurred.

I also agree with the Union that an employer cannot with impunity change the reason for discipline after imposing it. Discipline must rise or fall on the reason or reasons which the employer articulated at the time of discipline. In this case, because the Employer initially disciplined ██████ on the basis of conduct which it claimed he committed on February 2 (i.e.; the morning of the February 1/2 shift), security footage dated the morning of February 2 proves nothing with respect to Ribeiro's conduct during the morning hours of his February 2 shift because the morning of his February 2 shift would be February 3. The Hotel's inconsistency with respect to the date on which it alleges a disciplinable incident of job abandonment results in a basic denial of procedural due process and, ultimately, a denial of just cause because it required the Union and ██████ to prepare a defense for conduct on a date unknown to them until the arbitration hearing. The Hotel's actions and the attendant passage of time caused memories to fade and, thereby, interfered with the Union's ability to mount a full defense. To the extent to which the discharge in this case relies on the charge of ██████ early departure from work on February 2, it cannot stand.

The Hotel argues that the Union's insistence that the dates of the overnight shifts between February 1 and 3, 2019 are mere "red herrings" in this case. Specifically, it argues that ██████ response to ██████ text of early morning February 3, 2019 shows that he was fully aware that ██████ question

"what time did you punch out on February 1" to be the February 1 into the 2nd shift." The Hotel cites the following testimony of [REDACTED] on cross-examination.

Q: ... You understood this, "what time did you punch out on February 1st" to be the February 1 into the 2nd shift?

A: Correct.

Q: And you responded, "5;53"?

A: Correct.

There is no official transcript of the testimony in this case. But neither my notes nor my recollection contains such definitive testimony of [REDACTED] concerning his understanding of the meaning of "February 1st."

2. February 6/7

Even if [REDACTED] abandoned his February 6 shift in the manner in which the Hotel alleges, discharge for such conduct cannot meet the contractual just cause standard. To discharge [REDACTED] for his conduct on his February 6 shift would render him a victim of disparate treatment. The Union introduced evidence of the Hotel's issuing far lighter discipline to employees who have engaged in conduct similar to that in which [REDACTED] engaged in this case. They are cited as follows:

a. [REDACTED]

The Hotel issued a Verbal Warning to [REDACTED] in November 2017 for leaving his 3:00PM-11:00PM "before the end of his shift without informing a manager." In addition, [REDACTED] "failed to keep accurate records of time worked including failure to punch before starting work duties or punching out after the shift."

b. [REDACTED]

In December 2018 the Hotel issued a "coaching & counseling" -- informal discipline -- to [REDACTED]. Stewarding Manager [REDACTED] described the "actions that occurred" as follows:

On Sunday, December 2018, [REDACTED] was missing from his assigned work area during his shift. [REDACTED] was missing from his work area for more than thirty minutes. After reviewing security footage, it was discovered that [REDACTED] departed the hotel at 4:42AM and did not return to the Hotel until 5:27AM. [REDACTED] was off property, on the clock without notifying any one for almost one hour.

[REDACTED] described the "Actions to Take in the Future" as follows:

[REDACTED] understands that it is his responsibility as overnight team leader to set the example for his fellow Colleagues. Leaving property for more than a half hour at the end of his shift is unacceptable and is a violation of Hotel policy. Additional violations of this Hotel policy and/or any other Hotel policy will result in progressive discipline.

Again, the Hotel did not discharge [REDACTED] for conduct which is similar to that which the Hotel argues [REDACTED] engaged in.

3. The alleged threat

Even if [REDACTED] did, in fact, confront [REDACTED] on the Stuart Street sidewalk at approximately 5:00AM on February 10, 2019 and even if he uttered words to the effect "if you reported me to management, I will make your life hell" and even if those

words can reasonably be interpreted as a threat of violence, I conclude that the incident does not constitute grounds for discharge.

Again, to discharge ██████ on the basis of the alleged incident of February 10, 2019 would be an act of disparate treatment. The allegation against ██████ is for uttering words which are far less serious than those ██████ admitted to uttering. ██████ alleged threat of violence is reasonably amenable to conflicting interpretation. In the context of this case his words could reasonably be interpreted as a warning to ██████ that he would continue to complain about his job performance as distinguished from a direct threat of violence against ██████ person. To the contrary, ██████ threat to a co-worker that "I will fucking snap your neck" cannot reasonably be interpreted as anything but a threat of violence -- even death -- to a Colleague. For this threat ██████ received a Final Warning.

4. The remaining allegations in the discharge form

Because the Hotel presented no evidence in support of its allegations that ██████ either (1) failed "to comply with management's directions regarding work rules" or (2) engaged in "inefficiency, inattentiveness or neglect of the performance of job duties and responsibilities," there is no need to discuss these charges.

* * *

The Hotel argues that the above-cited cases regarding disparate treatment are inapposite here. It argues that none of the bargaining unit members to whom it assessed discipline (or a

coaching and counseling) less severe than discharge committed two or three offenses in quick succession as did ██████ in this case. It may be true that ██████, ██████, and ██████ did not collect a series of disciplines in quick succession. But the fact that the two allegations against ██████ concerning shift abandonment and the allegation of a threat against ██████ involve closely related subject matter and were incurred within a period of approximately 10 days, suggests that the allegations are closely related and tantamount to a single alleged offense. The timing of these alleged offenses and their interrelated nature also gives credence to the Union's theory that it was anxiety related to the anniversary of his father's death which caused ██████ inability to complete his shifts in early February 2019. After all, ██████ did not have a chronic problem with attendance in the year and a half that the Hotel had employed him. ██████ time records and lack of disciplinary history show that historically he had no problem completing his shifts and had no history of allegedly threatening his co-workers until February 2019.

Remedy:

██████ is the only case cited here which involves a bargaining unit member who uttered an unambiguous threat of violence against a co-worker. The Hotel issued a Final Warning to him; it did not discharge him. The fact that the Hotel issued a Final Warning to ██████ however, does not require me to order the Hotel to reduce the discharge of ██████ to a Final Warning in this case. ██████ acknowledged making a threat of violence. ██████ denied uttering the words of which the Hotel accused him.

The burden of proof lies with the Hotel in this case. I

conclude that the Hotel failed to provide sufficient evidence upon which to conclude that [REDACTED], in fact, threatened [REDACTED]. There were no witnesses to the alleged interaction between [REDACTED] and [REDACTED]. Thus, the only direct evidence of the alleged incident is [REDACTED] testimony about a threat and [REDACTED] categorical denial that the incident even happened. Each has an obvious motive to lie. [REDACTED] has a demonstrated dislike of [REDACTED]. [REDACTED] may want to preserve his job. Because I do not conclude that [REDACTED] uttered any threat, I cannot require the Hotel to assess any discipline for a threat that has not been proved.

Award:

There was no just cause to discharge the grievant, [REDACTED]
[REDACTED]

The Hotel shall immediately offer to reinstate [REDACTED] to his former position.

The Hotel shall immediately make [REDACTED] whole for any wages and benefits which he lost as a result of his unjust discharge.

/S/ James M.Litton

James M. Litton
Arbitrator

Dated: February 27, 2020