

**In Arbitration Before  
Richard L. Ahearn**

**Arbitrator's Opinion and Award**

**Washington Federation of State  
Employees, on behalf of  
Faafao Lauvao,  
Grievants** )  
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**and** )  
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)  
**Washington Military Department,  
Employer** )

**AAA No. 75-39—00470-12**

**For the Union:**

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## **I. Introduction**

The Washington Youth Academy (Employer), which is operated by the Washington Military Department, discharged Faafeo Lauvao (Lauvao) effective April 13, 2012 for an alleged pattern of abusive behavior toward students (cadets) of the Employer. The Union contends on Lauvao's behalf that she is the victim either of a disconnect between the actual practices of the Employer and its stated expectations or of anti-union discrimination.

At a hearing held on April 9, 2013 in Bremerton, Washington, the Parties had full opportunity to present evidence and argument, including the opportunity to cross-examine witnesses. A transcript of the proceedings was prepared by a certified reporter, and the Parties supplied a copy of the transcript to the Arbitrator. Post-hearing briefs were filed electronically, and with the Arbitrator's receipt of the briefs on June 3, 2013, the record closed. Having carefully considered the evidence and the comprehensive and well-stated arguments of the Parties, my Opinion and Award follow.

## **II. Statement of The Issue**

A. Did the Employer violate the provisions of Article 27.1 of the applicable collective bargaining agreement between the Parties when it terminated the employment of Faafeo Lauvao on April 13, 2012? If so, what is the appropriate remedy?<sup>1</sup>

B. Did the Employer discriminate against Faafeo Lauvao based upon her union activities in violation of Article 2.1 and/or 2.3 of the applicable collective

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<sup>1</sup> Article 27.1 provides that employees may not be disciplined without "just cause."

bargaining agreement when it terminated her on April 13, 2012?<sup>2</sup> If so, what is the appropriate remedy?

### **III. Facts**

#### **A. Background**

Following extensive lobbying efforts by General Timothy Lowenberg with the legislature of the State of Washington, the Washington Youth Academy (Employer) was created in 2007. The Employer, which is operated by the Washington Military Department, seeks to improve the lives of at risk youth who have, or are at risk of dropping out of high school. The Employer's boarding school program for the students is highly regimented, with a military-style curriculum, including significant academic course work. The ultimate goal of the program is to permit students to gain self-confidence, improve their work and study habits, earn academic credits and return to their high schools to graduate with their peers.

The Employer's structure is largely based on the military, with the students called cadets. They are assigned together in groups called platoons. The cadets live in dormitory-style, open-bay housing and their movements are closely watched. Employees referred to as cadre provide direct staff interaction with the cadets at all hours of the day, seven days per week and are responsible for guiding and directing the cadets regarding discipline and training. The program has enjoyed exceptional success, with the cadets showing impressive improvement academically and personally at the conclusion of their 22-week cycle in the program.

Lauvao was hired by the Employer on or about June 7, 2010 as a cadre. She had previously been in the United States Army for approximately eight (8) years and

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<sup>2</sup> The Employer contends that the second issue is subsumed by the first, that if there was just cause for discharge, it could not have resulted from discrimination, and if there were discrimination, it could not have been with just cause.

was honorably discharged. The Position Description for a cadre includes the following essential functions:

- Promote a learning and instructional environment that is positive, productive, safe and secure.
- Ability to demonstrate mature judgment under stress and conditions of uncertainty to provide stable and consistent guidance and leadership to Cadre staff and students.
- Ability to implement guidance and directives from the Cadre supervisory chain in providing instruction, training, direction, and support to the cadet corps.

According to Lauvao, in July 2011, she became the "point person" in the campaign to organize certain groups of employees of the Employer for purposes of union recognition. Prior to her termination, she had no disciplinary actions; her performance evaluations were satisfactory.

#### **B. Events Leading to Discharge of Lauvao**

On March 8, 2012, Master Sgt. Michelle Rauback discovered pictures of four female cadets who had taken photos of themselves with their hair down while in a latrine area that was off-limits to them. Sgt. Rauback shared the pictures with Lauvao. Following a discussion between the two of them, Lauvao decided that the appropriate response would be to require the cadets to wear signs around their necks as a visible reminder that they had improperly entered a restricted area. The signs contained the following language:

"I will not use the BRC latrines to take pictures of myself. BRC latrines are off limits at all times."

