ARBITRATION AWARD

In the Matter of the Arbitration

between

WASHINGTON FEDERATION OF STATE EMPLOYEES,
(Union)

and

STATE OF WASHINGTON DEPARTMENT OF LICENSING
(Employer)

Keith Kendall
(Grievant)
AAA No. 75-390-00124-13

BEFORE: Eduardo Escamilla, Arbitrator

APPEARANCES:

For the Employer:	Catherine R. Seelig, Attorney
For the Grievant:	Sheri Ann Burke, Labor Advocate
Date of Hearing:	August 15, 2013
Place of Hearing:	Olympia, Washington
Date of Briefs:	September 30, 2013
Date of Award:	October 18, 2013

Eduardo Escamilla
Arbitrator

ISSUE

Did the Employer have just cause to discipline the Grievant, Keith Kendall? If not, what is the appropriate remedy?

STATEMENT OF FACTS

STATE OF WASHINGTON, DEPARTMENT OF LICENSING, (Employer) and WASHINGTON FEDERATION OF STATE EMPLOYEES (Union) share a collective bargaining agreement with the applicable contract effective dates of July 1, 2011, through June 30, 2013. The contract contains a grievance/arbitration procedure that requires the parties to resolve their contract disputes through this process.

The Grievant is employed by the Department of Licensing (DOL) as a commercial driving license tester 3. The DOL partners with different schools throughout the state that provide training for applicants for commercial driver's licenses. DOL employees go the various vocational schools to test the drivers' ability to obtain a commercial driving license. The Employer's testers visit approximately 30 different schools throughout the state to administer this test. The Employer also conducts this testing at its facilities.

CDS is a private training school which offers its trainees lessons and training to prepare them to pass the commercial driver's license test. CDS has approximately 13 instructors that train approximately 20 to 25 students. State employees will come to the CDS training school and conduct commercial driver license test on students. The testers conduct three tests, a pretrip test (safety), backing up test and a driving test.

This matter involves the discipline (letter of reprimand) of the Grievant on February 1, 2012, based on CDS complaint against the Grievant. The Union filed a grievance on February 8, 2012, alleging violations of Article 2.3, Non-Discrimination, and Article 27.1, Discipline. The Union argues that the Employer did not have just cause to issue the letter reprimand to the Grievant. Furthermore it argues that the letter of reprimand is in retaliation for the Grievant's protected concerted activities under Article 2.3.

On February 1, 2012, the Employer issued the Grievant a written reprimand which states,

> "This letter is to provide a written reprimand regarding your behavior and demeanor when dealing with customers and stakeholders and when conducting skill test, your interaction with your manager and your scoring of test."

The disciplinary letter reveals that DOL received complaints on July 1 and September 22, 2011, from CDS about the Grievant. The letter of reprimand recounts the Grievant conduct during the fact-finding meeting on November 3, 2011, wherein the Grievant expressed frustration. During the meeting, the Employer questioned the Grievant about several different interactions with his manager, Ellen West, to which he replied that if she were nicer, he would not need to be rude.

The Grievant accused the manager of not telling the truth and being rude. He also felt frustrated about being questioned about his testing methods. He did not like people telling him how the test should be conducted. The disciplinary letter also recounted that on June 29, the Grievant received a Letter of Expectation outlining his expectations how to perform his work, and about his attitude and demeanor.

The grievance was processed in accordance with the contract's grievance procedures which eventually resulted in the instant hearing being held on August 15, 2013.

Testimony

The Employer presented two CDS employees, Dion McNeeley and Lynn Wilmon, to testify about their written statements submitted to the Employer complaining about the Grievant's conduct on September 22, 2011, which forms the underlying basis for the disciplinary action.

Willmon testified that on September 22, 2011, the Grievant approached her, yelling at her, "hey you". She felt embarrassed being yelled to because her students were nearby. The Grievant asked where McNeeley was located and she directed the Grievant to him. She could not hear the subsequent conversation between the Grievant and McNeeley but she observed that the Grievant appeared mad and saw the Grievant kicked dirt and rocks on McNeeley's shoes. It appeared to her that the Grievant was very angry at McNeeley. Willmon believed that based on Grievant's raised voice and red face, the Grievant was throwing a temper tantrum. The students near her asked not to be tested by the Grievant.

