

IN THE MATTER OF THE ARBITRATION BETWEEN

UNITE HERE, LOCAL 17,	)	FEDERAL MEDIATION AND
	)	CONCILIATION SERVICE
	)	CASE NO. 11-03672
	)	
Union,	)	
	)	
and	)	
	)	
HILTON HOTELS WORLDWIDE,	)	
DOING BUSINESS AS	)	
HILTON MINNEAPOLIS,	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

APPEARANCES

For the Union:

Richard L. Kaspari  
Metcalf, Kaspari, Engdahl  
& Lazarus, P.A.  
Attorneys at Law  
230 Specialty Building  
2356 University Avenue West  
St. Paul, MN 55114-1850

For the Employer:

Thomas E. Marshall  
Engelmeier & Umanah, P.A.  
Attorneys at Law  
Suite 1230  
12 South Sixth Street  
Minneapolis, MN 55402

On October 20, 2011, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Kathy S. Jensen.

## FACTS

The Employer operates a large hotel in the central business district of Minneapolis, Minnesota. The Union is the collective bargaining representative of most of the non-supervisory employees of the Employer who work at the hotel, including those who work in the Room Attendant's classification (hereafter, "Housekeeper," as the parties refer to it).

The grievant was hired by the Employer on September 28, 1998, and she was discharged on June 13, 2011. During all of that employment, she was classified as a Housekeeper -- one who cleans and prepares hotel rooms for occupancy.

On June 13, 2011, Daniel P. Truniger, Director of Housekeeping, and Adam J. Welch, Assistant Director of Human Resources, issued a discipline notice to the grievant, discharging her from her employment for conduct occurring on June 9, 2011, described in the notice as follows:

While cleaning a room, [the grievant] did not follow the Key Security Procedures of verifying a guest key. She allowed a guest access to a room that was not assigned to him. Resulting in the mis-placement of his luggage. Policy states that every guest trying [to] access an open room must use their own key to enter.

The Employer trains employees in its policies, as written in its Hilton Hotels Corporation Team Member Handbook (the "Handbook"), which is used in all Hilton Hotels. The Employer cites the following excerpt from the Handbook as relevant to the present case:

### SAFETY AND SECURITY

Safety and security are the responsibility of everyone and are very important to our business. We owe it to ourselves, our co-workers and our guests to provide a

safe and secure environment. You will receive comprehensive training on safety and security issues during orientation which is updated from time to time. You are expected to follow your location's safety and security procedures. Keeping the Company safe and secure is your responsibility.

The Employer's local addendum to the Handbook includes a list entitled, "Guidelines for Team Member Conduct," which provides:

By providing this list, Hilton does not in any way alter the at-will nature of your employment. The following conduct is prohibited: [The list includes thirty-six descriptions of prohibited conduct, two of which are cited by the Employer as relevant here.]

- Willful or negligent failure to abide by Company safety rules and practices that may create a safety hazard.
- Violation of departmental policies and procedures.

Truniger testified as follows about the training received by all Housekeepers, including the grievant. When the grievant was hired in 1998, she received extensive training in the standard procedures used in the hotel's Housekeeping Department. All Housekeepers receive additional training in monthly meetings and in morning conferences at the start of each day's shift.

The training that Housekeepers receive includes instruction about maintaining room security while each room is being cleaned -- described by Truniger as follows. Housekeepers are instructed that, when cleaning a room, they should not allow anyone to enter the room without demonstrating by use of a room key that the person is authorized to enter the room. Room keys are plastic cards each of which is encoded electronically to open only the door of one room and to activate a green light on the door's locking mechanism when it is the authorized key.

If a person represents that he or she is entitled to enter a room, either as, or with the permission of, its registered guest while the room is being cleaned, the Housekeeper must ask the person to show, by using a room key, that he or she is entitled to enter the room. If the person refuses or attempts to use a key that does not unlock the door to the room (shown by a red light that flashes on the door's locking mechanism), the Housekeeper must direct the person to the hotel's front desk.

The Employer presented evidence that the grievant attended a monthly training in November of 2003 that covered the Employer's policy on room security, using written materials describing that policy, relevant excerpts from which are set out below:

Our team members are the eyes and ears of security. More than anyone, you know who belongs and who doesn't belong, what activities are normal, and what activities are suspicious. You don't have to do anything out of the ordinary, just be aware. You can greatly assist the security function by assuming the following responsibilities. . .

