

In the Matter of the Arbitration
between
State of Washington Department of Social and Health Services
and
Washington State Federation of Employees

Earl Davis Discharge Grievance

AAA Case No. 75 390 00393 08

Arbitrator's Opinion and Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

September 28, 2009

Grievance and statement of the issues

Introduction. The State of Washington, Department of Social and Health Services (State) discharged Earl Davis (Grievant), a member of a bargaining unit represented by the Washington State Federation of Employees (Union). The Union grieved, alleging that the discharge violated the parties' collective bargaining agreement. I conclude that the State did not prove all the procedural elements of just cause necessary to discharge Grievant. To remedy the violation, as explained below, I order the State to make Grievant whole but not to reinstate him.

The parties presented their cases in a hearing on May 15 and June 1, 2009, in Tacoma, Washington. The State was represented by Janetta Sheehan, Assistant Attorney General, PO Box 40145, Olympia WA 98504-0145. The Union was represented by Julie Kamerrer, Younglove & Coker, PO Box 7846, Olympia WA 98507.

The advocates fully and fairly represented their respective parties. The hearing was orderly; the parties had a full opportunity to present evidence and examine and cross-examine witnesses. The hearing closed on August 11, 2009, upon receipt of the parties' post-hearing briefs in electronic format. The parties agreed to extend the date on which this opinion and award are due to September 28, 2009.

The parties agreed that the grievance is substantively and procedurally arbitrable. They

authorized me to retain jurisdiction over the grievance for 90 days following issuance of my opinion and award, for the purpose of resolving any dispute regarding any remedy that I may direct.

Statement of the issues. The parties agreed that the issues are: Did the State discharge Grievant for just cause under the terms of the 2007-2009 collective bargaining agreement? If so, what is the appropriate remedy? The State has the burden of proving that the discipline complied with the terms of the parties' collective bargaining agreement. The Union has the burden of proving any affirmative defenses that it asserted.

Witnesses and exhibits. All witnesses testified under oath. The State offered 21 exhibits and testimony from eight witnesses (Jacquie Doss, Roger McKenzie, Luis Pedraza, Heidi Robbins Brown, Myron Toyama, Andrew Phillips, Carlos Arocho, Sheri Fontana Van Sittert). The Union offered 14 exhibits and testimony from eight witnesses (Bryan Crutcher, Lisa Champagne, Allen Lindsay, Leonard Kirkland, Michael James, David Pickett, Earl Davis, Charles Booker). I have thoroughly reviewed all of the evidence that was received, relevant, and material, and I have thoroughly considered the parties' arguments and post-hearing briefs.

Facts

The parties. The State is a public employer. The Union is the exclusive representative of a bargaining unit of State employees. Grievant was a member of the Union's bargaining unit.

Collective bargaining agreement. The parties' 2007-2009 contract provides:

27.1: "The Employer will not discipline any permanent employee without just cause."

27.2: "Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. . . ."

29.3.E.1: "The expenses and fees of the arbitrator . . . will be shared equally by the parties."

Background. The State operates Western State Hospital (WSH), a mental institution that serves about 1000 patients and employs about 2200 personnel. The Hospital employs personnel in the psychiatric security attendant (PSA) classifications. PSAs are assigned to work as patient escorts (who accompany patients to appointments, including court appearances), bailiffs (who assist judges in court proceedings conducted at the Hospital), and security patrol (who patrol WSH and grounds and provide security assistance as required).

The State employed Grievant for 26 years at WSH, most recently as a PSA—bailiff/court escort. Throughout his career, Grievant received at least satisfactory annual evaluations and was never disciplined.¹

Termination letter. By letter dated March 12, 2008, the State terminated Grievant. The letter stated that Grievant, over a two year period, had engaged in the following conduct toward PSA Jacquie Doss: “[1] touching Ms Doss’ thighs and shoulders; [2] putting your hand down the front of your pants and taking it out [and] telling her to smell it; [3] telling her that she wears ‘granny underwear’; and [4] calling her a ‘forty year old virgin.’”

State rules. State policy 18.66 includes a statement of the federal Equal Employment Opportunity Commission (EEOC) definition of “sexual harassment”: “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [constitute sexual harassment] when . . . (1) submission to such conduct is made either explicitly or implicitly a term of condition of an individual’s employment, (2) submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.” (See 29 CFR Section 1604.11.)

The EEOC states that two types of sexual harassment exist: “quid pro quo” and “hostile work environment,” which “involves harassment that creates an offensive and unpleasant working environment. A hostile work environment can be created by anyone in the work environment, whether it is a supervisor, other employees, or a client. Hostile work environment can involve verbal conduct of a sexual nature, unwelcome sexual materials, or unwelcome physical contact. Cartoons or posters of a sexual nature, vulgar or lewd comments or jokes, or unwanted touching or fondling all fall into this category.”

State policy 18.66 paragraph 7.C prohibits sexual harassment, including “verbal or physical conduct of a sexual nature, when such conduct: is made explicitly or implicitly a term or condition of employment; is used as a basis for an employment decision; or interferes with an employee’s work performance or creates an intimidating, hostile or otherwise offensive environment.” The policy states that examples of sexual harassment include:

¹ In July 2006, a WSH employee alleged that Grievant had used vulgar language. Booker investigated; Grievant denied making the statement; and Booker verbally counseled Grievant. (Ex. R-4 at 22.) Under Article 27.12 of the parties’ collective bargaining agreement, “counseling” is not a form of discipline.

- Verbal: Sexual innuendoes, suggestive comments, jokes of a sexual nature, sexual propositions, lewd remarks, threats. . . . Verbal abuse or ‘kidding’ which is oriented towards a prohibitive [sic] form of harassment, including that which is sex oriented. . . .
- Physical: Unwelcome, unwanted physical contact, including but not limited to touching, tickling, pinching, patting, brushing up against, hugging, cornering, kissing, fondling, forced sexual intercourse or assault.

The policy specifies that sexual harassment “does not refer to behavior or occasional compliments of a socially acceptable nature. It refers to behavior that is unwelcome, that is personally offensive, which lowers morale and therefore interferes with work effectiveness.” In addition, it states: “Normal, courteous, mutually respectful, pleasant, non-coercive interactions between employees that are acceptable to and welcomed by both parties are not considered harassment.”

State policy 18.66, paragraph 10 provides that State staff who violate the policy “may be subject to disciplinary action in accordance with . . . the provisions of an applicable collective bargaining agreement.”

Chronology

- November 8, 1982—Grievant hired as a WSH hospital attendant.
- September 1989—Doss hired as a WSH mental health tech.
- September 2005—Doss began working as a PSA with Grievant and PSA Leonard Kirkland in the State’s three-person bailiff/patient transport office. Patrol Supervisor Charles Booker supervised the office; Booker often referred to Grievant as “Superfly.”²
- In late 2005 or early 2006, based on Grievant’s long service, Booker designated Grievant as the point person for the office. Grievant had the authority to assign particular tasks to Doss. (Day 2 (Tr 41.)
- In late 2005, Doss called Booker and asked him to tell Grievant to stop talking “dirty” to her. (Day 1 (Tr 30-31.)

