IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.

WASHINGTON FEDERATION OF STATE EMPLOYEES,	)
	)
Union,	) ARBITRATOR'S DECISION
	) AND AWARD
and	)
	) AAA No. 75-390-00075-08
	)
STATE OF WASHINGTON, DEPT. OF SOCIAL AND HEALTH SERVICES,	)
	)
Employer.	)
	)
(Frank DiMichel Grievance)	)

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I. INTRODUCTION

The Department discharged Grievant on June 3, 2008 based on an allegation that he had deliberately touched the breast of a female co-worker during a meeting on January 29, 2008. Grievant denies the touching, and the Union argues on his behalf that the State lacked sufficient evidence to establish just cause for dismissal.

At a hearing held September 29, 2009 in Tumwater, Washington, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine each other's witnesses. The proceedings were transcribed by a certified court reporter, and I have carefully reviewed the transcript in the course of my analysis of the issues. Counsel filed simultaneous post-hearing briefs electronically on November 20, 2009, and with my receipt of the briefs, the record closed. Having now carefully considered the evidence and argument in its entirety, I am prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue before me should be formulated as follows:

> Did DSHS violate the Collective Bargaining Agreement, specifically Article 27, when it terminated employee Frank DiMichel? If so, what is the appropriate remedy?

Tr. at 4. The parties also stipulated on the record that the matter is arbitrable and properly before me for decision, and they requested that I retain jurisdiction, in the event I should find that some remedy is appropriate, solely to resolve any disputes in connection with implementation of the awarded remedy that the parties are unable to resolve on their own. *Id.*

III. FACTS

Grievant has been employed by the Department since 1989, and at the time of termination he was serving in the position of Information Technology Systems/Applications 6 within the Department's Health and Recovery Administration, Division of Systems and Monitoring. In that capacity, one of his internal "clients" for IT

services was Adult Treatment Systems Manager "V."[1] It appears that Grievant and V. had worked together for several years and historically had gotten along well. Moreover, the evidence establishes that Grievant was an effective and valued employee within DSHS.

On January 29, 2008, Grievant and V. were both in attendance at a meeting conducted at Lacey Community Center. The total number of attendees at the meeting was variously estimated by the witnesses to be between 30 and 60, which included a number of Division of Alcohol and Substance Abuse ("DASA") employees as well as "stakeholders" from the communities served by DASA. As I understand it, the purpose of the meeting was to discuss training that DASA might provide in the communities. During a discussion led by facilitators, V. was seated at one of a series of round tables in a large meeting room, with Grievant seated directly behind her (although somewhat to her right because of the curvature of the table). Another Department employee, John Taylor,[2] was seated directly behind Grievant (again, slightly to Grievant's right).

At some point during the meeting (the witnesses disagreed about whether it was before or after lunch), V. turned around slightly in her chair and remarked that the meeting room was cold. Grievant then retrieved a fleece pullover top he had brought to the meeting (but was not wearing at the time) and draped it over V.'s shoulders from behind. According to V., in the process of doing so Grievant reached between her right arm (which was propped on the table) and her body to "tuck" the sleeve, and while pulling the sleeve backwards, Grievant "cupped" or "grabbed" V.'s right breast. Tr. at 40. Although V. said nothing at the time, Mr. Taylor observed Grievant's actions, and while

[1] Because of the sensitive nature of some of the evidence, I refer to "V." by initial only.
[2] Mr. Taylor is the Office of Program Services Chief. V.'s immediate supervisor reports to Taylor.

Grievant was reaching between V.'s arm and body, Taylor saw V. "go rigid." Tr. at 61. Although Taylor originally stated that he saw Grievant touch V.'s breast, he subsequently clarified that he could not actually see Grievant's breast from where he was seated, but that he had deduced that Grievant had touched V.'s breast because of what he saw, supplemented by what V. told him several days later. In any event, Taylor said nothing to either Grievant or to V. that day, and V. likewise said nothing about an alleged touching at the time, either to Grievant or to anyone else in the room.[3]

