AMERICAN ARBITRATION ASSOCIATION

In Arbitration Proceedings Between: [redacted] Local [redacted] (on Behalf of Grievant) and [redacted] Refinery Re: Termination of [redacted]	)	AAA Case # [redacted] ARBITRATION OPINION AND AWARD Thomas Kruglinski, Arbitrator[1] DATE: November 27, 2023

APPEARANCES

For the Employer

[redacted]

And

For the Union

[redacted] LLP

Commented [MB1]: Please be sure to eliminate all names, union & employer as well as counsel names as we do not have permission to share the decision.

INTRODUCTION

Pursuant to the collective bargaining agreement of the parties, I conducted a hearing on June [redacted], 2023, continued on July [redacted], 2023, via Zoom videoconference, regarding the termination of the employment of [redacted] ("[redacted]" or "Grievant"), from the [redacted]

[1]**Disclaimer**: Please note that this Opinion and Award is for the purposes of training and development of the Arbitrator, Thomas Kruglinski. It is to be considered a practice exercise and a demonstration of the arbitrator's abilities in writing awards. The case is a real one and the actual arbitrator was Melissa H. Biren, who is acting as a National Academy of Arbitrators mentor to Arbitrator Kruglinski and who wrote the actual opinion and award in this case. As such, this document is a MOCK AWARD. Identifying names and places have been redacted from this document as the parties have not consented to its publication.

[redacted], [redacted] Refinery ("Refinery" or "Company"). At the hearing the parties were given the opportunity to present their respective cases: proofs, exhibits, witnesses, and arguments. The parties stipulated to the issue before the arbitrator, as follows:

> *Did the company have just cause to discharge the grievant, [redacted]. If not, what shall be the remedy?*

A number of exhibits were submitted by the parties and admitted into evidence, including five joint exhibits (J-1 through J-5), 20 Employer exhibits (C-1 through C-18, C-32 and C-37) and 11 Union exhibits (U-1 through U-11). Both parties submitted post-hearing briefs summarizing their arguments, after which the record of this case was closed. This Arbitration Opinion and Award may not address every argument presented by the parties, but all arguments were considered in the preparation of this Opinion and Award.

BACKGROUND FACTS

The grievant in this case, [redacted], was a 14-year employee at [redacted] Refinery, a petrochemical refining facility located in [redacted], New Jersey. [redacted] is represented by the [redacted], Local [redacted] ("[redacted]" or "[redacted] Local [redacted]" or "Union"), under a collective bargaining agreement entered into by the Company and the Union on [redacted], 2022 (Joint Exhibit 1). The Union and the Refinery, under various ownerships, have had a longstanding collective bargaining relationship dating back many years.

The Grievant was employed by the Company as an Operator in the Refinery's water treatment plant. He was originally hired by the Company in 2009 and served until his termination on November 17, 2022. As an Operator, Grievant's typical work day consisted of making "rounds" in the water treatment facility, checking on the operation of various pieces of equipment, and addressing operational needs as they arose. One of his assigned tasks was to

periodically check the level of slurry, a mixture of water, soda ash, and lime within the sediment tank ("sediment tank" or "sed tank"). Slurry is an extremely hot liquid of approximately 220 degrees. Slurry is used to soften the water the Refinery uses in its various processes. When the level of slurry in the sediment tank reaches a certain point, that level must be lowered. This entails draining slurry into, the "slurry pit." The slurry in the pit would ultimately be removed from the area by a contractor's vacuum truck. The draining of the sediment tank is accomplished by opening a particular valve, draining the slurry into the pit until desired levels are reached, and then closing the valve.

According to the record, on November 9, 2022, while on his regular rounds, the Grievant opened the valve to reduce the levels of the lime slurry in the sediment tank. While the tank was draining, the Grievant turned his attention to service a leaking pump located, according to testimony, 10-20 feet away from the open valve[2] . While attending to these other duties, away from the immediate area of the open valve, he "totally forgot" that he had opened the valve (C-5, confirmed by testimony of grievant at Tr: 405: 4-15).