² “Super Fly” was a 1972 film about a cocaine dealer. <http://www.imdb.com/title/tt0069332/>

- In late 2005, Doss asked Mental Health Tech Milton Pickett and Print Shop Supervisor Jack Baker whether Grievant's conduct toward her was inappropriate. They said that conduct was not appropriate. According to Doss, Baker reported the conversation to Manager Kelly Satchi, who was responsible for the PSAs at the time. According to Doss, Grievant was upset with her because Satchi had talked with Grievant about an alleged incident of sexual harassment. Grievant's conduct toward Doss continued. (Day 1 (Tr 16-23, 89.)
- March 31, 2006—Kirkland retired from WSH.
- March to June 2006—Security Guard Bryan Crutcher (hired in late February 2006) temporarily replaced Kirkland. During that time, Crutcher did not observe Grievant engage in sexual harassment toward Doss. (Day 1 Tr 185-86.)
- June 2006—PSA Roger McKenzie permanently replaced Crutcher.
- According to Doss, Grievant's conduct toward Doss continued while Kirkland, Crutcher, and McKenzie were assigned to work with Grievant and Doss in the patient transport office.
- 2006—Doss asked Patrol Supervisor Booker to order Grievant to stop engaging in inappropriate conduct toward her. Booker did not do so.
- December 2006—McKenzie left the work unit. He was temporarily replaced by Security Guard Crutcher, for two to three weeks, and later permanently replaced by Security Guard Luis Pedraza. During that time, Crutcher did not observe Grievant engage in sexual harassment toward Doss. (Day 1 Tr 188-89.) According to Doss, Grievant's conduct toward her continued.
- Early 2007—Security Supervisor Carlos Arocho became responsible for the work unit.
- March 28, 2007—Doss and Grievant signed a grievance alleging that Director of Emergency Services Millman had unfairly reassigned them away from patient escort work. (Exhibit U-5.) In a June 2007 response, the State considered the grievance resolved. The Union did not pursue the grievance to arbitration.
- April 23, 2007—Doss asked Arocho to tell Grievant to “stop talking dirty to me.” On April 24, Arocho talked with Grievant about Doss's allegation, and Grievant denied having made any inappropriate comments to her. Arocho told Grievant to conduct himself in a professional

manner.³ Several days later, in a unit meeting, Arocho told Grievant, Doss, and Pedraza to work in a professional manner. (Day 2 Tr 89-100; Ex. R-19 at 4-6.)

- Summer 2007—Security Guard David Pickett worked for two weeks in the transport unit as a substitute. He understands that an employee who observed sexual harassment is to report it to a supervisor. He did not observe Grievant engage in any sexual harassment of Doss. (Day 2 Tr 11-16.)
- Between September 2005 and September 2007—Doss accompanied Grievant once or twice to visit his mother, to go shopping, and to look at a house he considered buying.⁴ (Day 1 Tr 38.) On a couple occasions during that two year period, Doss attended dinner and socialized with a group of WSH PSAs, including Grievant. Several co-workers thought that Grievant and Doss acted like cousins, brother and sister, or friends.
- September 27, 2007—Doss told Office Assistant Diana LaVergne that Grievant had inappropriately touched her and made sexually explicit comments to her. LaVergne reported that information to Director of Emergency Services Spike Millman. The State assigned Investigator Eddie Ortiz to investigate Doss’s allegations.
- September 27, 2007—Due to the stress of dealing with Grievant’s conduct toward her, Doss took several days off: “I did not know what to do, and I just didn’t want to go back to that spot.” (Day 1 Tr 87.) Sheri Fontana Van Sittert corroborated that Grievant went through a “really rough, emotional period” just before the State transferred Grievant, pending the investigation that led to his discharge. (Day 2 Tr 143-45.)
- February 20, 2008—Ortiz issued his investigation report. Grievant asked Ortiz to interview Booker, Crutcher, Champagne, and Allen Lindsay. In his report, Ortiz stated that he was unable to contact Lindsay in December 2007 for an interview. Lindsay testified that after a miscommunication about the time for an appointment, Ortiz did not again attempt to contact him. (Day 1 Tr 237.) (As noted in the next entry, the State waited over two months before

³ The parties’ collective bargaining agreement provides that discipline includes oral and written reprimands. Arocho did not make a determination that Grievant actually “talked dirty” to Doss and then reprimand Grievant. Arocho simply counseled Grievant. This incident did not involve discipline; I do not consider it in the progressive discipline analysis.

⁴ In a November 30, 2007 email to State Investigator Ortiz, Doss wrote: “I say just because I help someone does not give them the right to touch me.” (Ex. R-4 at 31.)

discharging Grievant; the record does not indicate why the State did not contact Lindsay during that period.) Grievant testified that Ortiz decided not to interview Sheri Fontana and Glynnis Hughes because they were Pierce County employees, not State employees. (Day 2 Tr 62.) In the summary section, Ortiz concluded that Grievant had engaged in the conduct described in the letter discharging Grievant.⁵ (Exhibit R-3 at 3.)

- February 28, 2008—The State notified Grievant of its intention to discipline him.
- March 6, 2008— WSH CEO Andrew Phillips conducted a predisciplinary meeting with Grievant and a Union representative and invited them to provide additional information. (Day 1 Tr 165-66.)
- March 12, 2008—The State terminated Grievant.
- August 15, 2008—Doss and a WSH State Hospital custodian, Ann Marie Johns, filed a sexual harassment complaint against the State, in Pierce County Superior Court and U.S. Federal District Court, alleging violation of Washington’s Law against Discrimination. (Ex. R-10B.)
- September 30, 2008—The State demoted Booker from Security Guard 3 to Security Guard 2 in part for “failure to take timely action to stop a subordinate staff from engaging in sexual harassing behaviors. . . .” (Ex. R-21.) Booker did not grieve his demotion.
- January 9, 2009—The State offered to settle Doss’s sexual harassment lawsuit. The parties settled the dispute before this arbitration hearing.

Charges

The State charged that Grievant engaged in the following conduct toward Doss. For each charge, I state the evidence in the record, make observations (in *italics* and in parentheses) regarding particular points, and then find whether the State proved the charge.

⁵ Separately, Ortiz concluded that Grievant had tried to hug and kiss Doss and had told her that she had a “big butt.” The discharge letter did not include those allegations. The Ortiz report was received in the record as Exhibit R-3. Because Ortiz did not testify at hearing, I consider the report only to the extent that its contents were validated by witnesses. Ortiz’s investigation notes, Exhibit R-4, are virtually indecipherable; I do not consider the handwritten portions of that exhibit.

Charge 1—Touching. The State charged Grievant with “touching Ms Doss’ thighs and shoulders.”

State evidence. Doss kept a journal of the times when Grievant sexually harassed her but then discarded it “because he would [engage in sexually harassing conduct] in front of everybody, and my thoughts were that: I have witnesses just sitting in a room with me that, to me, were more important, and it was just so much, all the time, writing and doing—I mean, after a while, it was just: Leave me alone, stop. That’s what you’re constantly hearing yourself say all the time.” (Day 1 Tr 68.)

Doss discussed Grievant’s sexually harassing conduct toward her with at least nine WSH employees (including Pedraza and McKenzie) over a two year period. In September 2007, Doss took off work for a couple days due to the stress of Grievant’s conduct toward her. (Day 1 Tr 87.)