Two days later, V. was in Taylor's office for a previously scheduled meeting. Taylor asked her about what had happened at the Community Center, and she began to cry, telling him that Grievant had grabbed her breast. Although V. expressed reluctance to pursue the matter, eventually she agreed to provide a written statement. Exh. R-1. In addition, V. filed a criminal complaint with the Lacey Police Department on February 8, 2008. Exh. R-3 at 6-7. In connection with that criminal complaint, Grievant was interviewed by Officer Bret Beall, and in the course of the interview Grievant denied touching V.'s breast. *Id*. at Bates No. 352.[4] He asserted that he had "not done anything inappropriate" and offered to take a polygraph. *Id.* at 353. As a result of the police investigation, Grievant was charged with simple assault, but he entered into a deferred prosecution agreement on March 20, 2008, under which the charges would be dismissed in May 2009 if he complied with all conditions in the interim, including having no contact with V. Exh. R-4. It is undisputed that Grievant complied with the conditions and that the charges against him were ultimately dismissed, but the State argues that as part of

[3] Grievant contends, however, that shortly after he draped his fleece top over V.'s shoulders, she turned slightly and mouthed "thank you."

[4] For the remainder of this Decision and Award, citations to three-digit page numbers of exhibits are references to the Bates stamped numbers on the lower right hand corners of the documents.

the agreement, Grievant stipulated to the factual basis on which he had been charged by the City, including the alleged fact that he had touched V.'s breast.[5]

Eventually, the matter was investigated by the Human Resources Division ("HRD") following an investigation by the Washington State Patrol. *See*, Exhs. R-5 and R-6. Both investigations seemed to place significant weight on the contents of the deferred prosecution agreement. Exh. R-5 at 267; Exh. R-6 at 294. An investigation by Regina Hook, HRD Investigator, concluded that it was "more likely than not" that Grievant touched V.'s breast inappropriately during the meeting on January 9, 2008. Exh. R-6 at 273.[6] During that investigation, Grievant told Hook that he had not touched Grievant's breast, but that if he had, it was inadvertent. Based on the investigative findings, the appointing authority, Division of Systems and Monitoring Director Richard Campbell, determined that Grievant should be discharged. Exh. R-7 (discharge letter dated June 3, 2008). In the discharge letter, Mr. Campbell specifically relied upon the deferred prosecution agreement in finding that Grievant was guilty of the misconduct alleged. Id at 300-01.

Additional pertinent facts will be developed in the course of the analysis that follows.

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[5] I will analyze the effect of the deferred prosecution agreement in detail in the course of my analysis of the merits. It is necessary to do so because the official who determined that Grievant should be discharged treated the stipulations in connection with that agreement as an admission of guilt. The Union vigorously contends that it was no such thing.

[6] As an aside, I note that Ms. Hook apparently utilized a "preponderance of the evidence" test in evaluating whether Grievant's misconduct had been established. For reasons that I will outline in a moment, however, the tenets of contractual "just cause" under the CBA require that I hold the Department to a stricter level of proof in this kind of case.

IV. DECISION

A. Burden and Quantum of Proof

The parties agree that the Department bears the burden of proof here, but they disagree as to the quantum of proof the State should be required to present in order to meet its burden. I recently answered that very question in a very similar matter between these same parties. As I said in deciding *DSHS and WFSE,* AAA Case No. 75 390 00392 08 (Cavanaugh, 2009):

> [I]t seems to me that it is inconsistent with notions of industrial due process, i.e. "just cause," to deprive a long-term employee of his livelihood on the barest preponderance of the evidence. That is particularly so in a case involving discharge based on conduct which . . . would properly be regarded as reprehensible (if not criminal) by most people in our society. Therefore, I will apply the test I customarily apply in this kind of case—namely, I will look to see if the record convincingly establishes that Grievant is guilty of the elements of misconduct charged in the letter of dismissal.

That case, like this one, centered on allegations of offensive touching, and thus it is all the more appropriate to adhere to the same standards of proof here.