Commented [MB2]: This is where you can put in some facts to make the distinction between solely overflowing the tank and leaving the valve open when leaving area —

At some point thereafter, one of the Refinery's supervisors, [redacted], who happened to be walking by the sed tank, notified the Grievant by radio that the slurry pit was overflowing both of its containment areas and running onto the driveway. This spill which, according to the Company's later estimation, caused approximately 4,900 gallons of lime slurry to overflow, some or all of which wound up in the driveway, required a substantial cleanup effort. Following the incident, the Grievant texted his supervisor, [redacted], writing:

[2] There is conflicting testimony as to how far away from the valve he eventually traveled while the tank was draining, with the possibilities ranging from at least 10 feet away while servicing a leaking pump, to as much as 200 feet away, in a structure called the "Control House."

"Good Morning. Not sure if you're at work. I fucked up again and over flowed the lime pit. I'm so sorry. I know that doesn't change the situation. I just wanted you to know that I'm so sorry." (Exhibit C-4, with some punctuation added).

The Company subsequently conducted an investigation, including an interview with the Grievant on November 11, two days after the spill. At this meeting, [redacted], the Grievant's supervisor and a participant in the investigation, testified that grievant told her he left the valve open to attend to other duties and "totally forgot" about the open valve, resulting in the overflowing incident (Exhibit C-5 and Tr: 425: 5-15). Supervisor [redacted] testified that a day or two later, McKenzie was informed he was being put on administrative leave. Then, on November 17, 2022, he was terminated for violations of Company work rules (Exhibit J-3). In deciding that discipline was appropriate, the Company considered Grievant's prior disciplinary history with the Refinery. This included three prior incidents over the previous year involving unsatisfactory job performance, failure to report to work on time, and failure to properly perform his maintenance rounds (Exhibits C-1 through C-3). The last discipline resulted in two-shift suspension and a coaching session, after which supervisor [redacted] testified:

Commented [MB3]: Stylistic — put the exhibit number or other citation at the end of the sentence so it flows better. Up to you.

"[redacted] sat in my office, and I just wanted to convey to him, you know, how, you know, how important it was to be engaged in his job and the last thing I wanted to specifically -- I specifically said was the last I wanted to -- was for him to ever lose his job. I needed him to be 100 percent engaged in his job while he was inside the refinery." (Tr: 164:5-14)

In accordance with Article 19, the CBA's Grievance Procedure, the Union filed a grievance (Exhibit J-4, Grievance B-136-22) on [redacted] behalf on December 5, 2022, alleging violations of Articles 10 and 24 of the CBA (non-discrimination and just cause discipline, respectively) and requesting that the termination penalty be reduced to a time-served suspension and a last chance work agreement with Mr. [redacted]. The parties failed to resolve

the grievance at Step 3 and the Company formally denied the grievance on December 19, 2022 (Exhibit J-5). That denial resulted in the instant proceeding before this arbitrator.

COMPANY ARGUMENT

The Employer maintains that it has met its burden of proving just cause for the Grievant's discharge. It argues that its termination of the Grievant's employment was the last step of a progressive discipline process focused primarily on the safety risk Grievant posed to himself and others. The Refinery argues that the nature of its operations, involving the routine processing of chemicals and flammable materials, requires a very high standard of excellence with regard to safety that the Grievant did not exhibit, not just in the actions leading up to the slurry pit spill but also in two of his three disciplines within the previous year (Exhibits C-1, a verbal warning for failing to inspect fire extinguishers, and C-3, Failure to report a non-working feedwater pump, both safety-related offenses).

The Company argues that leaving the immediate area with the valve open, causing the overfilling of the slurry pit, [redacted] violated two important work rules properly promulgated by the Company under the CBA. Both rules, by themselves, the Company maintains, constitute just cause for termination (Exhibit J-2, paragraph 2). Posted Offense 18 is "Unsatisfactory job performance," and Posted Offense 42 is "Failure to comply with Safe Work Practices or Life Saving rules." To support these charges, the Company alleges that leaving the valve in question open and unattended while the Grievant left the immediate area also constituted a violation of a known work rule, the Refinery-Wide Protocol ("RWP") on "Draining and Depressuring Process Equipment," which states in relevant part that:

"Active draining or depressuring operations to non-closed systems cannot be left unattended. If draining or depressuring will take an extended period of time; a relief person may need to be available." (C-6, Item D-7).