KEY CONTROL

- Your master key (card) works for only those rooms, floors or areas assigned to you.
- Secure this key. Keep it attached to your uniform or on a belt around your waste so that you don't leave it on your cart or in a room.
- Don't loan this key to anyone. If a guest wants access to their room they MUST use their own key or go to the front desk for one. . .
- Secure the key overnight. Sign in when you pick up a key and sign out when you return it so that a key is always accounted for. [This provision appears to refer to the Housekeeper's master key.]

HOUSEKEEPING SECURITY TIPS

- . . .  
- If a door is left open, when rooms are being cleaned, [Housekeeper] utility carts will be placed in front of each guest room door so as to block entrance to the room while it is being cleaned.

- Any persons attempting entrance to a room that is being cleaned must demonstrate that they are in possession of the correct room key. . .
- If a guest leaves a valuable behind, turn it over immediately. . .

MAINTENANCE SECURITY TIPS

- . . .
- Team members will leave the door open or use a "Room in Service" sign hung on the door while working in a guestroom.
- A guestroom will never be left open or unlocked when unattended. . . .

The following is a summary of the evidence about the occurrences that led to the grievant's discharge -- taken from the testimony of the grievant and from testimony and documents presented by the Employer.

On June 9, 2011, the grievant was assigned to clean rooms on the hotel's nineteenth floor, her usual assignment. At a time during her shift (but not specified in the evidence), she began cleaning Room 1932, a room that had been vacated that morning by its last previous guest (a "check-out room"). As she was cleaning the room, she left it to obtain towels from the 19th floor's linen storage room, about nine rooms down the central corridor. She did not close the door to Room 1932 when she went to the linen storage room. The grievant testified that she had been taught in training that, when she temporarily left a room to get supplies, it was necessary to close the door to the room only if the room was occupied by a current guest and that she did not close the door to Room 1932 because she knew it was a vacant, check-out room that had no property of a current guest in it.

When the grievant returned to Room 1932 from the linen storage room, she found a new guest in the room. Hereafter, I refer to the guest the grievant found in Room 1932 as "John

Doe," a fictitious name used to protect his identity. As the grievant entered Room 1932, returning from the linen storage room, Doe said to her that he had been sent previously by the registration clerks to another room (presumably in error) and that she could continue cleaning the room. The grievant testified that she saw that Doe had his luggage in the room, and that she saw on the desk a paper folder the hotel uses to enclose the plastic key card given to each guest at the time of registration (the "key card folder").

Registration clerks use the key card folder to write the room number assigned to a new guest, on a blank line printed on it for that purpose. The grievant testified that, when she looked at the key card folder on the desk, she saw that the room number handwritten on the blank line had been "643," but that that number was crossed out and, above it, another number had been handwritten. The new number could be read as "1932," but, as the grievant and Doe learned later, the registration clerk who had written it intended the last of those four numerals to be "7" and not "2" -- and, thus, had intended Doe's room assignment to be Room 1937 rather than Room 1932. The ambiguity in the appearance of the last numeral was caused when the clerk wrote the "7" with an interlineation through it, in the style often used in Europe. Because the interlineation was in the lower part of the figure, it had appeared to Doe to be a "2" rather than a "7."

The grievant testified that, after Doe told her that she could keep cleaning the room, he asked her if she knew where he

could get a haircut and that she suggested a barber shop. She also testified that Doe then asked her if she would be cleaning the room till Sunday and that she replied that she would be, except for Sunday, her day off. Doe then gave her \$20, and he left the room, with his luggage placed next to a wall. The grievant finished cleaning the room, and sent a signal to the registration desk through the room's telephone, indicating that the room was clean.

The grievant conceded that, during her conversation with Doe, she did not ask him to use his key card to show he was the guest assigned to Room 1932. She testified that she was aware of a rule that, when a person approached an occupied room that she was cleaning, she was required to have that person use a key card to enter the room, thus to show that he or she was the guest properly assigned to the room. She testified, however, that she had never before experienced a situation similar to the one she experienced that day with Doe -- in which a new guest came to a check-out room while she was cleaning it. She testified that she did not know that the rule requiring key card use applied in that situation.