McNeeley recalls the September 22, 2011, incident. He states the Grievant had failed a student's pretrip test portion of the exam. The student complained that the Grievant had been rude and abrupt. Subsequently the student passed the class with another tester. When he observed the Grievant yelling at Wilmon, he approached the Grievant and attempted to walk away from the building and away from the students' hearing range.

McNeeley told the Grievant that the reason the student failed the test was because of the Grievant's testing procedures which had thrown the student off his routine causing the student to fail the test. The Grievant started the conversation in a loud voice. The Grievant's face became red and started yelling that the school (CDS) was difficult to work with and he was going to call his boss. McNeeley believed that the Grievant was angry enough to assault him. McNeeley responded in a calm manner which infuriated the Grievant because he then began kicking dirt and rocks on his shoes.

Later the Grievant apologized to McNeeley after speaking with his supervisor, Ellen West. The Grievant added that he was under the assumption that McNeeley had already called West. McNeeley stated that the Grievant's apology appeared to be sarcasticly made.

McNeeley later spoke to West and gave her previously written statements that he and Wilmon had prepared in anticipation of obtaining a restraining order against the Grievant. McNeeley was concerned that the Grievant would lose his temper again with someone else and perhaps that person would not be able to maintain his composure. McNeeley has heard the

Grievant tell students that it was not their fault for failing the test but rather it was the fault of the school.

Ellen West has been the licensing service manager for approximately 3 1/2 years. She testified about various incidents that were raised in the disciplinary letter. She recalls the June 29, 2011, incident wherein the bus' qualifications for a class C test were brought to her attention by the Grievant. She was specifically aware of that particular vehicle's specification and prior use as a testing vehicle, but she nevertheless conferred with others to make sure that the vehicle specifications were sufficient to conduct a class C test. She told the Grievant that he could conduct the test on that vehicle.

The Grievant refused to conduct the test on the vehicle because it did not meet the qualifications for the vehicle because it had 14 seats rather than 16 seats. McNeeley explained that the two seats had been removed but that he had checked with the Grievant's office and they had approved that the specific vehicle could be used for a class C test. The Grievant refused to conduct the test.

McNeeley contacted West and explained the situation. West responded that someone else would conduct the test on that bus. McNeeley informed the Grievant that he had contacted West and she agreed that the test could be done on that particular vehicle. The Grievant responded that he did not care what West said to him on the phone. The Grievant later that day conducted the test.

West later spoke directly to McNeeley on July 5. McNeeley was upset that the Grievant was still testing at CDS. McNeeley was concerned that the issue of this particular vehicle had been raised before and had been resolved by DOL and was upset that the Grievant was raising this issue again.

West also testified about a Letter of Expectation she drafted on June 29, 2011, concerning the Grievant's incidents of March 25 and April 11, 2011.

West ask her manager Tandi Alexander to conduct the investigation over the recent September 22 incident because of her concerns with insubordination issues. West states that the Grievant is being disciplined for his actions that occurred on March, April, June and September, 2011.

West responded to the Grievant's claim in the grievance that she discouraged him from contacting the Union. She stated that she expressed to him the desire to develop a working relationship so they could deal with each other without contacting the Union. She did not try to discourage him from contacting the Union but wanted to improve their relationship.

Tandi Alexander, the commercial driving licensing program manager also testified. He conducted a fact-finding meeting on November 3, 2011, over the September 22 incident. He provided the statements of McNeeley and Wilmon to the Union. He recalls the Grievant stating he became upset with McNeeley and raised his voice. The Grievant believed he and McNeeley parted in good terms after the September 22 interaction. However, the Grievant at the November 3 meeting maintains that CDS does not like him because of the way he conducts tests.

Alexander also questioned the Grievant about the accusation that the Grievant does not like CDS and has made derogatory statements to students about CDS. The Grievant responded that he was being harassed by the school because the school did not like the way he performed his job. The Grievant denies making statements to students that they should not blame themselves but rather they should blame the school for failing the tests.