Shortly thereafter, Commandant Mike Baird (Baird), who had supervisory authority over all residential operations of the Employer, noticed from the window in his office that four cadets were standing by the flagpole in front of at least one platoon,

with signs around their necks. According to Baird's testimony, he had never seen cadets being put on display or made an example of in that way before. Baird promptly went outside and approached Lauvao, asking her what was going on. She replied that she was disciplining the students for using the wrong latrine. Baird directed her to remove the signs, which she did immediately. Returning to his office, Baird reported the incident to Sheri Poteet (Poteet), the Deputy Director, and to Larry Pierce (Pierce), the Director. Later that day, concerned about the public humiliation that had been imposed on the cadets by Lauvao, Pierce directed Poteet to conduct an investigation into Lauvao's behavior toward cadets.

Poteet's investigation revealed an incident in January, 2012 in which Lauvao threw some personal items of a female cadet off the third floor of a dormitory balcony. In addition, the investigation uncovered an occasion in which Lauvao allegedly threatened female cadets by telling them that if they put "bloody" underwear in their wash they would have to wear the "bloody" underwear around their neck for the day and also that she would make female cadets wear tampons around their necks and in their ears if they flushed tampons down the toilet.<sup>3</sup>

At the conclusion of the investigation, General Timothy Lowenberg, (General Lowenberg) Adjutant General of the Washington National Guard and Director of the Washington Military Department, conducted a Loudermill hearing with Lauvao and her union representative. According to General Lowenberg, Lauvao's responses at the hearing demonstrated she was unfit to properly perform her duties. In particular, he was disturbed by her failure to acknowledge that her behavior was inconsistent with the expectations of her position and by her inability to accept responsibility for her actions.

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<sup>3</sup> Although the evidence at hearing included other incidents of alleged malfeasance by Lauvao, the Employer in its brief explained that it would not discuss them as they were apparently not of significance in the termination decision. Accordingly, I will not address them in my Opinion.

### **C. The March 8, 2012 Sign Incident**

The Employer asserts that the March 8, 2012 sign incident was the worst such incident in its history. For instance, Baird testified that he had never seen cadets wearing signs around their necks before, stating:

"It looked like someone was being made an example."

According to Baird, when he approached the four cadets with signs and spoke to Lauvao, she replied that she was disciplining the students for using a latrine that was off limits to them. The Employer contends that the sign incident is so egregious in part because it may have been the only such public humiliation of cadets in the Employer's history.

In addition, the Employer considered the sign incident particularly vindictive and petty because Lauvao discovered the apparent misconduct the same day the cadets were required to wear the signs around their necks. Although the cadets attempted to explain to Lauvao that the incident involving the latrines occurred nearly two months earlier, and that the matter had been addressed by Master Sgt. Burt, Lauvao did not attempt to speak to Burt. Rather, she immediately forced the cadets to wear signs around their neck in the most public area of the Employer's premises. According to the Employer, Lauvao during the Loudermill meeting suggested "punishment" rather than "corrective training" was her principal objective.

The Union counters with the argument that Lauvao considered the signs a form of corrective training, and she never denied her involvement in the incident. Indeed, upon being spoken to by Baird, she immediately stopped using them and posted the prohibition in the pass down report that employees fill out at the end of their shifts. Prior to the directive from Baird, Lauvao had received no formal training and was unaware of any policy that would suggest that her decision to require the wearing of

the signs was inappropriate.<sup>4</sup> Rather, to the extent Lauvao received any training regarding appropriate discipline for the cadets, it was primarily through observation of her fellow cadres. In addition, Rauback, a lead employee over cadres, was significantly involved in the sign incident, as she showed the pictures of the cadres to Lauvao and condoned the decision to require the cadres to wear the signs around their necks, testifying about the incident:

"At the time I didn't see how it was anything inappropriate."

Indeed, although unable to recall specific details, Rauback testified that similar signs had been used in past cycles. For her involvement in introducing the cadets' inappropriate behavior to Lauvao and participating in the decision to require the sign wearing, Rauback, a former supervisor, received a verbal reprimand.