Abigail K. Choyce, the Employer's Housekeeping Manager, testified that she first became aware of the occurrence that led to the grievant's discharge when, on the evening of the incident, she received a call from the hotel's front desk, asking for her help in retrieving Doe's luggage. She met with Doe, who told her that he had put his luggage in the wrong room, Room 1932, when he had, in fact, been assigned to Room 1937. Doe showed her the

key card folder he had received, which I have described above. With help from Choyce, Doe's luggage was retrieved from Room 1932. When Choyce retrieved the luggage from Room 1932, she found it against one of the room's walls.

Choyce testified that Doe gave her the following account of what had happened. He went to Room 1932, because he misread the room number assigned to him as written on the key card folder, reading it as Room 1932 rather than Room 1937. He asked the grievant if he could leave his luggage in the room, and she said he could. He asked her if she knew a place where he could have his hair cut, and the grievant suggested a barber. Doe told Choyce that he gave the grievant \$20.

Choyce wrote the following account as part of the Employer's investigation of the incident:

On June 9, 2011 Mr. [Doe] was checked into 1937. When he got up to his room he was confused and thought 1932 was his room. [The grievant] was in the room cleaning it like a check out. The guest asked if he could leave his luggage in the room while she finished. She said yes and he gave her a twenty dollar bill then left the room. He returned later to find he left his luggage in the wrong room. I received [a] call in the evening from the Front Desk to see if his luggage was in Lost and Found or still in the room. I meet Mr. [Doe] on the 19th floor to return luggage and he shared with me the information with this situation.

Truniger testified that, on June 10, 2011, he interviewed the grievant during his disciplinary investigation. At the time of that interview, he had Choyce's written account of the incident, which I have reproduced just above. Truniger testified that the grievant told him she was cleaning Room 1932 and had gone down the hall to the linen storage room, that she

returned to Room 1932 and found Doe in the room and that, when Doe offered her \$20 to leave the luggage in the room, she agreed. Truniger testified that the grievant was very emotional during the interview.

Truniger also testified that, as part of his investigation, he checked the grievant's discipline record. That record shows the following prior discipline:

1. June 13, 2007. The grievant received a written warning for conduct described in the discipline notice, as follows:  
On June 12, 2007 while you were on your lunch break in the employee cafeteria you were overheard by fellow team members using profanity in your conversation, this is against our hotel's code of conduct policy.
2. July 25, 2009. The grievant received a written warning for the following conduct:  
On July 25, 2009 while [the grievant] had already cleaned the new guest was upset about the cleanliness of her room. The guest asked [her] if she considered her room deep cleaned, [the grievant] responded that she still had 4 more rooms to finish. This is not appropriate behavior towards our guest and against the hotel's policy.
3. January 2, 2010. The grievant was suspended for three working days for the following conduct:  
On January 1, 2010 [the grievant] was assigned to clean 16 rooms. She completed only 7 rooms leaving 9 rooms incomplete. This is considered excessive and against the hotel's performance policy.
4. July 24, 2010. The grievant was suspended for three working days for the following conduct:  
[The grievant] failed to return the Zone 3 [master key] that she had signed out on July 23, 2010. This is against the hotel's key policy procedures. The policy is that you must turn in all keys at the end of your shift.

Adam J. Welch, Assistant Director of Human Resources, testified that he and Truniger participated in the decision to discharge the grievant. He learned about what had occurred from

Truniger and Choyce, but did not talk to the grievant. He reviewed the grievant's discipline record and noted that she had had two previous three-day suspensions. He testified that usually, an employee is discharged after only one three-day suspension.

Welch testified that he considered the grievant's failure to require Doe to use his key to be a serious violation of policy, notwithstanding that the room, as a check-out room, was empty of any guest-owned property. He testified that permitting Doe to leave his luggage in the room, as the grievant did, could create a risk from terrorists, who might place an explosive device in the luggage.

Alicja Kotowska, Training Coordinator for newly hired Housekeepers, testified as follows. Housekeepers are trained that they should require any guest who seeks to enter a room while they are cleaning it to use the key card that unlocks the door to that room -- whether the room is a check-out room or is currently registered to a guest. In addition, she testified that Housekeepers are instructed that, if it becomes necessary to leave a room that is in the process of being cleaned -- for example, to get supplies -- they should close the door to the room while they are gone. Upon return, they can use the master key they have to re-enter the room. Kotowska also testified that Housekeepers are required to turn in the master key at the end of each shift.