Grievant's supervisor, [redacted], testified that the process incident to the spill was, in fact, such a non-closed system requiring constant attention while the valve was open (Tr: 82: 15-19).

The Company also argues that the Grievant, via his own testimony and text communications regarding this incident, was fully aware of his unsafe actions and violations of work rules and safety protocols of the plant, his expressions of remorse notwithstanding. The Grievant's testimony, they argue, also revealed that he had left the valve in question open on more than one occasion prior to the November 9, 2022 incident that gave rise to this proceeding, further demonstrating his general lack of attention to safety. Consequently, the company argues that the grievance should be denied, and the termination of [redacted]'s employment thus upheld.

Commented [MB4]: As discussed, I don't think this was considered problematic — hence no discipline — but it does support that it is leaving the valve open and walking away from the area, not just that there was some overflow, that merited the discipline here.

UNION ARGUMENT

The Union makes three main arguments in support of the grievance's contention that their member's termination was "unjust, excessive and discriminatory" (Exhibit J-4), and thus the company's burden of proving just cause for terminating Grievant has not been met. First, the Union maintains that the Company did not meet the "fair notice" requirement of just cause. It argues that the overfilling of the slurry pit was done by many other employees, and sometimes at management's direction as part of a "turnaround" process. It notes that the Grievant was the first and only union member to be disciplined for such an occurrence. The Union maintains that since "the overfilling of the slurry pit was not an altogether unforeseen or unusual occurrence," (Union Brief, page 11) and that since no one had been previously disciplined for such an incident, the Grievant could not have known that overflowing the pit would result in disciplinary action.

Second, the Union notes that the Refinery-Wide Protocol cited by the Company directing employees to not leave draining and depressuring operations unattended (Exhibit C-6, p.3) was inconsistently enforced, thereby sanctioning employees' disregard of the rule (Union Brief, page 13). The inconsistent enforcement, it argues, is evidenced by the fact that their member was the only employee who was ever disciplined for overfilling the slurry pit and this fact is sufficient to establish that there was no just cause for his termination. Finally, the Union argues that the discipline meted out to the Grievant was discriminatory (i.e., that their member was the victim of disparate treatment) and must be set aside for that reason. Again, they cite the fact that [redacted] was the first and only employee to be disciplined for overfilling the pit as the primary support for this argument.

The Union makes a variety of observations in support of these main arguments including:

- The Company's cited RWP is, at best, anecdotal and general, i.e., not specific to the draining of the slurry pit and as such is insufficient to establish fair notice, consistent enforcement, or non-discrimination;
- The Company's measurement of the amount of slurry that overflowed into the driveway was inaccurate;
- If the overflowing of the slurry pit was such a serious lapse as to warrant discipline for the spill, then the Company would have or should have installed "a dead man valve" or instrumentation and alarms prior to an overflow;
- The Company never cited the RWP during prior steps in the grievance process which is evidence that the Company's termination of the Grievant was for "some unknown policy or rule" that the Employer itself never even identified in its investigation nor mentioned in the termination letter, and never raised until arbitration (Union Brief, page 6-7);
- The spill was not serious enough to warrant reports to the EPA or [redacted]DEP; and
- Mitigating factors such as the Grievant's honesty throughout, his leaving the valve open and performing other necessary duties (as opposed to leaving and not working), and his quick response after he was informed that the slurry pit was overflowing were not considered in the Company's decision to terminate.

RELEVANT PROVISIONS OF THE CBA

ARTICLE 10—NON-DISCRIMINATION (Exhibit J-1)

> The Company is committed providing equal employment opportunity for all qualified persons without regard to race, color, religion, sex, sexual orientation, national origin, age, disability, veteran status or because of membership or non-membership in the Union.