Alexander also talked about the Grievant's pass/fail ratio because it was a very low ratio. The Grievant responded that he does not play the pass/fail test game and he just conducts his tests. Alexander had concerns about this ratio because the normal pass/fail ratio is approximately 30%, while the Grievant's ratio is approximately 50%. Alexander believes that the Grievant is over scoring the tests.

In response to Alexander's inquiry about insubordination towards West, the Grievant told Alexander that if West was nicer to him he would not have to be rude. No further specifics were discussed on this issue.

The Employer also presented several witnesses to testify about the processing of the grievance and the investigation of the allegation that the Employer was retaliating against the Grievant because of his protected concerted activity. The Employer asked the Union and Grievant to provide specifics when these incidents had occurred. The Union and the Grievant never responded or provided any information about these allegations. Therefore they did not deal with the nondiscrimination portion of the grievance because there was no evidence presented for them to respond.

Gibb Kinsley is the Employer's compliance program manager that conducts audits of the trainers. He testified that the audits of the Grievant reflect that the Grievant performs a good job in all testing areas. However, he cannot testify about the Grievant's conduct in situations where an audit is not being taken.

Kinsley concluded that the Grievant's audits showed that there was a high failure rate by the Grievant in the pretrip test portion of the test. The compliance office submitted the audit report to the Grievant's supervisor because Kingsley felt that the Grievant's high rate of failure should be of concern to the Employer.

The Grievant testified in his behalf. The Grievant has been employed by the DOL for approximately 6 years in his current position. He recalls that on September 22, 2011, he was doing his paperwork after testing a student when McNeeley interrupted him. He told McNeeley that he should not be interrupted and he called West about this incident. The Grievant returned to the yard and saw a girl and told her "excuse me are you an instructor" and asked where he could find McNeeley. There were no students near the instructor at that time.

He also recalls that during the September 22 conversation, McNeeley requested that the student be retested because he did not understand English very well. The Grievant refused because the test had been concluded. The Grievant later apologized to McNeeley and

McNeeley also apologized. McNeeley told him that there was no reason that "Olympia" (Employer's offices) should be called.

The Grievant maintains that the reason he called West on September 22 was because McNeeley had interrupted him. However, he also admits telling West that he had raised his voice when talking to McNeeley.

The Grievant denies kicking dirt and rocks on McNeeley's shoes or yelling at McNeeley. He also denies that he was self-reporting the incident when he called West on that day. Rather, he was just reporting the incident that McNeeley had interrupted him, as he has been instructed to do so.

The Grievant also recalls the June 29 incident. He believed that the vehicle that CDS intended to conduct the test did not meet the testing specifications. The Grievant called West and explained his concerns of the vehicle specifications. He also maintains that he was conducted a class B test and the vehicle was classified only for class C test.

He believes that CDS has issues with him because he has reported them for cheating during the backing up test portion of the test.

Another state employee testified about the September 22 incident. He stated that he observed the Grievant and McNeeley speaking that day but was unable to hear their conversation. He did not notice whether or not they were yelling at each other. He later had a conversation with West who questioned him about the incident. He replied that there was nothing to report. However, on that same day, McNeeley told that employee there was no reason to call Olympia.

ANALYSIS

Union's position

The Union maintains there are several just cause issues which require that the grievance be sustained. Specifically, the Union maintains that the Employer used the June 29, 2011, incident as basis of the instant disciplinary action. Employer's action is flawed because the June 29, 2011, incident was in fact a corrective action and as such, allowing the Employer to punish the Grievant for the same incident would amount to double jeopardy. Additionally, the September 22 disciplinary corrective letter involved matters that occurred in March and April 2011 which were not referenced in the instant disciplinary action, but were relied upon by West.

The Union maintains that there was no formal investigation that occurred regarding the two statements received by the Employer over the September 22, 2011, incident. Similarly, there was no formal investigation of the incident resulting in the June 29, 2011, corrective action concerning the testing on a vehicle incident.