On cross-examination, Kotowska conceded that it would be unusual to have a new guest show up while the Housekeeper is

cleaning a check-out room, and she conceded that that situation is not specifically covered during training.

I have summarized above the testimony the grievant gave describing the incident that led to her discharge. In addition, the grievant gave testimony that I summarize as follows. On June 10, 2011, the day after the incident, as she started her shift, she was told to go to Truniger's office. When she did so, Truniger asked her if she had cleaned Room 1932 the previous day, and she said that she had. He then asked her if she had taken a suitcase out of Room 1932, and he told her that a guest said that a suitcase was missing. She began to cry, thinking that she was being accused of theft. The grievant testified that Truniger asked her questions about the incident, but did not give her an opportunity to tell him what had happened. She testified that her training did not include any instruction about what she should do when a person appeared in a check-out room with a key card folder showing he was newly assigned to the room. She had been told in training that the reason for the rule requiring key card use to authenticate the right to enter a room was for the protection of the property of an occupying guest -- a rule that would not apply when, as in the incident here, the room being cleaned is a check-out room. The grievant testified that this discussion with Truniger was the only interview she had with a representative of the Employer before she was discharged.

The grievant testified as follows about her discipline record. On July 24, 2010, she was suspended for three days

because she did not turn in her master key at the end of her previous day's shift. She forgot to do so, leaving it in her uniform. When she came to work the next day, she found the master key still in her uniform, which she had left in her locker overnight. She told her supervisor what had happened, but was suspended for three days.

Nancy L. Goldman, President of the Union, testified with respect to the three-day suspension the grievant received on January 2, 2010. The hotel had been very busy on New Year's Eve, December 31, 2009, and many of the rooms were unusually messy. Because of that condition, many of the Housekeepers were unable to finish their cleaning assignments on January 1, including the grievant. Some of them received warnings and some received suspensions.

Not all of those disciplined brought grievances, however, and the grievant did not do so. Goldman testified that, during contract negotiations, the parties settled all of those grievances, with the Employer agreeing to remove the warnings and suspensions from the records of all Housekeepers who had grieved discipline for insufficient cleaning on January 1. Because the grievant had not grieved her suspension, it has remained on her record. I note that at the foot of the discipline notice of January 2, 2010, the grievant wrote that "I did call down and ask if it was okay at 3:30 Abby said yes."

The parties presented evidence about other employees who have been disciplined for violating the Employer's rules concerning keys. The following examples of the discipline of other employees were presented by the Employer.

On May 6, 2007, Employee A was suspended for three days for opening a room door with her master key for someone who was not the guest assigned to that room. Employee A had previously received a written warning for "excessive absenteeism."

On May 15, 2007, Employee B was suspended for three days for having "opened the guestroom door for the guest in Room 2405 this is against the hotel's safety and security policy." Apparently, the guest did not have his or her key at the time and asked Employee B to use her master key to open the door of the room to which the guest was registered. The discipline notice states that Employee B had no "prior discussion or warning" within the past eighteen months.

On June 26, 2007, Employee C, who had no previous discipline on his record, was discharged for conduct described in the discipline notice as follows:

Brian checked out a key on 6/20/07. When security did their nightly key audit they noticed the key was missing. The next day Brian approached our Director of Security in regards to his key not working. Joe then realized it was the key that was not turned in. Joe explained to Brian that the key had to be returned at the conclusion of a shift and is not to be taken off property. Brian admitted to keeping the key in his locker overnight. Brian signed a key policy shortly before incident occurred during HR New Hire Pre-Orient-ation, where the policy was fully explained.

I infer from the reference to the employee's "Pre-orientation" training that Employee C was a new employee.

On April 7, 2008, Employee D was suspended for three days for failing to turn in her zone key at the end of her shift. The discipline notice does not state whether the key was taken off the hotel's premises or remained in the hotel overnight.

On April 24, 2008, Employee E was discharged because she failed to turn in her zone key at the end of her shift. She had received a verbal warning on December 6, 2005, for "sitting in the women's restroom," and then a written warning on May 2, 2007, also for "sitting in the women's restroom," and then a three-day suspension on April 2, 2008, also for "sitting in the women's restroom." A note on the discipline notice states that the discharge is "progressive discipline on performance" -- an observation noting Employee E's lack of interest in her work.