Doss, in performing her work, often sat in the work unit’s small office with her back to the wall. She testified that Grievant often approached her, touched her, and brushed against her breasts while reaching across her to open a desk drawer. (Day 1 Tr 31, 34.)

Doss told Pedraza that Grievant touched her inappropriately. Pedraza took her seriously and encouraged her to sound more “authoritative” when telling Grievant to stop touching her. He also encouraged her to retain an attorney. (Day 1 Tr 36-7.)

Pedraza observed Grievant touching Doss’s shoulders and thigh numerous times between March and July 2007. (Ex. R-3 at 4; Day 1 Tr 124.) He also observed Grievant brush his hand across Doss’s breasts and across her thighs, try to hug her, and try to kiss her. (Day 1 Tr 122-23.)

McKenzie testified that Grievant would “hug [Doss] . . . and she’d brush him off and say ‘stop,’ and things of that nature.” (Day 1 Tr 98.) After Doss told Grievant to stop some conduct: “Sometimes he would—well, he’d stop—eventually he’d stop, yeah, but not at the time she’d say ‘stop.’ I mean, it ain’t like he’d continue on just grabbing . . . her.” (Day 1 Tr 117.) “I approached Mr. Davis and I told him, ‘Hey, man, watch yourself, how you treat [Doss] and act around her.’” (Day 1 Tr 99 and 113.)

Pierce County Clerk Sheri Fontana Van Sittert testified that she saw Grievant “just kind of touching [Doss]; not in a sexual way, necessarily, but she didn’t want him to touch her. And so she would tell him, you know, ‘Don’t touch me.’” (Day 2 Tr 138.) Van Sittert on occasion, after seeing Grievant’s interaction with Doss, told him to “knock it off.” (Day 2 Tr 137.)

While riding in a patient transport van with Grievant and Security Guard Crutcher (one of

Grievant's friends), Grievant "kept putting his hands all on [Doss] and touching me everywhere. I kept hitting him and moving his hands off me. And Crutcher looks out [the van window] and says he's not going to write a sexual harassment report. And I just became really depressed again." (Day 1 Tr 27-28.) Doss testified that—after she contends Crutcher observed Grievant touching Doss but refused to intervene or report Grievant—she became depressed: "Because it was like nobody was listening to me. He continued to do it and wouldn't stop, and I was just hoping just maybe one of his friends would just say, you know, 'Just stop,' and he would listen. But he just wouldn't. He just laughs." (Day 1 Tr 28.) *(Crutcher denies observing Grievant engage in sexual harassment toward Doss. He provided a plausible reason to discredit Doss's version of the incident in which she testified that she, Grievant, and Crutcher were in a patient transport van: WSH employs three individuals in the transport office and does not permit all three to transport a patient, because one staff member is always required to be present and on duty in the court. (Day 1 Tr 196-99.) Grievant also challenged that claim. (Day 2 Tr 59-60.) I conclude that the State did not prove, through clear and convincing evidence, that Grievant sexually harassed Doss in the transport van.)*

Union evidence. Grievant denies the charge. Doss never told Grievant that she was uncomfortable around him. (Day 2 Tr 26.) Grievant occasionally tapped Doss on the shoulder, to get her attention, but denies ever touching her shoulders in a way that amounted to sexual harassment, and she never asked him not to touch her shoulders. (Day 2 Tr 35, 72.) Grievant has touched Doss's knee, when asking her to move so he could get in a desk drawer, but he never touched her thighs. (Day 2 Tr 36.) According to Grievant—as discussed below—Doss, Pedraza, and McKenzie each had reasons to have the State discipline him.

Doss and Grievant filed their March 2007 grievance against Millman for imposing several allegedly disparate work time reporting requirements on them. Grievant refused Doss's request that he join her in retaining an attorney to sue the State. Grievant testified that Doss said "We can get a house out of this," predicting a significant monetary settlement or judgment, but he refused to pursue the claim. (Day 2 Tr 49-50, 84.) *(Doss denied making such a statement. (Day 1 Tr 27.))* Grievant's apparent theory is that Doss was frustrated that he wouldn't join her in suing Millman, which contributed to her filing a false sexual harassment complaint against him. *(The record does not show that the Union continued to process the grievance against Millman. I infer that the Union was satisfied with the State's response, so that dispute was effectively resolved. It appears that any suggestion Doss made about suing the State was workplace banter rather than a serious suggestion. In context, I find that Grievant's refusal to join Doss in hiring a lawyer to sue the State had no effect on her decision to charge that Grievant had engaged in sexual harassment toward her.)*

Grievant also contends that Doss did not have a valid sexual harassment complaint against him.

He testified that, sometime after the State's June 20, 2007 response to the above grievance, Doss proposed—in the presence of PSA Champagne—that Doss could falsely allege that Grievant sexually harassed her; she could sue the State; and the two of them could split the settlement or judgment resulting from that lawsuit. (Day 2 Tr 51-52.) Doss denied making that proposal. (Day 2 Tr 157.) The Union called Champagne as a surrebuttal witness but did not ask her about Doss's sexual harassment lawsuit proposal, as described by Grievant. (Day 2 Tr 164.) *(Doss had the ability to retain counsel on her own and therefore had no reason to make a fraudulent sexual harassment lawsuit proposal to Grievant. Doss testified that she sued the State “because I was seeking help [in getting the sexual harassment to stop], and no one (witness cries)—this is the only way I could get attention and get something to stop.” (Day 1 (Tr 48.) I conclude that Doss did not make a fraudulent lawsuit proposal to Grievant.)*

According to Grievant, Pedraza and he had a strained working relationship, due to several comments Pedraza made to Grievant. (Day 2 Tr 42-44.) *(Grievant established that Pedraza said that Grievant had referred to “pink ones” (Caucasian penises) but later apologized to Grievant, thereby resolving that issue between them. (Day 2 Tr 42-43.) Pedraza denies talking with Grievant about that subject. (Day 2 Tr 153.) The Union did not show that Grievant's working relationship with Pedraza was so strained as to make it likely that Pedraza retaliated against Grievant by making false statements during the State's investigation and by lying under oath in the arbitration hearing.)*

According to Grievant, McKenzie thought that *Grievant* had told management about some unspecified conduct that led to McKenzie being transferred away from his preferred assignment working for the court, but in fact *Doss* was the informant. Grievant also testified that McKenzie was upset that Grievant's softball team beat McKenzie's team; McKenzie had threatened to shoot Grievant; and Director Millman talked with Grievant and McKenzie about their dispute. (Day 2 Tr 45-46.) *(The Union did not show that the transfer of McKenzie was so onerous or burdensome to McKenzie as to make it likely that McKenzie retaliated against Grievant by making false statements about Grievant during the State's investigation and by lying under oath in the arbitration hearing. McKenzie's alleged statement about shooting Grievant clearly reflects some underlying animosity, but McKenzie was not asked questions to corroborate Grievant's account, and Millman was not called as a witness.)*

Champagne testified that Doss said she was out to get Grievant's job. (Exhibit R-3 at 6; Day 1 Tr 227.) *(An individual making a sexual harassment complaint against a co-worker knows or reasonably should know that the result could be the co-worker's discharge. Accordingly, Champagne's testimony that Doss said she was “out to get” Grievant's job did not contribute to Grievant's defense against this charge. Doss wanted to “get” Grievant's job to stop his sexual harassment of her.)*