The Grievant is being disciplined for following instructions regarding the appropriate procedure he should take when confronted with a problem. When the Grievant contacted the Employer about the testing of the vehicle incident to obtain clarification, he was subsequently discipline for reporting the issue and for following procedures.

The disciplinary action also cited higher than average pass/fail ratios as a basis for issuing discipline. The Union maintains there was insufficient evidence to substantiate any background information concerning this issue. It maintains if there is a performance issue, the Employer should address the issue through training and monitor the performance issue rather than address it immediately through a disciplinary action.

Employer's position

The Employer in its brief defined the issue in a very succinct manner in which it sets forth a general definition of just cause. In essence it maintains that just cause is "whether the Employer imposed discipline for good reason and was mindful of procedural and equitable considerations when doing so" and also cited references that elaborate on this general definition of just cause. Specifically, in determining just cause issues circumstances that are generally considered include notice to the Grievant of rules and consequences; proof of misconduct;

sound investigation of the misconduct; and reasonable and evenhanded discipline, including progressive discipline when appropriate. *WFSE (Hunter) v. DSHS*, (Duffy 2006), citing *Remedies in Arbitration*, 137-45 (2d ed., BNA Books, 1991).

The Employer assumes the burden of proof by the preponderance of evidence in disciplinary arbitration cases which in its view means that the facts presented "more probable than not" did in fact occur. However, if the Union asserts any irregularity, it is the burden of the Union to establish such irregularity.

The Employer maintains that the Grievant was on notice of the policies prohibiting misconduct specifically, when "dealing with customers and with coworkers in a professional and courteous manner even in the most difficult circumstances; support your supervisor or person in charge; and assist customers in a professional and courteous manner as timely as possible." *CDL Skills Tester Expectations*

The Grievant was further placed on notice of issues of misconduct when dealing with customers because of the contents of the Letter of Expectation dated June 29, 2011.

The Employer maintains that it provided notice to the Grievant concerning the allegations raised against him. A fact-finding meeting was conducted by the Employer in which the Grievant was provided an opportunity to be heard and present evidence. In that meeting the Grievant was specifically asked about the dirt kicking incident to which he denied ever doing. The Employer also discussed the discrepancies between his account of the September 22 incident and those of the complaining customers. During the meeting, the Grievant was further asked about his derogatory statements about the customer; his pass/fail ratio; and interactions with his supervisor. He was given an opportunity to respond to these issues that were later used as basis for discipline.

The Employer maintains that the Grievant version of the incidents is not credible and thus, the Union did not rebut the Employer's evidence.

The Employer also addressed the issue of discrimination against the Grievant by Employer for his Union activities. It maintains that there was no specific evidence that supported this allegation.

Conclusions

The parties agree that the central issue in this case is whether the Employer had just cause to discipline the Grievant. Inherent in determining this issue, several well-recognized axioms of legal principles involving the determination of just cause are adopted. In disciplinary matters, it is the burden of the Employer to prove by the preponderance of the evidence that it had just cause to discipline the employee. In order to establish just cause, many arbitrators have adopted well known and accepted analysis associated with this issue, which are reflected in Arbitrator Duffy's view of just cause in the cited arbitration award.

Firstly, Employers are endowed with the right to establish rules and policies under the general management rights provisions of the contract. They are generally within their managerial rights to establish these rules for the purpose of achieving business goals or promote the health and welfare of the employees. These rules create expectations that employees must abide by in order for continued employment. Thus, the Employer must establish that the disciplined employee violated a well-known rule that was reasonably implemented to achieve the Employer's business goals and safety and welfare of employees.

Once establishing the Employer has such a rule, it must be shown that the disciplined employee was aware of the rule and was also aware that adverse consequences would ensue if the rule was violated. Thus, the groundwork for Employers to manage its workforce through disciplinary process of enforcing reasonable work must be established.

If an Employer believes an employee violated a work rule, it is incumbent upon the Employer to provide the employee with inherent due process rights that are incorporated in the just cause provisions of the contract. These due process rights include a fair and open investigation of the allegations against the employee; specificity of the allegations; and an opportunity for the employee to respond to the allegations. Additionally, many arbitrators also find that the timely investigation and disciplinary action by the Employer is also a requirement for due process.