The following examples of the discipline of other employees were presented by the Union.

On July 24, 2008, Employee F received a verbal warning for the following conduct:

On July 23, 2008 [Employee F] at about 11:00 pm noticed that her Zone Key was missing, she says she looked for it until 12:00 am and she couldn't find it. [She] reported the missing Zone Key to [a supervisor] and security. It is the hotel's policy that [Employee F] must keep her Zone Key secured at all times while it is in her possession.

The discipline notice for this discipline lists no prior discussion or warning within the previous eighteen months.

On June 15, 2005, Employee G received a verbal warning for conduct described as follows:

On 6/13/05 [Employee G] signed out a zone key with security and failed to turn it in at the end of his shift. This key has access to every guestroom in the hotel. Further infractions will result in further disciplinary action up to and including termination.

The discipline notice for this verbal warning lists no prior discipline.

On September 20, 2006, Employee H (not a Housekeeper, but a House Person -- apparently one who sets up meeting rooms) received a verbal warning for the following conduct:

During his shift on Wednesday, September 20, [Employee H] borrowed his lead House Person's card key to gain access into meeting rooms he needed to set or refresh. The card key was misplaced and was never returned to the lead houseperson.

The discipline notice states "no prior discussion or warning within the past 18 months."

On September 12, 2004, Employee I, a Bartender, received a written warning for the following conduct:

[Employee I] forgot to drop his bank key before he left on vacation. He had previously signed off on this procedure when he received his bank. Further infractions will lead to further disciplinary action, up to and including termination.

The discipline notice for this warning lists a prior verbal warning, on July 13, 2004, for "duty meal checks not signed," and a prior three-day suspension on December 13, 2003, for "improper check handling."

The evidence shows that a Bartender's "bank" is the cash that he works with as he receives payment from customers for drinks purchased with cash and that the "bank key" locks and unlocks the place where cash is turned in. The Employer presented testimony that a violation of key control rules relating to a Bartender's bank key is less serious than a violation of key control rules relating to zone (master) keys because the latter relate to the security of guests and their property rather than the less important security of a Bartender's cash bank.

The evidence includes a copy of the Initial Orientation/ Annual Review Training text used in 2009, which includes the following provisions relating to "key control":

The keys assigned to you are critical to the security of the hotel. These keys will be obtained from the Security Dispatch Office or Housekeeping at the beginning of your workday. These keys, once obtained . . . must be kept on your person at all times. It is the Team Member's responsibility at all times to safeguard any keys issued. These keys are not transferrable under any circumstances. They must be signed out by the person using them. If your job duties dictate your leaving the building during the work day, then keys must [original emphasis] be returned to the Security Dispatch Office or Housekeeping until your return to the building. Keys will never be loaned to other employees. Keys will never be stored in any manner other than returned to the Security Dispatch Office or Housekeeping.

If a Team Member loses their key during their shift they must immediately report the loss to the Security Officer on duty. Failure to do so could lead to disciplinary action up to and including termination of your employment. If the loss of a key is due to carelessness, and or not following the above approved key practices, you will be subject to progressive discipline up to and including termination of your employment. If Team Member leaves the property with a master key a two hour grace period will be granted; after failure to bring back the key within the 2 hour grace period, the Team Member will be subject to progressive discipline up to and including termination of your employment.

Article 11 of the parties' labor agreement relates to discipline and discharge. Relevant parts of it are set out below:

- 11.1. Discipline and Discharge. The Employer will discipline employees for just cause only. Discipline will normally be in the following form:
- a) Verbal warning
  - b) Written warning
  - c) Suspension
  - d) Discharge

Progressive discipline need not be followed in incidents of violations of a serious nature as provided in the Employer Handbook, or Standards of Conduct, a copy of which shall be provided to each employee.

- . . .
- 11.3. Warning Notices - Cancellation. Warning notices shall not be used as a basis for discipline after a period of fifteen (15) months.
  - 11.4. Suspension and Discharges. All suspensions and discharges will be in written form and copies will be mailed to the Union upon issuance of such notices. Discharges will be preceded by a suspension during which an investigation of the incident leading to the discharge will be conducted. . . .