#### **D. The Gear-Tossing Incident**

On this occasion, which occurred prior to March 8, 2012, Lauvao threw the personal belongings of a female cadet whose locker was disorganized, off the dormitory balcony. At that time Lauvao told the cadet that her stuff did not belong in the bay if she was unable to follow instructions and standards. According to the Employer, rather than addressing the entire platoon, which would be the proper approach, Lauvao intimidated and humiliated the cadet by intentionally and publicly signaling her out. Although the Employer conceded that a certain amount of "tossing" or "resetting" of cadets' gear was an accepted practice to insure that cadets properly store their possessions, such actions by cadre are appropriate only if limited to the cadets' area. Moreover, although there had been a practice of tossing the bunks in the immediate area, the practice now is to place the items on the bed so that they

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<sup>4</sup> In this regard I also note Employer's Exhibit 2, and in particular the March 9, 2012 interview of Lieutenant Dwayne Johnson, Lauvao's supervisor at the time. Although Johnson did not testify at the hearing, the notes of his interview contain the observation that the March 8 sign incident constitutes unsanctioned conduct, but he saw..."there is a fine line between trying something out of the box...and not crossing over to inappropriate methods." He concluded by referencing his admonition to the staff to check with your supervisor first if not sure of any approach.

are not on the floor. Further, there is no evidence that any other cadre ever tossed a cadet's gear outside the building.

According to the Union, the gear-tossing incident is consistent with the types of corrective training commonly used by the cadres. For instance, former cadre and current medical technician Filipinas Benitez testified that she would not have been surprised to see a cadet's mattress tossed outside. The term Benitez asserted that cadre used to describe the process of tossing a cadet's footlocker was "hurricane." In addition, former cadet Jordan Weiss, whose personal belongings were those tossed by Lauvao in this incident, testified about an occasion when cadets were forced to carry their mattresses both to the dining facility and to the quad area.

#### **E. The Alleged Threats**

The statements by Lauvao about the "bloody underwear" and "tampons" occurred weeks after a December 19, 2011 memo from Director Pierce, who was responding to reports from the outgoing class that cadre had used certain offensive language. As a result, Director Pierce prepared and distributed to all cadre a written directive reminding them of their obligation to follow a "discipline caring approach" and to avoid humiliating or degrading any cadets. According to the testimony of Pierce, Lauvao's statements to the cadets were "not acceptable behavior in any way, shape, or form." Further, at the Loudermill meeting, Lauvao could not recall the "bloody" underwear statement, but stated that she would never actually carry out such a threat. With respect to the "tampon" statement, Lauvao indicated that she may have said it as a deterrent.

On the other hand, former cadet Jordan Weiss testified that she and the other cadets who heard the "bloody underwear" and "tampon" remarks understood that they were ridiculous, testifying:

"... It was obviously not a serious threat."

According to Weiss, the type of comment at issue here was not uncommon from cadre, stating:

"Yeah, there was a lot of times like where they would just say something that was kind of silly and totally overdramatic. But it just kind of showed you that they were seriously getting tired of the actions that were taking place."

#### **F. Lauvao's Union Activity**

Lauvao testified that she became the "point person" during the union organizing effort at the Employer in July 2011. Although she gave notice to other employees about union meetings, evidence of the Employer's knowledge is inconclusive. Prior to her active role in the union campaign, Lauvao had never been the subject of any corrective action or formal counseling.

The Employer counters that General Lowenberg, the decision-maker for the discharge, had in the past represented unions and union members, and was totally unaware of any union activities by Lauvao, testifying:

"I knew absolutely nothing about her affiliation, if any, with the union."

#### **G. Training**

According to the testimony of Commandant Acuna, whose responsibilities include staff training, Lauvao attended a three-day National Guard Bureau training course, as well as a four-day in-service training between each class cycle. Acuna testified that the extensive training provided positive reinforcement, role playing, an ethical action test, nonviolent crisis intervention, physical exercise, essay writing, in the use of non-threatening body language designed to:

"...be positive and have lasting accountability by inspiring self-reliance and through our example and teaching is what we've always been about."