Upon completion of the investigation and deliberation by the Employer of all the evidence, the Employer then has wide latitude of deciding whether or not it has a reasonable basis to conclude that it had just cause to discipline an employee. Normally, the Employer's discretion may not be usurped by arbitrators nor should an arbitrator's own judgment on the degree of punishment be substituted for that of the Employer's.

Arbitrators rely on numerous factors in determining credibility resolutions. Observation of the witness when testifying is indeed a factor that arbitrators will use to determine credibility. However arbitrators are not bestowed with some mystical power to determine whether a witnesses is being truthful or not. A witness' nervousness when testifying can be reasonably interpreted differently. Thus this particular trait of observation of a witness is not particular helpful. Although, the demeanor of the witness while testifying may provide some guidance for arbitrators. The witnesses' evasive, argumentative, and unresponsive answers to questions are factors relied by arbitrators more so than just mere observation in determining credibility resolutions.

However perhaps the strongest and most persuasive evidence to consider in determining credibility resolutions are inconsistent statements, corroborative evidence, and documentary evidence. Additionally, a witness' variance of his answer depending on the question asked as well as the evidence that has been presented before him is also indicative of a witness who is adjusting their testimony in order to meet the evidence.

Using the above criteria for just cause and credibility resolutions, I find that the Employer has met its burden of proof of establishing it had just cause to discipline the Grievant for his conduct on September 22. However, the Employer failed to meet its burden of proof establishing Grievant's misconduct based on the allegations of March, April and June, 2011. Additionally, the Employer did not meet its burden of proof of establishing that the Grievant was properly discipline for derogatory remarks about CDS, insubordination, and low pass/fail ratio.

Additionally, there was insufficient evidence to show that the Employer engaged in discrimination against the Grievant for his protected certain activities based on the conversation between the Grievant and supervisor West. The burden falls on the Union to show by the preponderance of the evidence that the Employer did in fact discriminate against the Grievant because of his protected concerted activities. Accordingly, this basis for sustaining the grievance is dismissed.

The allegations in the instant matter raised issues that fall into two categories: procedural and quantum of proof. The procedural aspect of just cause is equated to the fair treatment afforded to the Grievant investigating the allegations. An essential element of due process and fair play deals with the timely investigation of the allegations as well as timely disciplinary action. The letter of discipline relied on allegations that occurred in March, April, and June 2011. I find that disciplinary action is untimely based on those incidents. The record does not show any reasonable basis for the Employer to delay any disciplinary actions after conducting its investigation contemporary with the respective allegations of March, April, and June 2011.

Even without determining the merits of the Employer's allegations issues raised in those instances, I find that the Employer's failure to take disciplinary actions on the prior incidents that occurred approximately 12 to 6 months earlier creates an estoppel precluding the Employer from using the past incidents as valid bases for the current disciplinary action.

"Where management unduly delays in the assignment or enforcement of discipline, arbitrators have applied the double jeopardy concept. As Arbitrator Herbert M Berman stated:

"[I]t is a denial of procedural due process and just cause to hold a charge over an employee's head indefinitely and to revive it whenever corroborating or substantiating evidence might eventually surface." *How Arbitration Works*, Elkouri & Elkouri, (BNA 5th edition, p 924)

The Employer cannot rely on these incidents to substantiate the issuance of the instant letter of reprimand. It may not revisit these incidents and now decide to issue a disciplinary action because a similarly new incident has occurred. In essence, the Grievant is exposed to double jeopardy regarding the March, April, and June incidents. The Employer had the opportunity to discipline the Grievant but it failed to do so and now because of the September, 2011 incident, it has decided to revisit the prior incidents and issue a disciplinary action based on those incidents. It is unfair for the Employer to hang the threat of discipline for allegations that it has completely investigated but have not taken any actions to use them as a basis for disciplinary action in the unknown future. This violates this fundamental principles of due process and fair play that is incorporated into the just cause provision of the contract.