B. The Merits

The Department argues that V.'s testimony compellingly establishes that she was the victim of a very serious transgression, one that was grave enough to result in a criminal charge, and one that potentially exposed the State to significant civil liability.[7] According to the Department, Grievant's testimony, unlike the testimony of V., lacks believability because he adamantly denies touching V. *at all*, and even denies reaching between her arm and her body, despite the credible testimony of V. and Mr. Taylor that he did so. Moreover, his defense of "I didn't do it, but if I did it was an accident" is somewhat unusual, at least in the experience of the HRD investigator. Tr. at 97. Finally,

[7] At the hearing, however, V. disclaimed any intention of filing suit against the Department.

contends the Department, Grievant stipulated to facts in connection with the deferred prosecution that clearly establish his guilt. Therefore, the State argues that I should uphold Grievant's summary discharge despite his long record of good service and lack of any prior discipline of any kind, let alone any incidents of sexually inappropriate physical behavior.

The Union counters that the factual stipulations in the deferred prosecution agreement were conditional at best, i.e. by their express terms they would take effect only if Grievant violated the agreed conditions during the continuance of his trial on the merits. Because Grievant did not violate those conditions, however, the stipulations never became operable. On the facts, the Union notes that it defies logic that Grievant would suddenly become a sexual predator in the workplace, and that he would choose a venue in which there were fifty or sixty potential witnesses to his offensive touching of V., especially given the professional relationships, actual or potential, with the individuals attending the meeting. It is far more likely, according to the Union, that Grievant inadvertently touched V.'s breast while draping the fleece top over her shoulders, or perhaps that a sleeve of the top itself came in contact with V.'s breast in a way that she perceived was actually Grievant's hand. In any event, the Union argues that there is no convincing proof that Grievant committed the offense for which he was summarily dismissed. Therefore, the Union urges me to overturn the discharge and to return Grievant to his prior position with full back pay.

At the outset, I note that there no reason whatsoever to conclude that V. is being intentionally inaccurate in her description of what happened to her. The witnesses she spoke to about the incident in the following days described her as being quite emotional,

and some of that emotion was still evident during V.'s testimony at the hearing. I have concluded that V. clearly believes, honestly and in good faith, that Grievant intentionally grabbed her breast in the meeting on January 29, 2008. If V. is correct about what happened to her, it would be extremely difficult for me to interfere with the Department's decision to discharge Grievant. As I observed in the prior similar case between these parties, "the uninvited and unwelcome grabbing of the breasts and buttocks of female co-workers in the workplace is simply unacceptable, period." *DSHS and WFSE*, *supra* at 16. I went on to note that it is the kind of misconduct that can, and should, result in discharge, even for a first offense. *Id.* at 17. That will be the case, however, only when the underlying misconduct has been established by an appropriate level of proof, and thus it is my duty to analyze the evidence to determine whether in fact the Department has proved Grievant's alleged misconduct with convincing evidence.

I begin that analysis by addressing what seems to have been a central element in the Department's reasoning in support of discharge, i.e. that the "Order of Continuance; Establishing Bail; and Providing for the Forfeiture Thereof Under Certain Conditions" (Exh. R-4) constitutes an admission of Grievant's guilt. At the hearing, the Department elicited testimony about the text of Paragraph G of Exh. R-4, which states "Defendant hereby freely and voluntarily *stipulates to all reports prepared by the Lacey Police Department* relating to the charges against him/her and gives up the right to testify or not to testify." Id. at 285 (emphasis supplied). The Department seemed to be suggesting, in presenting this testimony, that if Grievant "stipulated to all reports," of necessity he must have been stipulating that they were *factually accurate*. I read the stipulation differently, however. First, whatever the stipulation means, it was clearly *conditional* and would only

take effect, as the first sentence of Paragraph G provides, "in the event of a breach of any condition." *Id.* Both the prosecuting attorney and Grievant's defense attorney in the criminal matter, in fact, agreed that the stipulation would only become operable if Grievant violated the conditions contained in the deferred prosecution agreement. *See,* Tr. at 174 (Valz Testimony); *see also*, Tr. at 92-93 (Svoboda Testimony). It is undisputed, however, that Grievant fully complied with all of the conditions of his deferred prosecution agreement. Therefore, this stipulation about the police reports—whatever its legal effect might otherwise have been—never took effect, and thus the police report does not constitute an admission of Grievant's guilt on the charges against him.