The Employer asserts that the training materials emphasize that cadres are expected to be fair, consistent, and sympathetic to the needs of the cadets. General

Lowenberg's testimony underscored the need to emphasize positive behavior and to avoid a military boot camp atmosphere.

Significantly, Employer contends that the testimony of Lauvao demonstrates a fundamental and stark misunderstanding and disagreement with the expressed purpose of the Employer's program and with the expectations for cadres. For example, contrary to the basic philosophy of the program, Lauvao testified:

"This is where we weed out the weak. So we need to be in their face. We need to break them down. It's just like they do at basic training."

The Union, on the other hand, asserts that the behaviors in which Lauvao engaged were done openly and were consistent with activities of other employees and her supervisors. Thus she had no reason to believe her actions were inappropriate. For instance, with respect to the sign-wearing incident, lead Rauback brought the behavior of the cadets to Lauvao's attention and participated in the decision to require them to wear signs and stand by the flagpole. Regarding the gear-tossing incident and alleged threats, Lauvao's activities fell within the range of similar activity by other cadre.

#### **H. The Loudermill Hearing**

General Lowenberg began the hearing by explaining that he wanted to hear anything Lauvao wanted to express. According to General Lowenberg's testimony, Lauvao's performance at the hearing was the most important factor in his decision. One example was her response to the "bloody underwear" comment, to which she asserted an inability to recall. General Lowenberg considered that statement to reflect Lauvao's belief that such a threat was so trivial that she couldn't even remember it. Overall, General Lowenberg was deeply disappointed in Lauvao's responses, testifying:

"And so I expected to hear some explanation for her behavior, that I would hear some acknowledgment or acceptance that the behavior was not in accordance with the standards of her position; some acceptance of

responsibility; some promise that if she was given a chance, she would change her behavior. And there was none of that."

The Union argues that General Lowenberg failed to cite any specific policy that Lauvao violated and relied on a flawed investigation that did not include any follow-up interview with Rauback, the lead who condoned the sign-wearing incident. Moreover, the discharge decision denied Lauvao her right to progressive discipline and the opportunity to adjust her work performance in response to clearly articulated expectations.

#### **1V. Summary of Parties' Positions**

##### **Employer**

The Employer argues that Lauvao's actions and testimony demonstrate a lack of common sense and a lack of empathy, making her unfit to be a cadre of the Employer. Contrary to the Employer's goals and purpose, she believes that her focus should be on weeding out the weakest cadets. Such an approach might be consistent with her prior role as a military drill sergeant, but is inconsistent with the expectations and needs of the Employer. Lauvao's lack of judgment and understanding of the training she received confirm that, if re-employed, she would continue to abuse and mistreat the at-risk youth whom the program is attempting to assist.

##### **Union**

Prior to her involvement with the Union, Lauvao had never received any discipline. The credible evidence demonstrates that she acted openly and consistently with the standards and conduct of her colleagues and superiors. Further, it is evident from her immediate compliance with the directive regarding the signs, that she would have conformed her conduct to clearly expressed expectations. Indeed, she recorded the directive in the pass down report. Further, General Lowenberg relied on a flawed investigation and gave no consideration to the active involvement of

Rauback in the sign incident when assessing discipline for Lauvao. In addition, inexplicably General Lowenberg could not understand Lauvao's testimony that she did not believe she did anything wrong and denied her the opportunity to modify her behavior following some level of progressive discipline.

## **V. Just Cause Standard**

Initially, I note that the Employer, in discharge cases such as here, bears the burden of proof. I also recognize that "just cause," which is not defined in the Parties' collective bargaining agreement, has acquired a special interpretation in labor arbitration, based upon decades of awards in varying industries and employment settings.

Numerous opinions in arbitration refer to the so-called "seven tests" developed by Arbitrator Carroll R. Daugherty. *Enterprise Wire Co.*, 46 LA 359, 1966. Although these tests have been relied on in many opinions, arbitrators increasingly reject a mechanistic or automatic application of them. Another popular approach, advanced by Arbitrators Abrams and Nolan, is a so-called "systematic" theory that suggests "just cause" contemplates both an employee's obligation to perform satisfactory work and that any discipline must further at least one of the following interests of the employer:

- deterrence of similar conduct
  - rehabilitation of a potentially satisfactory employee
  - protection of the employer's ability to operate the business successfully
- "Toward a Theory of Just Cause in Employee Discipline Cases,"* 1985 Duke L.J. 594 (1985).