ARTICLE 24 DISCIPLINE (Exhibit J-1)

> Article 24-1 General
>
> a. The Company may discipline an employee only for just cause.
>
> b. The Company may post a list of offenses and publish working rules, and may change them only once each calendar year by giving the Union 30 days advance notice.
>
> c. Committing a posted offense, failing to obey the working rules, or unsatisfactory work performance may be cause for discipline.
>
> Article 24-2 Discipline
>
> When the Company disciplines an employee, it may impose any discipline which it believes appropriate. If the Union claims the discipline including the issuance of a disciplinary letter is not reasonable, then the reasonableness of the discipline is a grievance.

POSTED OFFENSES (Exhibit J-2)

> The following Posted Offenses apply to all employees covered by the CBA between [redacted] and [redacted] Local [redacted] for operating, mechanical and maintenance employees.
>
> An employee who commits one of the following offenses may be dismissed or otherwise disciplined without notice. This does not apply to any acts which the Company expressly authorizes, or which the employee is forced into by a cause beyond the employee's control. These rules are not intended to interfere with employee rights under any applicable federal, state or local laws.
> …
> General
> …
> 18. Unsatisfactory job performance
> …
> Disregard of Safety
> …
> 42. Failure to comply with Safe Work Practices or Life Saving Rules.

WORK RULES: REFINERY-WIDE PROTOCOL DRAINING & DEPRESSURING PROCESS EQUIPMENT (Exhibit C-6, Section D-7).

> **Active draining or depressuring operations to non-closed systems cannot be left unattended**. If draining or depressuring will take an extended period of time; a relief person may need to be available. Active draining or depressuring to a closed system may be left unattended however extra rounds and monitoring must be in place while depressuring or draining to a closed system (emphasis added).

DISCUSSION AND OPINION

At issue in this case is whether the company had just cause, as required by the CBA, to dismiss the Grievant on November 17, 2022. The appropriate standard of proof in this case, as most disciplinary cases, is "preponderance of the evidence." That is, based on the facts presented, is it more likely than not that the Company had just cause to terminate Grievant's employment and, if so, was the discipline imposed by the Company appropriate to the offense(s) described? Conversely, if no just cause exists, what shall the remedy be? The following discussion and award addresses these questions.

Of note is that there is no significant factual disagreement between the parties regarding the "who, what, when, and where" of the spill that gave rise to the Grievant's termination. The overflow of the slurry pit and the actions that led up to it were thoroughly documented. At no time did the Grievant deny his action of leaving the immediate area with the open valve unattended, and forgetting about it until Supervisor [redacted] called his attention to the overflow situation. Moreover, he openly and forthrightly admitted his responsibility for the spill, that leaving the open valve unattended was wrong, and he expressed regret immediately thereafter via multiple text messages to his supervisors (Exhibits C-4 and C-9) and in the subsequent investigation (Exhibits C-5, U-2 and Tr: 425: 5-15). Though the Company and Union may differ on the seriousness of the spill, it is undisputed that the spill was not an immediate environmental hazard. It did, however, require what the Company described as an extensive cleanup effort (Tr: 180-181).

While these basic facts are not in dispute, the parties differ significantly over the severity of the Grievant's offending actions and the appropriateness of the Company's response(s) to those actions.

The Company sees this case as a straightforward dismissal of an employee whose continued work at the Refinery constituted a safety hazard and that the dismissal was the result of progressive discipline: what was, in its view, within the space of a year, the fourth infraction of legitimate work rules. The Company defines the safety-related infraction as the Grievant leaving the immediate area with the valve open, then forgetting it. The Union, while never directly addressing the Company's progressive discipline argument, focuses on the legitimacy of the infraction itself, which it defines as the *overflowing of the slurry pit*, not leaving the area with the valve unattended. These are fundamental differences.