With respect to the issue of the low pass/fail ratio as a basis for disciplinary action, the Employer did not establish just cause. The Employer must provide notice to an employee of performance issues in order to provide the employee an opportunity to improve his performance. In the instant case, the Employer used the performance allegation as a basis to discipline the Grievant even though the Grievant was unaware that his performance was at issue.

The Employer is not precluded from disciplining an employee for performance issues. But before disciplining an employee for performance issues, it must provide notice to the employee that an issue concerning performance is present. Of course there are circumstances where the performance issue is so egregious that disciplinary actions may be taken without notice. However this is not one of those types of situations.

Thus this disciplinary action cannot be based on a performance issue of which the Grievant was unaware of its existence.

With respect to the allegations of insubordination raised in the disciplinary letter, the Employer failed to establish just cause because of lack of specificity. The evidence is abundant that the Grievant did have an attitude towards his supervisor that can be reasonably interpreted as being insubordinate. The Grievant's own comments in the fact-finding of November 3, 2011 displays this attitude.

However the mere fact that the Grievant has this attitude may not be the sole basis to discipline him for insubordination. The attitude must have a nexus to a specific incident whose facts have been completely flushed out to demonstrate insubordination. The Employer failed to prove with any specificity the facts of any an incident that demonstrated insubordination towards supervisor West.

I do note that the Employer did demonstrate by the preponderance of the evidence that the Grievant did engage in insubordination behavior towards West on June 29, 2011. When the Grievant refused to conduct the test on the bus that was specifically cleared for testing by West, the Grievant in essence refused to follow an order. However, I find that this act of insubordination cannot be used as a basis to discipline the Grievant in the instant matter on the basis of due process for failing to take disciplinary actions on a timely manner. No evidence was presented to explain why the Employer did not take disciplinary action within a reasonable time after the June 29 interaction between West and the Grievant. If the interaction between the Grievant and West was not egregious enough on June 29 to warrant taking disciplinary action for insubordination, how can this incident can now be a valid basis to show insubordination that warrants disciplinary action?

As noted earlier, the grievance raised the issue of Employer discrimination against the Grievant based on his protected concerted activities. The burden of proof on this allegation falls on the Union to demonstrate discrimination by the preponderance of the evidence. The record fails to provide any probative evidence to support the allegation. The only evidence presented on this issue was a conversation between supervisor West and the Grievant wherein the supervisor asked the Grievant to try to work out the issues with her before contacting the Union. This evidence does not rise to the level of establishing discrimination or malicious motive. This allegation is dismissed.

It is concluded that the letter of discipline was issued primarily because of the September 22 incident. There is no question the Employer had in fact provided notice to the Grievant about his requirements to act in a professional and courteous manner dealing with customers. This is evident by the investigation of the March, April and June incidents, which resulted in the Letter of Expectation. Furthermore the Grievant's job description specifies these requirements as part of his job duties. The Grievant was on notice that his unprofessional interactions with customers are an expectation for which adverse consequences are imposed for failure to comply.

In order to resolve this final allegation whether the Employer proved the allegations of September 22, credibility resolutions must be made because the Employer and the Union witnesses presented completely different versions of the incident. The Employers witness showed that the Grievant confronted McNeeley in an anger and irate tone resulting in the Grievant kicking dirt and rocks on the McNeeley shoes. The Union version shows that there was no anger involved as the Grievant acted in a professional manner.

In deciding credibility resolutions, each party's testimony is subject to claims of bias. In essence, each party comes into a hearing with a viewpoint of establishing its position through their testimony. It is difficult to establish credibility resolutions solely on testimony of opposing parties. Arbitrators may use other factors such as inconsistent statements or rely on reasonable inferences drawn from the logical interpretation of testimony. Arbitrators will often rely on non-party witnesses as a basis for credibility resolutions as these witnesses do not have a stake hold in the outcome of the arbitration.

In the instant case, I find that the third-party witnesses (CDS employees), McNeely and Wilmon, presented their testimony in a forth right manner without any contradictions. I find particularly, the testimony of Wilmon that the Grievant engaged McNeeley in an angry tone resulting in kicking dirt and rocks on McNeeley shoes to be compelling. This is not an issue of interpreting a conversation but rather it involves an observation by a third-party witness. I find that this type of testimony under these circumstances has a high degree of reliability.