Regardless of which formulation one follows, two principles that are cornerstones of "just cause" are due process and progressive discipline. Even in the absence of specified steps of progressive discipline in a collective bargaining agreement,

arbitrators customarily require that an employer provide an employee some warning that certain behavior is unacceptable and some opportunity to act consistent with the employer's expectations. In the absence of the most blatant and serious offenses, such as stealing or destroying company property, for which termination for the first offense may be appropriate, fair notice and an opportunity to improve, together with increasingly stiff penalties, constitute the hallmark of an employer's obligations under progressive discipline. *Discipline and Discharge in Arbitration*, 31, Brand and Biren, 2<sup>nd</sup> Ed, (2008).

Moreover, the Employer has the burden of establishing that the penalty of discharge is "just." In that regard, arbitrators commonly examine whether there is reasonable proportionality between the offense and the penalty. Among the many factors that determine the relative seriousness of the offense are:

- the nature and consequences of the individual's misconduct
- the clarity of the rules allegedly violated and the employee's knowledge of the rules and resulting penalties
- whether the violations were repetitive
- how similar offenses were treated

Ultimately the concept of "just cause" must be applied to the specific facts and in the context of each unique employment setting.

## **V1. Opinion**

### **A. Alleged Anti-Union Discrimination**

Initially I find insufficient basis to conclude that Lauvao's discharge was based on anti-union considerations in violation of Article 2.1 and/or 2.3 of the collective bargaining agreement. Elements essential to establish anti-union discrimination include activity, knowledge, animus and disparate treatment. Here, although there is some evidence that certain managers were aware of Lauvo's union involvement

during the organizing campaign in the summer of 2011, there is no evidence of and any such knowledge by General Lowenberg, and no evidence of any anti-union animus attributed to any supervisor or manager of the Employer. Further, there is a lengthy gap in timing between the union activity and the discharge decision in April 2012. Under these circumstances I find that the absence of any evidence of animus and the lapse in timing, as well as the uncertain evidence of knowledge, preclude me from finding a nexus between any alleged anti-union discrimination and the Employer's decision to terminate Lauvao. Accordingly, I shall deny the grievance to the extent it relies upon a violation of Articles 2.1 and/ or 2.3.

## **B. "Just Cause" Applied to the Discharge**

### **1. The Issue**

The issue here is not whether Lauvao engaged in the conduct for which she was discharged. Indeed, there is little dispute about whether she engaged in the conduct on which the Employer relies. Rather, my task initially is to decide whether or not her conduct violated the Employer's reasonable expectations. If so, I must further consider whether discharge was a "just" penalty under all the circumstances. I recognize that when proof of misconduct is established, arbitrators are reluctant to substitute their judgment for that of management regarding the appropriate level of discipline. Equally well settled, however, is the understanding and practice that arbitrators can and do modify or rescind discipline which is arbitrary, capricious or in which the employer did not adhere to progressive discipline. *How Arbitration Works*, Elkouri and Elkouri, 966, 6<sup>th</sup> Ed., (2003). The principles of progressive discipline as a crucial element of substantive due process are particularly relevant and material here.

The theory of progressive discipline is that discipline should be corrective and that repeated offenses warrant stiffer levels of discipline. Ultimately, as warnings are followed by suspensions, and subsequently perhaps even final warnings, an employer can properly conclude that the employee is either unable or unwilling to

perform his or her responsibilities. The employer would then have "just cause" to discharge.

As an exception to the customary requirement, arbitrators have found that progressive discipline does not apply and that summary discharge is appropriate in cases of extremely serious offenses. *How Arbitration Works*, supra at 965.