Booker testified that Doss never told him that Grievant had touched her. (Day 2 Tr 110.) (*The State demoted Booker for failing to act on Doss's sexual harassment complaints. Because Booker did not grieve the demotion and successfully dispute Doss's claim that she did tell him about Grievant's sexual harassment, his testimony on this point is not credible.*)

Kirkland testified that, many times when he approached Doss's desk and started to open a drawer, Doss repeatedly was startled and said "Oh no, no. no. He's going to touch me." (Day 1 Tr 250-51.) (*Doss testified that Grievant repeatedly approached her desk and touched her or attempted to touch her, which was upsetting to her. Kirkland's testimony indicates that Doss was often anxious and nervous when people approached her behind her desk in the crowded transport unit office. Kirkland's testimony appears to support Doss's claim.*)

Both Crutcher and Michael James testified that they never observed Grievant touch Doss inappropriately. (Day 1 Tr 185-86, 248, 267-68). (*Their failure to observe Grievant touching Doss does not establish that Grievant never did inappropriately touch her. Without discrediting the testimony of Crutcher and James simply due to one consideration, I note that they are friends of Grievant. (Day 1 Tr 211, 262.)*)

Pickett worked in the transport unit for two weeks in the summer of 2007 and did not observe Grievant touch Doss inappropriately. (*Pickett had minimal time in the unit. Pickett's testimony regarding Pedraza's credibility was confusing and unconvincing. (Day 2 Tr 15-16.)*)

During the arbitration hearing, the parties presented some evidence regarding other incidents in which Grievant allegedly sexual harassed Doss. While the State did not raise that alleged conduct as the *basis* for Grievant's discharge, it provides a *context* that is consistent with this first charge.⁶

⁶ I review Doss' testimony regarding Grievant's other alleged conduct and Grievant's response, if any, *in italics*, and determine whether the record establishes that those incidents in fact occurred. "There's some lotion on the desk, and he gets up and he walks over and he goes 'Yeah, when you come, you're going to come like this,' and squirted it on the floor" (Day 1 Tr 15, 31-32 corroborated by McKenzie Day 1 Tr 98). *Grievant testified "I take offense to that. First of all, . . . we can't have anything in the court area like that because of the residents that we bring into our waiting area."* (Day 2 Tr 58-59.) *Grievant's denial and limited explanation do not overcome the consistent testimony of both Doss and McKenzie.* Grievant would "continue on saying rude things or dirty—he'll tell me, 'You used to be a stripper,' and shake his butt in my face, sit on my lap" (Day 1 Tr 15). *Grievant denied those claims. (Day 2 Tr 58.)* Grievant stated that Doss liked "pink ones," meaning Caucasian penises (Day 1 Tr 24)—*Grievant testified that Pedraza had said that Grievant had referred to "pink ones;" Grievant confronted Pedraza, vigorously denied making such a comment; and Pedraza apologized. (Day 2 Tr 42-43). Pedraza denies having that conversation.* Grievant said if "anybody make him lose his job, he'll get his family and" threatened retaliation (Day 1 Tr 20, 22-23, 89-90)—*Grievant denied threatening Doss (Day 2 Tr 55-57).* Grievant made lewd comments (Day 1 Tr 14). Grievant "took his foot out [of his shoe] and started

Finding. During the two year period when Doss worked with Grievant, she told at least nine WSH employees about his conduct toward her. Doss was consistent in insisting that Grievant had sexually harassed her, as stated in this first charge, during those *24 months* that she and Grievant worked in the patient transport unit, through the *six months* of the State’s post-termination investigation, and finally *15 months* later in the arbitration hearing.

Doss occasionally wept during her testimony, which is not unexpected given the frequent and traumatic events she testified occurred during her two years of working at the patient transport unit and her understandable frustration that the State failed to act on her repeated complaints.

The Union argued that Doss intended to find some way to sue the State and get money to buy a house. I have rejected the argument that Doss filed a false sexual harassment complaint. Doss did state, on occasion during the two year period, that she could get paid by the State. Saying that was not unreasonable, because she knew the State had paid another woman who had alleged sexual harassment by Barrette Green, a former WSH employee. After the State terminated Grievant, Doss sued the State and—*before* testifying in this hearing—settled that dispute.⁷ Doss had no financial reason to testify falsely in this case.

Pedraza and McKenzie had nothing to gain from being untruthful and corroborated Doss’s testimony. The Union presented no convincing reason why Doss, Pedraza, or McKenzie would lie about Grievant’s conduct toward Doss. Doss, Pedraza, and McKenzie were credible witnesses.

Crutcher and Lindsay were credible witnesses. However, they worked only briefly with Doss and Grievant, and their testimony that they never observed Grievant sexually harassing Doss does not mean that Grievant never sexually harassed Doss when they were not around. While the Union

rubbing the back of my leg” (Day 1 Tr 15). Grievant “would lay on the couch and tell me to give him a back rub” (Day 1 Tr 15). Grievant continually asked Doss “who was having sex with me” (Day 1 Tr 24). Grievant asked “did I want his sperm” (Day 1 Tr 25). Grievant questioned her about her private body parts (Day 1 Tr 32). Grievant showed her a cell phone photograph of a female’s genitals (Day 1 Tr 32). Grievant described his sexual interests to other employees in Doss’s presence (Day 1 Tr 33). During her direct examination—and often not in response to questions from counsel—Doss spontaneously blurted out references to several of Grievant’s alleged, uncharged actions, and she wept at several points in her testimony. Grievant denied some of the above claims but did not address others. I regard the un rebutted claims, above, as Doss’s accurate recollections of events that occurred and not the untruthful product of a vivid imagination. That conduct by Grievant reflects an atmosphere in the transport unit office that is consistent with the conduct alleged in the first charge.

⁷ The sexual harassment complaint Doss filed in court against the State addressed two of the charges in the discharge letter plus 22 other distinct acts of Grievant’s alleged sexual harassment toward Doss. (Exhibit R-10B, paragraph 5.24.)

successfully challenged Doss's testimony that Crutcher observed Grievant sexually harass Doss in a patient transport van, that incident involved only one day in a two-year period. The fact that the State did not prove that Grievant engaged in sexual harassment in that single instance does not negate the State's proof of Grievant's sexual harassment of Doss in other incidents.

Van Sittert (formerly Fontana) observed Grievant touching Doss and heard Doss tell him not to touch her. In some situations involving Grievant's conduct toward Doss, Van Sittert herself told him to "knock it off."

The Union argues that the State did not establish the time and date of Grievant's alleged sexual harassment. The State would have been able to prove its case far more easily if Grievant had maintained a journal or kept copies of contemporaneous emails or letters regarding the incidents. Instead, the State proved its case through the testimony of Doss, Pedraza, McKenzie, and Van Sittert. Their testimony shows that Grievant sexually harassed Doss. Additional detail is not required.

Grievant was a straightforward witness with a businesslike demeanor, but his denial of this sexual harassment charge is not credible. Grievant has two obvious incentives to deny the charge: (1) he has worked 26 years for WSH and wants to remain employed there (he has not been able to find other regular work), and (2) the charge involves socially unacceptable, stigmatizing behavior that harms his standing in the WSH and broader community.