#### DECISION

The Employer makes the following arguments. The prior disciplines of the grievant, none of which were grieved, should not be subject to challenge in this proceeding. Because they were ungrieved, they form part of her record and were properly considered by Truniger and Welch when they decided that, after two previous three-day suspensions, discharge was the appropriate discipline as the final step in progressive discipline.

The Employer also argues that the apparent error made by the registration clerk who wrote Doe's room assignment on his key card folder is not at issue. Despite the error, the grievant should have known that a Housekeeper must always require key card proof of the right to enter, to be in, or to leave luggage in a guest room. Because the grievant's failure to require such proof was serious misconduct, the Employer had just cause to discharge her. It was improper for the grievant to rely on the room number written on Doe's key card folder as proof of his right to the room, rather than the surer proof required by rule -- that Doe's key card would open the door to the room. If the grievant had asked Doe to use the key card, presumably it would not have worked, and possibly, the grievant

and Doe could have discerned upon a closer view that the number written on the key card folder was "1937" and not "1932."

The Employer argues that, even though the room was a check-out room and had no property in it of an occupying guest, it was, nevertheless, possible that the luggage Doe was allowed to leave in the room could contain dangerous materials -- a kind of risk that proof by key card use would also protect against. The Employer urges that the rule the grievant violated is so important to the security of the hotel that it should be strictly enforced -- so that employees know that they are not free to make a judgment that the rule can sometimes be waived.

The Employer also argues that the grievant should not have left the door to Room 1932 open when she went to the linen room for supplies. If she had closed the door, she might have found Doe at the door to the room when she returned, and then she might have asked him to use his key card. If she had done so, the writing error on the key card folder would have been discovered. Even if the incident is characterized as resulting from a mistake by the grievant, it was a mistake so serious that the Employer was justified in strict enforcement of the rule.

The Union makes the following arguments. This case is about a misunderstanding that started when a registration clerk wrote on the key card folder given to Doe a room number that appeared, both to him and to the grievant, to be "1932" rather than the correct room number, "1937." When the grievant found Doe in Room 1932 with a key card folder indicating that he had been registered to that room as its newly assigned guest, the

grievant was faced with a situation unique in her thirteen years of experience as a Housekeeper. She had not encountered such a situation in the past, and she had not been trained how she should handle it.

The Union also argues that, though the Employer has shown that the grievant was trained to require a person trying to enter an occupied room to use a key card to prove the right to enter, she was told in training that the purpose underlying that rule was to keep the property of an occupying guest safe from theft. In judging what to do in this situation -- that the room was not an occupied room with property of an occupying guest in it -- the grievant did not know what to do. She thought that it was reasonable not to require key card proof of registration when there was no guest property in the room to protect and she saw that Doe had a key card folder assigning him to the room.

The Union also argues that, though the Employer presented testimony that there may be another purpose to the rule, one that is relevant even to check-out rooms, i.e., to prevent placement of terrorist explosives in the room, the grievant's training had not referred to that purpose.

With respect to the grievant's prior discipline, the Union makes the following arguments. It argues that the discipline notice of June 13, 2011 (the one that discharged the grievant), improperly listed two warnings that occurred more than fifteen months previous to June 9, 2011, the date of the incident that led to her discharge. The discharge notice lists four prior disciplines:

3 Day Suspension - 7/24/10  
3 Day Suspension - 1/1/10  
Written Warning - 7/25/09  
Written Warning - 6/12-07

The Union points out that Section 11.3 of the parties' labor agreement, which is entitled, "Warning Notices - Cancellation," requires that "warning notices shall not be used as a basis for discipline after a period of fifteen (15) months." The Union argues that the appearance in the discharge notice of the two expired written warnings shows that they were improperly considered as part of the grievant's record.

The Union also argues that the grievant's conduct that led to the three-day suspensions she received should, if considered at all, not be considered as serious. It urges that, in July of 2010, when the grievant left her master key in her uniform over one night, from the end of one shift till the start of her next shift, with the uniform always in the hotel, she should have been given at most a verbal warning, because nothing in that conduct jeopardized the hotel's security -- whereas the evidence about the Employer's choice of discipline of other employees shows an inconsistency and a leniency even for those who have taken a master key out of the hotel, some of whom have been given only warnings.