Representative examples include:

- Employee with a loaded gun in his locker *San Diego Trolley*, 112 LA 323 (Prayzich, 1999)
- Illegal use or sale of drugs on employer's property *Burger Iron Co.*, 92 LA 1100, 1105 (Dworkin, 1989)
- Striking a foreman *United States Steel*, 70 LA 146, 149 (Powell, Jr. 1978)

Based on the above well-established standards, if I find that Lauvao's conduct warrants discipline, I must examine the nature of her misconduct to determine whether progressive discipline principles must apply, or whether her level of misconduct is so egregious as to justify summary discharge. Although "just cause" is multi-faceted, progressive discipline is the element of greatest relevance here.

## **2. Lauvao's Conduct**

Central to my consideration of Lauvao's conduct is a review of the Employer's systematic and periodic training that emphasizes to cadres the imperative of treating cadets with respect and of providing discipline that is corrective rather than punitive. The Employer makes a strong argument that Lauvao knew or should have known of the Employer's expectations and that many practices common at a military boot camp are inappropriate here. On the other hand, the record includes evidence that the instructions leave room for interpretation and may often require nuanced judgment that does not lend itself easily to bright line tests<sup>5</sup> In this regard, Rauback, a lead with greater seniority than Lauvao, believed that the sign incident

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<sup>5</sup> See for example the notes of the interview of Lieutenant Johnson at f.n.4.

conduct was consistent with the Employer's policies and expectations at that time. Further, some testimony in the record suggests that cadre occasionally engaged in administering discipline similar to, but perhaps less severe than, the other alleged misconduct by Lauvao. Thus, there is some basis to conclude either that there was widespread uncertainty regarding the Employer's expectations or that Lauvao's actions did not deviate significantly from at least some other infrequent practices. On balance, however, despite the Union's vigorous arguments, I find that the weight of the evidence supports the conclusion that Lauvao's conduct did exceed the Employer's expectations and thus warranted discipline.

Regarding the March 8, 2012 sign incident, Baird was obviously upset and dismayed by the appearance of four female cadets with signs around their necks on public display. The Employer asserts that such public humiliation of individual cadets undermines the program's goal of constructive discipline and support for the cadets. On the other hand, Rauback, a former supervisor and at the time a lead, played a significant role in the discipline by initially informing Lauvao of the cadets' behavior and by at least condoning her actions. Rauback's subsequent written reprimand provides support for the conclusion that some form of discipline was warranted.

With respect to the gear-tossing incident, the record indicates that each cycle cadre have occasion to "toss" or "reset" cadets' gear. Although the testimony of former cadre Benitez asserted that the term "hurricane" was often used to describe such events, there is no evidence of any specific examples parallel to what occurred here. Thus the record as a whole supports the conclusion that Lauvao's actions were somewhat similar to, but beyond the limits of what might be considered customary and acceptable. Discipline was likewise appropriate for this incident.

Regarding the statements about "bloody underwear" and "tampons," I initially note that these alleged threats were made only weeks after the specific December 19, 2011 directive to all cadre. Under these circumstances I find that Lauvao was given specific and clear notice of the Employer's rules and expectations, with explicit

warning of the possibility of disciplinary action for violations of this policy. Although the testimony of former cadet Weiss indicates that the cadets were not offended and did not take the alleged “threats” seriously, I apply an objective rather than a subjective test to the language used. Under these circumstances, I find that Lauvao’s statements were in direct violation of the December rule. Although there is some evidence that inappropriate, unspecified threats have been made by other cadre, there is no evidence of specific, similar statements by any other cadre following the December memo. Accordingly, discipline is also warranted here.

I agree with the Employer that some of Lauvao’s Loudermill comments demonstrated a lack of understanding and poor judgment. However, I also find that she apparently believed she was following the Employer’s expectations. In that regard, it appears that Lauvao continued to employ tactics familiar from her background in the military in an overzealous attempt to mold the cadets. Some of her misunderstanding may arise from the difficulty of conveying clear direction to cadre who must respond to a myriad of spontaneous and changing events on a daily basis. Behavior that requires exercise of such prompt and nuanced judgment makes the logic of progressive discipline even more compelling than if employees were subject to absolute rules. Thus, progressive discipline would be particularly effective here in providing meaningful and clearer guidance to Lauvao and other cadre. Unfortunately, Lauvao was never provided an opportunity following an initial reprimand or other discipline to demonstrate her ability and willingness to follow the Employer’s clearly stated expectations.