I find the Company's view of the situation here more reasonable. It presented clear evidence that a) Grievant showed a pattern of unacceptable behavior with three instances of discipline within the previous year, two of which had explicitly noted safety implications, and b) the incident, involving a spill that it estimated to be 4,900 gallons of hot 220-degree liquid onto a roadway was indisputably a safety-related event. That much is clear. The fact that this event occurred on the heels of two other safety-related infractions formed an adequate basis for the Company to take affirmative action via discipline.

However, ***if*** the Union's argument—that the spill itself was not a just cause for discipline—is strong enough, then it is conceivably appropriate for the Grievant to be returned to his employment at the Refinery where he would resume his position as an Operator at the water treatment plant with three previous disciplines on his record. Unfortunately, for the Union's case, I do not find that proposition compelling for the reasons indicated below.

The doctrine of just cause requires several elements[3], to be present including some that do not appear to be in dispute in this case[4]. However, two key components of proving just cause are contested by the Union: 1) notice that the precipitating act would result in discipline and 2) consistent enforcement of the rule, i.e., no disparate treatment.

Even assuming *arguendo*, the Union's view, that the overflow of the slurry pit (and not Grievant's overall safety record) was the sole precipitating event that caused the Company to discipline their member, the Union's argument that the Grievant could not reasonably have known that the overfilling of the slurry pit would result in discipline is belied by the testimony in the record of multiple witnesses. Company witnesses, [redacted] and [redacted] testified that it was unacceptable procedure to open a valve such as the one in question and leave the area with it unattended and open (Tr: 79: 2-5 and 175:4-8). Similarly, Union witness [redacted] testified that leaving the valve unattended was "wrong" (Tr: 329:2-7 and Tr: 416:20-21, respectively). Finally, the Grievant himself testified that his actions on November 9 were wrong (Tr: 416:20-21). He clearly and reasonably inferred that his actions would lead to discipline, as evidenced by his after-the-fact apologetic texts to his supervisors, [redacted] and [redacted]. While there is a dispute between the parties on where, exactly, the Grievant was at the time he was notified by Supervisor [redacted] that the pit was overflowing, there is no dispute that he was not in the immediate area of the valve in question monitoring the rising level of slurry in the pit.

[3] Union counsel cites the "Seven Tests" for just cause, originally articulated by Arbitrator Caroll Daugherty in 1964 in Grief Bros (Cooperage Corp, 42 LA 555, 557-59), and while strict adherence to Dougherty has fallen out of favor with most arbitrators, the elements cited by the Union as deficient in this case are key elements of both Daugherty and subsequent (and established) doctrine on just cause.

[4] Among these undisputed elements are the reasonableness of the rule, the adequacy and fairness of a post-incident investigation (including overall due process), mitigating circumstances, and progressive discipline (which will be addressed below).

Similarly, there is no disagreement that, while away, he "totally forgot" that he had left the valve open with the sed tank draining (Exhibit C-5 corroborated by Grievant in Tr: 425:5-12).

The Union's argument that Company Exhibit C-6 (Refinery-Wide Protocol 01-09-03) is nonspecific to actions by the Grievant that led to the spill on November 9, 2022 is unconvincing. The referenced RWP indicates clearly, *"Active draining or depressuring operations to non-closed systems cannot be left unattended."* Testimony by Supervisor [redacted] confirms that the draining of the sed tank is such a "non-closed" system (Tr: 82: 2-25). The legitimacy of the work rule in C-6 itself is not disputed by the Union and the plain language and testimony in the record establishes sufficient specificity to negate this argument. And again, Grievant's actions in texting his supervisors that he knew what he had done was wrong and then apologizing for it are a clear indication that he knew he violated one or more policies that would get him into trouble.

Similarly, I am not persuaded by the Union's arguments about the vagueness of the reasons cited in the Company's letter dismissing their member, Violations of Posted Offenses 18 and 42 (Unsatisfactory job performance" and "Failure to comply with Safe Work Practices **or** Life Saving Rules," respectively, emphasis added). The record indicates clearly that the Company places a strong emphasis on safety for both their employees and the public at large and, again, Grievant's actions that precipitated the overflowing of such a large volume of 220-degree liquid outside of its proper containment limits is an evident safety hazard as well as a legitimate indication of inadequate job performance.