Finally, the Union argues that it was unfair to use the three-day suspension the grievant received on January 2, 2010, as justification for her discharge -- when the other employees who were disciplined for the same conduct had their disciplines entirely rescinded as the result of bargaining for the current labor agreement. The Union urges that to consider that suspension as part of progressive discipline justifying the

grievant's discharge unfairly ignores the rescissions of discipline other employees received arising out of the same circumstances -- even though it may be technically true that the suspension remains as part of the grievant's record.

For the following reasons, I rule that the Employer did not have just cause to discharge the grievant, as is required by Section 11.1 of the labor agreement. Progressive discipline is recognized in American labor law as an essential component of the just-cause standard (though certainly, progressive discipline need not be used in cases of egregious misconduct, such as theft or an assault upon a supervisor). Its recognition as such derives from the view that the chief purpose of discipline is to correct conduct of an employee that is adverse to the employer's operations -- rather than to punish the employee for that conduct. If, especially, misconduct has occurred by mistake rather than by intention, the progression of discipline gives the employee the chance to correct that conduct after training, and, in such a case, an employer may also benefit by the progression of discipline and the retention of a trained and willing employee.

I agree with the Employer that the grievant should have asked Doe to use his key card to prove his assignment to Room 1932. As the Union argues, however, the evidence shows, not that the grievant intentionally ignored the rule, but that she was confused when she saw Doe in possession of a key card folder that, on its face, showed him to be in his assigned room. Clearly, that confusion was the result of her error -- but an

error not requiring the discharge of an employee who is incorrigible, but an error amenable to instruction and lesser discipline.

It also appears from the discharge notice that the two expired warnings were considered, contrary to Section 11.3 of the labor agreement, as part of the grievant's record justifying her discharge as the final step in progressive discipline.

The Employer correctly argues that, because the two three-day suspensions on the grievant's record were not grieved, they remain as part of her record. Even though those suspensions were not grieved and thus may\* remain part of the grievant's discipline record, the underlying facts that led to the suspensions, are relevant when considering whether an employee should be discharged for subsequent conduct. It appears at least that the grievant's suspension for having left her master key in her uniform overnight and in her hotel locker was not a serious offense showing an underlying tendency toward misconduct so adverse to the Employer that there was just cause to discharge her for the key control violation of June 9, 2011.

Remedy. The Union seeks reinstatement of the grievant and an award of back pay. It is difficult to provide a just

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\* I do not decide here whether, under Section 11.3 of the labor agreement, the grievant's notice of suspension of January 2, 2010, should be considered a notice equivalent to "warning notices [that] shall not be used as a basis for discipline after a period of fifteen (15) months" -- because resolution of that issue is not necessary to the decision of this case.

remedy in a case such as this -- in which the grievant was at fault for having violated an important rule, but her fault was not the result either of intention or of careless disregard for the rule, but, instead, was the result of confusion, justifying only instruction or discipline less than discharge. The award below attempts to balance these equities. It directs the Employer to reinstate the grievant to her employment, without loss of seniority and with partial back pay and benefits.

#### AWARD

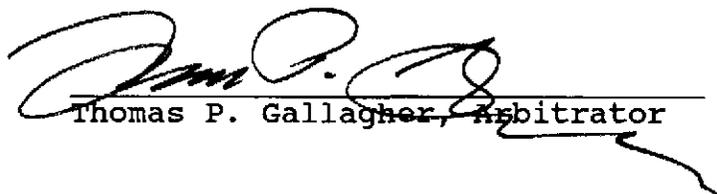
The grievance is sustained in part. The Employer shall reduce the grievant's discipline to a ten calendar-day suspension without pay, measured from the first date she was suspended without pay while the Employer conducted its disciplinary investigation. The Employer shall reinstate the grievant to her position without loss of seniority.

The parties shall 1) determine the amount of pay and benefits the grievant would have received from the Employer during the period between the expiration of the ten calendar-day suspension and her reinstatement and 2) reduce that amount by whatever she received as unemployment compensation or earned from other employment or should have earned in performance of her duty to mitigate her damages. The Employer shall pay the grievant 75% of the amount thus determined as an award of partial back pay.

The parties shall make a similar determination of the benefits the grievant would have received, if any, had she not been discharged, and the Employer shall provide her with those

benefits. I retain jurisdiction to determine, if the parties cannot agree, the amount of back pay and benefits the grievant is entitled to receive.

December 27, 2011



Thomas P. Gallagher, Arbitrator