Significantly, I find that none of Lauvao’s actions violated societal norms such as violent misbehavior or illegal drug use. Accordingly, her misconduct does not fall within the narrow range of egregious misconduct for which summary discharge has been found appropriate. Rather, I find that the nature of her actions fall well within the type of unsatisfactory performance for which progressive discipline is required. See *CingularWireless*, 121 LA 438 (Nolan, 2005). As Lauvao was entitled to but did not receive any progressive discipline, she was denied fair warning regarding the

consequences of noncompliance. See *Tri-County Beverage Co.*, 107 LA 577 (House, 1996). Moreover, although the Employer is correct that Lauvao's failure at the Loudermill hearing to accept full responsibility or to promise to correct her behavior raise doubts about her ability to properly conform her conduct, I find that her missteps were not deliberate or malicious. Rather, she appears to have acted in accord with a mistaken but not bad faith understanding of the proper parameters of her role. In this regard I note that whether misconduct is willful or intentional is a factor arbitrators consider in evaluating appropriate levels of discipline. *Discipline and Discharge*, supra at 106. Under these circumstances I am compelled to find that the Employer failed to carry its burden that it had "just cause" to summarily discharge her. Nevertheless, as described below, progressive discipline is appropriate.

### **3. Appropriate Discipline**

The appropriate level of discipline here must be consistent with the seriousness of the offense and in the context of progressive discipline. Initially, for the sign incident, I find that the Employer established the appropriate level by issuing a written reprimand to Rauback for her role.<sup>6</sup> Accordingly, I would find a similar reprimand to Lauvao reasonable for that incident. Regarding the gear-tossing, I likewise find that a separate written warning is appropriate, based on the relative ambiguity of acceptable conduct in that area, as well as the fact that this was her first offense of that character.

With regard to the "bloody underwear" and "tampon" statements, I consider them distinct from the other issues in the sense that the Employer's December 19, 2011 directive was clear and precise. Accordingly, as this concern of the Employer was addressed to the cadets in clear terms with possible consequences included, shortly

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<sup>6</sup> In this regard I note the testimony of Director Pierce, who conceded that discharge would not be appropriate for this incident alone; rather a reprimand. Although there are three incidents on which the Employer relies, none involved counseling or reprimands.

before Lauvao's remarks, a stiffer penalty is appropriate to reinforce to all cadets the seriousness of violating this recent and relatively unambiguous rule. Under these circumstances, I conclude that a 3-day suspension without pay is a just penalty for these remarks.

#### **4. Concluding Observations**

I recognize that this Employer performs an exceptionally important and valuable service for the State of Washington by providing a structured and supportive environment to youth who might otherwise never become productive members of society. In carrying out its mission, it relies heavily on the cadres, whose interaction with the cadets is crucial to the Employer's ability to provide a constructive and supportive environment. Manifestly, cadre such as Lauvao, many of whom come from a military background, must conform to the unique mission and values of the Washington Youth Academy. Although it may be understandable that cadre from a military background may revert to familiar patterns of behavior, such lapses in judgment cannot be tolerated and presumably will be subject to progressive discipline, including discharge, when appropriate.

## Award

Based on the rationale and findings set forth above, I award the following:

1. The grievance is denied to the extent it alleges that Lauvao was discharged in violation of Article 2.1 and/or 2.3 because of anti-union discrimination.
2. The grievance is sustained to the extent that it alleges the Employer lacked just cause to discharge Lauvao.
3. The penalty of discharge is reduced to separate written warnings for both the sign incident and the gear-tossing incident and to a 3-day suspension without pay for the "bloody underwear" and "tampon" remarks.
4. Lauvao will be promptly reinstated to her former position without loss of seniority or benefits and she will be made whole for lost wages (less customary offsets and deductions and minus the 3-day suspension); unemployment benefits, if any, shall be treated in accordance with Washington law.
5. Pursuant to the agreement of the Parties, I will retain jurisdiction for the sole purpose of resolving any disputes over implementation of the awarded remedy that the Parties are unable to resolve on their own.

Dated: June 23, 2013

Seattle, Washington



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Richard L. Ahearn