Grievant did admit touching Doss's knee, in an effort to reach into a desk drawer. Any reasonable employee—instead of touching a co-worker's knee—would request the co-worker to move or to herself retrieve the sought item from the desk drawer. Grievant's lack of judgment in that regard tends to indicate that he would also lack judgment in other conduct toward Doss, including the conduct alleged in this first charge.

Grievant's denial was corroborated by Booker, but the State demoted Booker for failing to report Grievant's sexual harassment, and Booker then failed even to attempt to challenge that very serious charge.

All things considered, I find that the State proved that Grievant, on more than one occasion, touched Doss's body in the manner charged.

Charge 2—Hand gesture. The State charged Grievant with “putting your hand down the front of your pants and taking it out [and] telling her to smell it.”

State evidence. Doss testified that Grievant put a hand down his pants and said “smell it” to her. (Day 1 Tr 21.) Doss also testified that, after Satchi talked with Grievant about Doss’s claim that he had made that gesture, Grievant confronted Doss about making that disclosure to Satchi. (Day 1 Tr 19-21.) McKenzie corroborated Doss’s testimony that Grievant engaged in the alleged conduct. (Day 1 Tr 98-99, 108-09; Ex. R-3 at 4.)⁸

Union evidence. Grievant testified: “I really take offense on that [allegation]. That’s—that’s nothing I would ever do. I really take great offense at that. I did not do that.” (Day 2 Tr 39-40.) Grievant testified that “nobody [including Saatchi] ever said a word to me” about that type of conduct. (Day 2 Tr 39-40.) Booker testified generally that Doss never told him that Grievant had engaged in sexual harassment. (Day 2 Tr 110.)

Finding. The charged conduct is something that might be done by a troubled adolescent boy. Grievant is a 26-year employee and about 46 years old. He adamantly denied engaging in the charged conduct. Both Doss and McKenzie testified that Grievant did engage in the charged conduct.

The State provided sexual harassment training to WSH employees, in small groups of about 20 employees, in 2003 and 2004. (Day 1 Tr 139-42, 161, 172.) Doss reported the conduct, and she believes that Satchi talked with Grievant about it. Neither party called Satchi as a witness. Despite the State’s sexual harassment training and the unusually crude nature of the charged conduct, apparently McKenzie did not report it to a supervisor.

All things considered, I find that the State did not prove, through clear and convincing evidence, that Grievant engaged in this charged conduct.

Charge 3—Underwear. The State charged Grievant with “telling [Doss] that she wears ‘granny underwear.’”

State evidence. Doss testified that Grievant said, on an almost daily basis, that Doss wore “granny panties,” or large sized women’s underwear. (Day 1 Tr 23-24, 69-70.) McKenzie testified that

⁸ Whether Grievant, during the charged conduct, *actually* or simply *appeared to* put his hand into his pants is immaterial; the question is whether Grievant engaged in conduct that involved sexual harassment. The Union offered Exhibit U-7, which appears to be a statement by a Melony Rogers that challenges McKenzie’s credibility. That exhibit was not received in evidence, and Rogers did not testify.

Grievant, in McKenzie's presence, said that Doss wore "granny panties." (Day 1 Tr 98.) More generally, on April 23, 2007, Doss asked Arocho to tell Grievant to "stop talking dirty to me." Arocho testified that on April 24, he talked with Grievant about Doss's allegation, and Grievant denied having made any inappropriate comments to her. Arocho told Grievant to conduct himself in a professional manner. (Day 2 Tr 89-90.) Several days later, in a unit meeting, Arocho told the employees to work in a professional manner. (Ex. R-19 at 4-6.) Pedraza testified that he told Grievant, generally, "that he needed to be careful the way he talks about ladies, females, because he can get himself in trouble." (Day 1 Tr 125.)

Van Sittert on occasion, after seeing Grievant's interaction with Doss, told him to "knock it off." (Day 2 Tr 137.)

Union evidence. Grievant testified that Pedraza, not Grievant, made a comment that Doss wears "granny panties." (Day 2 Tr 36-38.) (*Pedraza denied that he ever made that comment to Doss.* (Day 2 Tr 155.)) Grievant testified that Supervisor Arocho never talked with Grievant about "talking dirty." (Day 2 Tr 67.) Booker testified that Doss never told him that Grievant had made any sexually harassing comments. (Day 2 Tr 110.)

Finding. Doss and McKenzie established that Grievant made the alleged statement; Pedraza corroborated generally that he cautioned Grievant about making inappropriate comments. Grievant did not show any convincing reason why Doss, McKenzie, or Pedraza would be untruthful in their testimony regarding this charge. Doss complained to Arocho generally about Grievant making inappropriate comments to her. Arocho considered Doss's complaint to be substantial enough to warrant talking with Grievant about it. Grievant did not dispute Van Sittert's testimony that she occasionally told him to "knock it off," regarding his conduct toward Doss.

The "granny panties" statement had a sexually-based undertone and appears to have been designed to embarrass Doss. For Grievant to make the charged statement would be consistent with the harassing behavior the State alleged and proved in the first charge. I find that the State proved that Grievant made the charged statement to Doss.

Charge 4—Name calling. The State charged Grievant with "calling [Doss] a 'forty year old virgin.'"⁹ The State presented no evidence about this charge. Grievant testified that he never made that statement and that Pedraza once used the term "40 year-old virgin" in the workplace. (Day 2 Tr 38.)

⁹ A film entitled "The 40 Year Old Virgin" was released on August 19, 2005. <http://www.imdb.com/title/tt0405422/>

Finding. The State did not prove that Grievant made the alleged statement.

Positions of the Parties

State

1. Grievant had actual notice of the State's rules prohibiting sexual harassment. Traditionally, employers will impose serious sanctions, including dismissal, upon individuals who are found to have engaged in sexual harassment.

2. Although it took some time for anyone to listen to Doss' complaints against Grievant, the State initiated a timely and fair investigation when the complaint was finally brought to the attention of COO Thompson.

3. The State proved that Grievant engaged in the four forms of conduct alleged.

4. Discharge is appropriate based on the pervasiveness of Grievant's conduct over nearly two years and because it involved both physical and verbal harassment. The Union did not show that the State's discharge of Grievant was different than its treatment of other personnel who engaged in sexual harassment.

5. Discharge was the only appropriate form of discipline, given the type of patients who reside at WSH, the close proximity of employees in the patient transport unit, and the difficulty of finding another WSH position where Grievant would not be working closely with female co-workers. In addition, Grievant has never acknowledged any wrongdoing or accepted any responsibility for his actions. His inability to accept responsibility for his own behavior made retaining him impossible.

Union

1. The State did not meet its burden of proving that it had just cause to discharge Grievant.

2. The State conducted a narrow and unfair investigation of the charges. Because the investigator who prepared the investigation report did not testify at hearing, the content of the report is hearsay and should not be considered.

3. No State witness identified a date or time when Grievant allegedly sexually harassed Doss. It's simple for a witness to indicate that a pattern of behavior occurred constantly, but the

evidence does not support that Grievant committed acts of sexual harassment at all times he was working with Doss.