In a related argument along these lines, the Department notes that the agreement contains a stipulation by Grievant that the authorities "had probable and reasonable cause to arrest him/her on the charge of simple assault." Exh. R-4 at 286. But while I agree with the Department that this stipulation is a concession that "reasonable cause" existed to *arrest* Grievant, Department Brief at 14, that is a far cry from an admission by Grievant that he was *guilty of assaulting V.*, i.e. that facts existed that would provide just cause for his summary discharge. The two issues are actually quite distinct. Probable cause for arrest requires sufficient evidence to justify moving forward with the criminal process. That process includes, of course (unless the accused pleads guilty), a trial at which the government will be required to prove that he *actually committed* the offense. I take arbitral notice of the fact that many persons who are arrested have charges against them dropped prior to trial, and even in the cases that are tried, many of those charged with crimes are acquitted on the basis of evidence developed after a full hearing. Therefore, Grievant's stipulation that probable cause existed for his arrest simply does not establish

his guilt on the criminal charge, nor does it constitute convincing evidence that he engaged in the conduct for which he was discharged. In sum, because of the differences between the criminal process and the grievance procedure under a CBA, as well as the significantly different standards of proof involved, Grievant's stipulation that the City had reasonable cause for his arrest—which the Union has persuasively argued is merely designed to protect the City from subsequent civil litigation—is of little help to me in determining whether Grievant actually grabbed V.'s breast.

Turning to the actual evidence, then, the Union argues that Grievant has no history of unwanted intimate physical contact with co-workers. Moreover, the argument continues, the setting is inconsistent with an intentional touching—a large, well-lit meeting room, filled with a large number of Grievant's co-workers and community stakeholders, and with a number of those attendees close enough to see what was happening, including a manager sitting directly behind him. I tend to agree. It makes little sense to me that a man with no record of such behavior would choose that venue for an intentional touching of a co-worker with whom he got along well.

In support of the opposite conclusion, the Department points first to some discrepancies in Grievant's description of the events. For example, Grievant has consistently denied that he put his hand between V.'s arm and her body, but Mr. Taylor testified that he had a clear view of the situation and that he observed Grievant do just that, thus corroborating that portion of V.'s testimony. The Department also highlights Grievant's somewhat unusual "denial with an explanation," i.e. the "I didn't touch her, but if I did it was accidental" response. Similarly, the Department points to evidence uncovered during Ms. Hook's investigation that Grievant sometimes referred to female

co-workers as "M'Lady," and that on one occasion he had offered to allow a female co-worker to stay for free in his hotel room in Hawaii on a planned vacation.[8] The Department argues that this latter incident, in particular, suggests that Grievant is a person "who does not respect boundaries."[9]

I have carefully considered these arguments, but in the end, I do not find that they are sufficient to establish convincing proof that Grievant intentionally touched V.'s breast. With respect to the "reaching between the arm and body" issue, I note that neither V. nor Mr. Taylor said anything at the time of the alleged touching. Consequently, several days passed before Grievant had notice that he was accused of a serious impropriety. It would have been much easier for him to remember exactly what he did while draping the top over V.'s shoulders, of course, had the issue been raised immediately, or even if it had been raised shortly afterwards. But with the passage of several days, in the absence of notice that it might be important for him to remember what would otherwise be simply one among a myriad of unimportant details, it would obviously be much more difficult to recall the precise sequence of events. Thus, I do not find that discrepancy to be sufficient to support a conclusion that Grievant is lying,[10] which is essentially what the Department is arguing.

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[8] Grievant testified that he had reservations for a vacation with his son who could not make the trip at the last minute, therefore he offered the extra accommodation to a co-worker with whom he was friendly. He denied any romantic intent.

[9] The Department suggests, in fact, that the uninvited act of placing his fleece top over V.'s shoulders, in response to her remark that she was cold, was itself "an intrusion into V.'s private, personal space," i.e. "a failure to observe boundaries." Department Brief at 13. It seems to me that observation, at least when viewed apart from the alleged touching of V.'s breast, is somewhat harsh, although I understand the point, and I suspect Grievant does as well after what has happened to him.