I also note that McNeeley did demonstrate during his testimony the frustration of dealing with the Grievant. However, I find there is insufficient evidence to show that this frustration led to fabrication of the statements especially when McNeely submitted a written statement which was prepared for the purpose of obtaining a restraining order against the Grievant rather than for the purpose of assisting the Employer's attempt to discipline the Grievant.

On the other hand the Union's case does not enjoy the support of a third-party witness that is detached from the outcome of the arbitration. The employee's testimony presented by the Union concerning his observation of the interaction between McNeeley and the Grievant is too unspecific to conclude the allegations did not occur as proffered by the Union. The employee's testimony did not establish that he was in a position to observe the entire interactions of the parties on that date. The evidence may demonstrate that for the moment that the witness observed McNeeley and the Grievant, no incidents occurred. It does not demonstrate what might have occurred outside of the period of observation.

With respect to the Grievant's testimony, I find it contradictory that the Grievant testified that nothing of any significance such as losing his temper occurred on September 22 but yet the Grievant admits that later that day he sought out McNeeley after talking to West to apologize to McNeeley. If nothing had occurred as purported by the Grievant, there is no a reasonable basis to apologize to McNeeley. Additionally, in the November 3, 2011, fact finding meeting, the Employer's notes reveal that the Grievant admitted that he raised his voice. I find this to be consistent with his contemporaneous admission to West of his difficulty with McNeeley and subsequent apology to McNeeley.

I also find the employee witness who testified in behalf of the Grievant is relevant to the issue of credibility. The Union witness testified that he had a conversation with McNeeley on September 22 in which McNeeley told him that he did not have to report the incident to "Olympia". There would be no reason for McNeeley to make such a statement to the employee unless in fact there was or had been a difficult interaction between McNeeley and the Grievant. Thus this statement supports the Employer's version of the incident.

Accordingly, I shall credit of the Employer's witnesses' version of what occurred on September 22.

I find the Employer established by the preponderance of the evidence the Grievant did in fact confront McNeeley in an angry tone resulting in the Grievant kicking dirt and rocks on McNeeley's shoes. The Employer met is just cause requirement of proving that the Grievant engaged in an unprofessional manner towards its customers, and thus subject to discipline.

Arbitrators have divergent views in determining the outcome of grievances when certain allegations are proven and other allegations are not. Arbitrators are reluctant to second-guess the Employer in determining what the appropriate level of discipline should be when only one allegation is proven rather than all of the allegations used as a basis for disciplinary action. It is appropriate to analyze disciplinary actions on a case-by-case basis to determine whether the disciplinary action can be substantiated by proving only one of the allegations. At times, there is insufficient objective evidence to make this determination and the disciplinary action will be reduced if not dismissed in its entirety.

In this case, I find that the level of discipline is low enough in the progressive discipline hierarchy, that dismissal or reduction of discipline is not warranted. Additional, the record also discloses objective evidence that the Employer indicated in its meeting's notes with the Union, that it would have issued this disciplinary action based solely on the September 22 incident. I rely heavily on this pre-arbitration Employer's comments to conclude that if the Employer had only raised the proven September 22 allegation, it would have issued the same disciplinary action. Accordingly, I find no objective basis to reduce the disciplinary letter. See, *November 19, 2012, Employer Step 3 Response,* p 3.

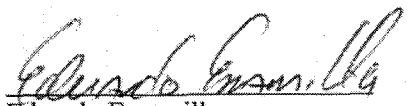
AWARD

The grievance is denied. The Employer had just cause to discipline the Grievant over the September 22, 2011 incident regarding professional conduct towards customers. The

Employer did not just cause to discipline the Grievant concerning the allegations of insubordination, derogatory remarks about customers, and pass/fail ratios of test.

The Union failed to establish that the Employer discriminated against the Grievant because of his protected concerted activities.

Dated this 18th day of October, 2013



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Arbitrator