The Union goes to some lengths to argue that the Grievant was the subject of disparate treatment, i.e., there were a number of other spills that occurred in the past that, not only did not result in any termination, but were not even deemed to be a cause for discipline. The record indicates, however, that such accounts were merely anecdotal and without sufficient specificity

to establish that they were the same or similar to the spill that occurred incident to the Grievant's actions on November 9. Testimony was also presented that the slurry spill in question was of a greater volume than had occurred in the past. For example, under cross-examination by Union counsel, Supervisor [redacted] testified as follows:

> *Q: Your last response I heard you say was that you have no idea how many times the slurry pit has overfilled, is that correct?*
>
> *A: It hasn't overflown—it hasn't overflown to the extent where—that 5,000 gallons. Sometimes when the guys go to close the valve they don't close it fast enough and there might be a little bit that comes out. It is nothing compared to what the spill [in question] was (Tr: 107-108).*

Also, Supervisor [redacted] testified that he had never encountered a lime slurry overflow that went past the pit's secondary containment (Tr: 161:8-10 and 176:12-21). For the foregoing reasons[5], I find the Union's disparate treatment argument, in addition to its lack of notice case, not sufficiently persuasive that discipline was without just cause. The company did have just cause to issue discipline.

But did the penalty imposed by the Company, termination of employment, fit the circumstances of this case? Was termination fair? The Union believes it was not. As noted, on the original Grievance Form, the Union asked the Company to put the Grievant, "…back to work with time served off to serve as a suspension with additional terms to be determined in a last chance return to work agreement" (Exhibit J-4). In its post-hearing brief, counsel goes further and asks for sustainment of the grievance with Grievant "…reinstated to his previous position of employment with [redacted], along with retention of all seniority rights as well as a make-whole

[5] The union presents several other possible grounds for this arbitrator to uphold the grievance, including: a) that if the Company was serious about preventing spills it would have installed a "dead-man" valve to drain the sed tank or would have installed an alarm system to prevent the overfilling of the slurry pit, and b) management could have assigned an Assistant Operator to the water treatment plant. These and the other arguments put forth by the Union were considered but are not relevant and—in any event—trumped by the volume of evidence on the extensive nature of this particular spill and the obvious failures exhibited by the Grievant.

economic remedy that includes back pay, fringe benefits and all accrued paid time off" (Union Brief, page 21).

Possible mitigating circumstances cited by the Union include the facts that the Grievant was a 14-year employee who made an honest error—leaving the immediate area of the slurry pit valve and forgetting about the open valve—about which he was totally forthcoming and honest. Both sides indicated that he was well-liked and helpful. Despite these factors, I am forced to agree with the crux of the Company's position on this case. It found itself—despite acknowledging Mr. [redacted]'s tenure, disposition, and honesty—in an unenviable position: having to decide what to do with an employee with multiple safety-related disciplines, whom it had counseled after a two-shift safety-related suspension (Exhibit C-3) to become more engaged in his job or face termination, now making a third safety-related error. I find that the Company was within its rights under the CBA, and with just cause, to eliminate the risk Mr. [redacted] became on November 9, 2022 and terminate Grievant's employment.

AWARD

I find the Company's termination of the Grievant is for just cause and the grievance is denied.

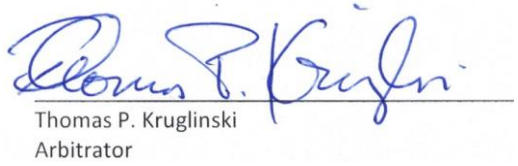
Date: _____ Signature: _____

State of New York

County of Ulster

I, Thomas P. Kruglinski, do affirm my oath as an Arbitrator that I am the individual described herein and who executed the instrument, which is my Award.

Signed and dated this 27th Day of November at Gardiner, New York, by:



Thomas P. Kruglinski
Arbitrator