4. Regarding the charged misconduct: (1) *touching*—Grievant admits he touched Doss’ shoulder and knees, but not in a manner that violated the sexual harassment policy; they worked in a confined area and Grievant’s touching occurred as he tried to reach across her desk to reach a drawer; (2) *hand gesture*—the witnesses’ accounts do not match up; McKenzie did not see what happened and based his interpretation on Doss’s reaction to Grievant’s alleged conduct; (3) *underwear*—Grievant explained that the only reference to “granny panties” he ever heard came from Pedraza; (4) *name-calling*—Grievant was the only witness at hearing to refer to the “40 year old virgin” comment, and he established that it was Pedraza who had talked at work about a movie of that name.

5. The State did not prove that Grievant engaged in the charged misconduct. In particular, Doss was not a credible witness, because: (1) she filed and received a financial settlement for a sexual harassment lawsuit against the State but did not request an order that the alleged behavior stop;¹⁰ (2) she repeatedly made comments at work that the State “was going to buy her a house;” (3) she was unable to answer simple questions during cross examination; (4) her claim that Grievant threatened to have gang members do something to her was unfounded; (5) her description of lotion being squirted on the floor (an allusion to sexual activity) at a time when particular employees were in the office was flawed, because some of those employees were not employed in the office at that time; and (6) she made sexual comments about Grievant.

6. Even if Grievant did commit some or all of the charged acts of misconduct, dismissal is not a reasonable penalty. Discharge is appropriate only for an egregious violation or repeated misconduct after receiving progressive discipline. Grievant is a 26-year employee with no prior discipline. After Doss complained to Supervisor Arocho about Grievant “talking dirty” to her, Arocho did not discipline Grievant but instead simply discussed professionalism in a regularly scheduled employee meeting.

Discussion

Charges stated in the termination letter. The State’s March 12, 2008 letter discharging Grievant states four charges. The just cause analysis is limited to the stated charges:

¹⁰ I note that Doss, in the sexual harassment lawsuit filed against the State, requested relief including an injunction “to enjoin [the State] from allowing or tolerating sexual harassment” (Ex. R10B, paragraphs 6.3 and 8.3.)

Arbitrators usually decline to uphold discipline based on a ground that the employer failed to rely on at the time of discharge. “It is axiomatic that an employer’s defense in a discipline case must rise or fall on the initial reasons provided the employee. Other reasons can’t be added later when the case reaches arbitration merely in an attempt to strengthen the employer’s defense.” The employer may not give the reasons for the discharge and then alter or add to them at the arbitration hearing.¹¹

The State has the burden of proving the four charges in this case by clear and convincing evidence.¹² I address four questions.

1. Did the State provide Grievant with notice of the rules to be followed and the consequence of failing to follow them? The Union does not dispute that Grievant had notice of and understood the State’s sexual harassment rule. Bargaining unit employees are reasonably expected to know that discharge will occur in certain circumstances.

First, some misconduct is so serious—such as hitting a supervisor—that discharge is to be expected.

Second, an employer rule, training, or the collective bargaining agreement may specifically provide discharge for particular misconduct. The applicable policy in this case, after stating the State’s commitment to eradicate sexual harassment, provides that employees who violate the policy “may be subject to disciplinary action in accordance with . . . the provisions of an applicable collective bargaining agreement.” Article 27.2 of the parties’ collective bargaining agreement provides for a range of potential discipline: “Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. . . .” To the extent that the State has a “zero tolerance” policy, it mandates *some* form of discipline but not necessarily *discharge*. In other words, the State policy does not clearly state that discharge is the *uniform* response to *all* proven violations of its sexual harassment policy.

Third, bargaining unit employees reasonably should know, from prior similar incidents, that

¹¹ Brand and Biren, eds., *Discipline and Discharge in Arbitration* (BNA 2nd ed. 2008) at 50, quoting *Chevron-Phillips Chem. Co.*, 120 LA 1065, 1073 (Neas 2005).

¹² “[I]n cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a ‘clear and convincing evidence’ standard. . . .” Ruben, ed., *How Arbitration Works* (BNA 6th ed. 2003) at 950-51 and 1143. See also *WFSE and Washington State Department of Social & Health Services—Hunter Termination* (Arbitrator Duffy 2006) at 14. The “beyond a reasonable doubt” standard is not appropriate in this case.

discharge will result from particular misconduct. According to the State, “no arbitrator has yet decided a case involving the State and an employee covered by the collective bargaining agreements who was charged with sexual harassment.” (Brief at 13.) Therefore, to the extent that arbitration opinions provide bargaining unit employees with notice of the State’s practice in enforcing the sexual harassment policy, Grievant did not have notice from any prior arbitration opinions that *any* violation of the State’s sexual harassment policy would *always* result in discharge.

However, before the parties submitted discipline disputes to arbitration, the Washington Personnel Appeals Board (PAB) decided discipline disputes for some or all State employees. Employees arguably are presumed to have notice of the PAB’s decisions and the sanctions imposed for various misconduct. In *Barrette Green v. Department of Social and Health Services*, Case No. DISM-03-0115 (2005), PAB upheld the discharge of a WSH risk manager, a 15-year employee, for sexual harassment. The PAB decision stated that the discharge letter, “alleged numerous incidents of misconduct committed by Appellant over a period of time spanning from 1988 through 2002.” The allegations included Green’s conduct toward three women, including kissing, brushing against a breast of one woman, initiating graphic sexual conversations, requesting meeting at a hotel for sex, grabbing clothing and exposing another woman’s breast, and propositioning oral sex. The State provided expert testimony, through a psychology professor, regarding sexual harassment in the workplace. PAB determined that Green had engaged in a pattern of misconduct toward the three women and upheld the discharge. (Ex. R-15.) The conduct in *Green* is significantly more severe than that alleged in this case and might have involved an individual who was not in a bargaining unit represented by a labor organization.

PAB also considered the discharge of an 11-year security guard for an incident of alleged sexual harassment that occurred in May 2000. PAB found that the appellant entered an office; saw a female employee standing behind a desk and leaning slightly forward; placed his hand on the side of her head and touched her hair; hooked his finger inside the neckline of her blouse and pulled the blouse up away from her neck; and said “Just a little friendly advice; you’d better not bend over.” PAB upheld the termination. *David Bloshenko v. Department of Social & Health Services*, PAB No. DISM-00-0080 (2002). Since that decision, the Washington legislature has authorized the arbitration of certain disputes, and the parties’ collective bargaining agreement provides that the State must have just cause to discipline bargaining unit employees. Nonetheless, *Bloshenko* serves as notice to employees that the State will impose serious discipline for that type of conduct.

I conclude that Grievant knew, or reasonably should have known, that engaging in sexual harassment would result in serious discipline or discharge.

2. Was the disciplinary procedure fair? The Union asserts that the State’s investigation of the charges was narrow and unfair. I conclude that the disciplinary process was unfair for several reasons. First, Grievant asked Investigator Ortiz to interview several individuals, including Lindsay. In December 2007, Ortiz and Lindsay made an appointment to discuss Doss’s complaint, but they did not connect either at that time or later. The State did not discharge Grievant for over two months after that date; and the record does not indicate why the State did not interview Lindsay at some time during that period. Second, Grievant established that Ortiz said he would not interview Pierce County court clerks Sheri Fontana and Glynnis Hughes, simply because they were not State employees. (Doss referred to them in her testimony at the arbitration hearing.) Third, Ortiz had retired as of the hearing dates and did not appear at the hearing to testify about his investigation. Other aspects of the State’s treatment of Grievant, discussed below, also reflect a defective discipline process.