[10] Although I do not personally find the results of polygraph tests particularly persuasive in light of the literature that suggests they are often unreliable, I note that Grievant offered to submit to such a test on the critical question, i.e. whether he intentionally touched V.'s breast. That fact suggests to me that he was

Nor do I find the Department's other evidence sufficient to support such a conclusion. Co-workers described Grievant as "old school," and Grievant himself noted his background as career military, with stints living in the South and overseas, experiences that may well be quite different from those of his social worker colleagues. Thus, his use of the term "M'Lady," for example, might be seen by him as consistent with a "chivalrous" approach, whereas it could well be taken as condescending by female co-workers, even though not intended in that way. Similarly, the complaint by one female co-worker that he sometimes stood too close to her could simply reflect a difference in what people consider adequate personal space, a difference that is not all that uncommon. None of these behaviors were apparently troubling enough to Grievant's co-workers that they felt the need to report them at the time. Rather, apparently these issues only came to light because of the investigation into the allegation that Grievant improperly touched V. I do agree that the Hawaii hotel reservation incident is more troubling than the others, but according to Ms. Hook's investigative report,[11] the female co-worker involved simply told Grievant that she believed his offer to be inappropriate, and he never engaged in any similar conduct thereafter. Exh. R-6 at 272. Thus, none of these incidents, it seems to me, offer much support for the Department's theory that Grievant had become a predator,[12] especially when considered in light of the testimony of several other female co-

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confident that he had not done so. While certainly not dispositive in itself, it is a fact on Grievant's side of the ledger here.

[11] The female co-worker involved in the Hawaii incident was not called as a witness at the hearing by either side. Thus, I am left with the hearsay evidence on that issue that is contained in the investigator's report, evidence that is decidedly less helpful than live testimony. That is particularly so if I am being asked to find, based on that the incident, that Grievant's conduct in that instance should lead me to conclude that he would improperly touch a female co-worker.

[12] I also note that Grievant's alleged indiscretions, as relied upon by the Department here, are quite different from the unwanted intimate physical contact at the heart of this case. Thus, even if true, these incidents do not necessarily support a leap to the conclusion that Grievant was more likely to commit a physical assault in the workplace.

workers—one of whom worked in a cubicle a short distance away from Grievant and thus was in a position to observe his interactions with female employees with frequency—that he was unfailingly proper and a gentleman.

In sum, I do not find in this record sufficient proof that Grievant habitually transgressed important social boundaries, and thus the Department's "character evidence" fails to carry its burden to establish that Grievant intentionally touched V.'s breast on January 29, 2008. It is highly likely, in my view, that *something* came in contact with V.'s breast, whether the fleece top itself or perhaps Grievant's hand (or Grievant's hand through the jacket). But again, if it was Grievant's hand, the record does not contain convincing evidence that the touching was intentional as opposed to inadvertent and incidental contact in the course of performing what Grievant viewed as a considerate thing to do for a co-worker—offer an increased level of comfort in a cold meeting room.

The grievance must be sustained. Grievant shall be promptly reinstated without loss of seniority or benefits. He shall also be made whole for lost wages, less amounts earned or that could have been earned with reasonable diligence. Unemployment benefits received, if any, shall be treated in accordance with State law. Given the potential impact on V., the Department will be allowed some latitude in placement of Grievant upon his return to the workplace, so long as the position is in all material respects the equivalent of the position he formerly held. As requested, I will retain jurisdiction to assist the parties, should it become necessary, in resolving any disputes over this aspect, or any other, of the remedy awarded.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The Department lacked just cause under Article 27 of the Agreement to discharge Grievant; therefore,

2. The grievance must be sustained; and

3. Grievant shall be promptly reinstated without loss of seniority or benefits, and he shall also be made whole for lost wages, less amounts earned or that could have been earned with reasonable diligence (unemployment benefits received, if any, shall be treated in accordance with State law);

4. Given the potential impact on the employee who complained about Grievant's conduct, the Department will be allowed some latitude in placement of Grievant upon his return to the workplace, so long as the position is in all material respects the equivalent of the position he formerly held; and

5. The Arbitrator, as requested, will retain jurisdiction, for the sole purpose of resolving disputes in connection with implementation of the remedy that the parties are unable to resolve on their own; either party may invoke this reserved jurisdiction within sixty (60) days of the date of this AWARD, or within such reasonable extensions as the parties may mutually agree (with prompt notice to the Arbitrator) or that the Arbitrator may order for good cause shown; and

6. Consistent with the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 2nd day of December, 2009

Michael E. Cavanaugh, J.D.
Arbitrator