3. Did the State prove that Grievant engaged in the misconduct for which he was discharged? I found, in my finding regarding the first charge, that the State proved that Grievant made physical contact with Doss (“touching Ms Doss’ thighs and shoulders”) and made a comment that had a sexual undertone and appears to have been intended to embarrass Doss (“telling [Doss] that she wears ‘granny underwear”).

a. Did Grievant engage in sexual harassment? The Washington Court of Appeals has stated: “Whether the [sexual] harassment is such that it creates an abusive working environment may be determined by examining the totality of the circumstances. . . . We consider the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’ . . . ‘Casual, isolated or trivial’ incidents are not actionable. . . . “isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”¹³

Doss established that Grievant’s sexual harassment occurred frequently over a two year period. The State proved in the first charge that Grievant touched clothed parts of Doss’s body, and it proved in the third charge that Grievant often made the “granny panties” statement to Doss.

To evaluate the severity of those actions, acts of sexual harassment must be evaluated on a continuum. Both forms of Grievant’s sexual harassment of Doss were clearly offensive, but they were not on the severe end of the physical or verbal sexual harassment range of conduct. Nonetheless, a reasonable victim of sexual harassment would regard Grievant’s touching as both physically

¹³ *Sangster v. Albertson’s, Inc.*, 99 Wn App 156, 163, 991 P2d 674 (2000), cited by the State in its post-hearing brief at 12-13.

threatening and humiliating. Clearly, Grievant's conduct significantly interfered with Doss's work performance.

b. Did Doss welcome Grievant's conduct, as indicated by her socializing with him, so that in fact his actions did not amount to sexual harassment? During that two year period after Doss raised her concerns about Grievant's conduct and it continued, she nonetheless had some contact with him away from work. When asked on direct examination whether she accompanied Grievant to his mother's home, she testified:

Yes, because I felt—I was new—first of all, I was new where I was at, and they weren't—the clerks worked with him for, I don't know, years and years. And it's sort of like, you have to build trust. Walking through the door, saying that this person they've been working with for this amount of years has been doing this—touching me, doing things—they weren't going to believe me, because I'm the new person. And so far from—when Sheri [Fontana Van Sittert] said [Grievant's particular conduct] *wasn't a sexual-harassment report*, I was saddened at that point. So I knew I didn't have help from them. So then, when Kelly Satchi talked to him, *nothing happened*. Booker ended up talking to him; *nothing happened*. (Witness cries.) Crutcher was in the van, and he didn't do anything either. So I was, like, trying to deal with what I had. I was like: Okay, I'm going to try to forgive him. I was trying to get more peace for me. And I eventually told Carlos [Arocho]—and Carlos took over after Booker was no longer our supervisor. I told Carlos and Carlos spoke to Earl, and things *still didn't change*. (Day 1 Tr 38-39; emphasis added.)

I find that Doss's limited socialization with Grievant does not indicate that she welcomed his conduct toward her.

c. Did Doss welcome Grievant's conduct, as indicated by her demeanor when she objected to his actions? McKenzie testified that Doss and Grievant appeared to be close friends: "They joked and laughed around a lot, you know. And then, when she did tell him to stop, you know, she would often—it would often be like, you know, almost a laughing, joking way. You know, like it's "Stop it right now." It wasn't forceful. You know, she'd say, 'Stop,' you know, laughing and giggling." (Day 1 Tr 113-14.) On the other hand, Pedraza counseled Doss to be more forceful in objecting to Grievant's conduct, and she once yelled at Grievant to get him to stop. (Day 1 Tr 36.) It appears that Doss used several approaches to get Grievant to stop harassing her.

I find that Doss did not welcome Grievant's conduct. An employee's statement to "stop" means

“stop,” whether spoken with a scowl, with a smile, or with no emotion at all.

d. Did Grievant admit any wrongdoing? Throughout the discipline process and the arbitration hearing, Grievant did not admit to any wrongdoing, flatly denied sexually harassing Doss, and stated no remorse for his charged actions. However, based on the testimony of Doss, as corroborated by other reliable witnesses, I have found that Grievant *did* sexually harass Doss. I reject Grievant’s denial of the two proven charges and his refusal to admit that he engaged in sexual harassment.

e. Did the State in any way condone Grievant’s conduct toward Doss or allow it to continue through lax enforcement of its sexual harassment rule?¹⁴ Doss brought Grievant’s conduct to the attention of at least nine WSH employees, at the times noted, and Grievant’s conduct continued:

- In late 2005 to mid-2006, Doss reported to Security Supervisor Booker, who referred to Grievant as “Superfly.” Booker was in a position to observe Grievant’s conduct toward Doss, did nothing, and was later demoted in part for that failure.
- In late 2005 and early 2006, Doss worked in the transport unit with PSA Kirkland. He observed some of Grievant’s harassment of Doss and did nothing.
- In late 2005, Doss asked Mental Health Tech Milton Picket whether Grievant’s conduct was appropriate and, according to Doss, he said that Grievant’s conduct amounted to sexual harassment.
- In late 2005, Doss asked Print Shop Supervisor Baker whether Grievant’s conduct was appropriate and, according to Doss, he said that Grievant’s conduct amounted to sexual harassment. Baker reported Doss’s complaint to Manager Kelly Satchi.
- In late 2005, as a result of Baker’s report, Manager Satchi talked with Grievant about the incident of alleged sexual harassment.

¹⁴ The Union argues that Grievant did not engage in sexual harassment of Doss. In the Union’s brief, however, it argues in the alternative that “even if [Grievant] did commit some or all of the specific acts of misconduct alleged, under the circumstances, dismissal was not a reasonable penalty.” One element of the Union’s argument is that the State did not previously discipline Grievant for the “talking dirty” incident, which resulted only in counseling from Arocho. (Brief at 11.) Because of that argument, I understand that the Union asserts, in the alternative, that the State was lax in enforcing its sexual harassment rules.

- In late 2005 or 2006, Doss talked about Grievant’s conduct with co-worker Lynn Garrett, who advised her to ignore Grievant. (Day 1 Tr 31.)
- In 2006, PSA McKenzie worked with Doss and Grievant. At one point, due to Grievant’s conduct toward Doss, he told Grievant to watch himself and how he treated her.
- Beginning in December 2006, PSA Pedraza worked with Doss and Grievant. Due to Grievant’s sexually harassing conduct toward Doss, Pedraza encouraged her to sound more “authoritative” when telling Grievant to stop touching her, and he encouraged her to retain an attorney.
- In April 2007, Doss complained to Supervisor Arocho that Grievant was “talking dirty” to her. Arocho counseled Grievant to act in a professional manner but did not initiate a sexual harassment investigation.

Noted authorities have considered the question of lax enforcement:

When an employer establishes a rule but is lax in its enforcement, the implication is that it condones the conduct. Employees may be lulled into a false sense of security. . . .

The employer must have actual or constructive knowledge that a rule is being violated in order to be charged with lax enforcement. . . . Arbitrators impute laxness of rule enforcement to the employer through the actions of its supervisors. . . . As with any argument of constructive knowledge, the evidence must show that a reasonably alert employer should have known of the conduct.¹⁵

From September 2005 to September 2007, supervisors responsible for Grievant and Doss disregarded or minimized Doss’s claims that Grievant’s conduct amounted to sexual harassment that violated State rules. While Grievant had *notice* that the State prohibited sexual harassment, the *practice* was that the State essentially ignored Grievant’s sexually harassing behavior during that time.

I conclude that WSH knew or should have known that Grievant was sexually harassing Doss and that WSH was lax in its enforcement of its sexual harassment rule. The goal of progressive discipline is correction of inappropriate conduct. If WSH had issued progressive discipline to Grievant

¹⁵ *Discipline and Discharge in Arbitration* at 99. See also *How Arbitration Works* at 994.

earlier, then—under the progressive discipline theory—Grievant would have had an opportunity to correct his misconduct.

4. Under the circumstances, is discharge within the range of reasonable discipline for the proven misconduct? Just cause requires that discipline, considering all the circumstances, be proportionate to the proven charges. In evaluating whether the discharge meets that requirement, I consider a variety of factors.

a. Progressive discipline. An agreement to discipline for cause includes an agreement to apply the principles of progressive discipline. Progressive discipline is based on a premise that increasingly strict sanctions may *correct* an employee’s unacceptable conduct. The parties’ collective bargaining agreement provides, Article 27.2: “Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. . . .” Depending upon the misconduct proven and other circumstances, an employer is not prevented from skipping one or more steps in that sequence. Grievant’s misconduct was serious enough to warrant an exception to the usual progressive discipline sequence.

b. Likelihood that Grievant will repeat his misconduct. What is the likelihood that a form of discipline less than discharge will correct Grievant from engaging in future misconduct?¹⁶ Grievant flatly denied sexually harassing Doss, stated no remorse for his charged actions, and did not admit to any wrongdoing. Given his refusal to admit to the proven charges, there is a strong likelihood that discipline less than discharge would not correct Grievant’s failure to comply with the State’s policies and that he would again engage in that misconduct.

c. Lax enforcement of sexual harassment rule. The State was lax in its enforcement of the sexual harassment rule, which amounts to a failure of notice to Grievant. The resolution of this dispute must address that significant lapse.

d. The length and quality of Grievant’s work record and prior discipline. The State employed Grievant for 26 yrs at WSH. Throughout his career, Grievant received at least satisfactory annual evaluations and was never disciplined. When an employer proves that an individual

¹⁶ “When assessing whether discipline is excessive, arbitrators often consider the attitude of the employee. An admission of wrongdoing an expression of remorse, or an offer of apology may lead to a finding that leniency was appropriate. By contrast, when an employee avoids responsibility for his actions, the arbitrator may be less inclined to overturn a serious penalty.” *Discipline and Discharge in Arbitration* at 106.

has engaged in sexual harassment, however, the employee's longevity is a minimal consideration.¹⁷

e. Appropriate discipline. The State showed that Grievant engaged in serious misconduct and that he has persistently refused to admit that he engaged in any form of sexual harassment. Reinstatement of Grievant would result in very strained relationships in the workplace¹⁸ and reasonably could send a message to State employees that the State tolerates sexual harassment.

The Union showed the disciplinary process was flawed, because the State failed to investigate Doss's complaints—when she made them from late 2005 to mid-2007—when the State knew or reasonably should have known of Grievant's conduct and therefore was lax in enforcing the sexual harassment rules. In addition, the State's investigation, as detailed above, was incomplete, and Investigator Ortiz did not testify at the hearing.

The parties' collective bargaining agreement does not limit my authority to fashion a remedy. In these circumstances, “[w]here discharge is found not to have been for just cause, but the employer-employee relationship has deteriorated to the point where it is no longer viable or there is little doubt that the grievant, if returned to work, would be fired again, reinstatement may make no sense. The arbitrator may then award full or partial back pay but permit the termination to stand.”¹⁹

¹⁷ For example, see *George Koch Sons, Inc.*, 102 LA 737 (Brunner 1994) (37½ yr employee discharged for just cause after single incident).

¹⁸ Deputy Assistant Secretary of the Health and Recovery Services Division Heidi Robbins Brown, a State manager, testified that she had a concern about Grievant being returned to the workplace. (Day 1 Tr 145.)

¹⁹ Koven and Smith, *Just Cause—The Seven Tests* (BNA 1992) at 438. See also *How Arbitration Works* at 1235 and *Discipline and Discharge in Arbitration* at 490. For examples, see *Safeway Stores, Inc.*, 64 LA 563 (Gould 1974) (employer due process violations but employee's conduct determined to be “uncorrectable”); *Trailways Commuter Transit, Inc.*, 92 LA 503 (Marcus 1989) (employer relied on impermissible evidence in discharging employee but “disquieting evidence” in the record showed the employee's “inadequacies as a bus driver”); *Chromalloy American Corp.*, 93 LA 828 (Woolf 1989) (employer failed to inform employee of charges before discharge but employee physically threatened other employees); *Rexam Graphics*, 111 LA 1176 (Gangle 1998) (employer unfair and incomplete investigation of employee walking off the job but employee lied in unemployment application and at arbitration hearing, so the employment relationship “has clearly deteriorated to the point where it is no longer viable because the Grievant cannot be trusted”), award upheld on appeal, *Local 78 v. Rexam Graphic*, 221 F3d 1085, 165 LRRM 2137 (2000); *UFCW Local 7*, 114 LA 274 (Watkins 1999) (employer's discharge of employee was arbitrary and capricious but employee had made non-employer phone calls without authorization and there was a “disintegration of the working relationship”); *School Board of Broward County*, 117 LA 129 (Hoffman 2002) (employer due process violations but employee engaged in hostile and disruptive altercation with school security officers and reinstatement would result in a “hostile environment” and, in light of the proven misconduct “would be a mistake”).

All things considered, I conclude that a make whole order, without reinstatement, is the appropriate remedy in this case.

Conclusion

I conclude that the State did not follow all of the procedures mandated by the just cause provision of Article 27.1 of the parties' collective bargaining agreement and therefore did not meet all of the elements of just cause required to discharge Grievant. However, Grievant refuses to admit that he engaged in any of the proven misconduct; returning him to the workplace is inappropriate.

The State's discharge of Grievant violated the just cause provision of the parties' collective bargaining agreement. To remedy the violation, within 14 calendar days of the date of this opinion and award, the State shall make Grievant whole from March 12, 2008 to the date of the award. Unemployment benefits received by Grievant, if any, shall be treated in accordance with Washington law. The State is not obligated to reinstate Grievant.

I retain jurisdiction over this dispute for 90 days from the date of this award for the purpose of resolving any dispute regarding the remedy.

Respectfully submitted,

William Greer
Arbitrator

September 28, 2009
Portland, Oregon

In the Matter of the Arbitration
between

State of Washington
and
Washington State Federation of Employees

Earl Davis Discharge Grievance

AAA Case No. 75 390 00393 08

Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

The State's discharge of Grievant violated the just cause provision of the parties' collective bargaining agreement.

To remedy the violation, within 14 calendar days of the date of this award, the State shall make Grievant whole from March 12, 2008 to the date of this award. Unemployment benefits received by Grievant, if any, shall be treated in accordance with Washington law. The State is not obligated to reinstate Grievant.

I retain jurisdiction over this dispute for 90 days from the date of this award for the purpose of resolving any dispute regarding the remedy.

Respectfully submitted,

William Greer
Arbitrator

September 28, 2009