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

WASHINGTON FEDERATION OF STATE EMPLOYEES,	)
	)
Union,	) ARBITRATOR'S DECISION
	) AND AWARD
and	)
	) AAA No. 75-390-00392-08
	)
STATE OF WASHINGTON, DEPT. OF SOCIAL AND HEALTH SERVICES,	)
	)
Employer.	)
	)
(Glenn Teeter Grievance)	)

For the Employer:

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I. INTRODUCTION

The State discharged Grievant, a Juvenile Rehabilitation Security Officer 2 at the Maple Lane School in Centralia, Washington, for alleged sexual harassment of female co-workers. The Superintendent of Maple Lane, Robert L. Nelson, relying upon a criminal investigation conducted by a Detective from the Thurston County Sheriff's Office, determined that Grievant had verbally harassed at least four separate female

employees of Maple Lane, and had engaged in unwelcome sexually intimate physical contact with two of them. Supt. Nelson terminated Grievant effective November 14, 2007 because, he said, "this kind of behavior cannot be tolerated." Grievant contends that there was a "loose" atmosphere at Maple Lane, and he admits that he used unprofessional language at times, including calling some females "ho bags." Grievant denies the more suggestive comments attributed to him by the complaining witnesses, however, and he adamantly denies any intimate physical contact. The Union also asserts on Grievant's behalf that the discharge should be overturned or reduced because the investigation into the allegations failed to meet standards of industrial due process. Finally, the Union argues that if Grievant deserved some disciplinary penalty for his actions, the penalty of discharge was too severe in light of Grievant's excellent record and long tenure at Maple Lane.

At a hearing held July 30-31, 2009 at Centralia Community College in Centralia, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine each other's witnesses. The proceedings were transcribed by a certified court reporter, and the parties arranged for a copy of the transcript to be provided for my use in evaluating the testimony. Counsel chose to file written closing arguments, and I received the briefs of the parties electronically on October 2, 2009. At that point the record closed. Having carefully considered the evidence and argument, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

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

> Whether the Employer complied with the principles of just cause according to Article 27 of the CBA when it terminated Grievant Glenn Teeter? If not, what is the appropriate remedy?

Tr. I at 7.

III. FACTS

Since 1997, Grievant has worked as a supervisor in the security section at Maple Lane, a residential facility for juvenile offenders. In that capacity, he often interacted with clerical employees in the reception area of the facility, especially on weekends when he acted as their "de facto" supervisor. One of the employees in reception was Natasha Yahn[1] who was employed at Maple Lane from August of 2004 until February of 2008 when she transferred to Parks and Recreation. In April of 2007, Ms. Yahn was having some emotional difficulties resulting from the death of her mother. One of her supervisors, Associate Superintendent Renee Fenton, apparently had issued an oral reprimand in connection with what she viewed as Yahn's attendance and performance issues. Exh. U-10. On April 11, Yahn filed a grievance asserting that the Fenton reprimand was not supported by just cause. *Id.*

On April 24, 2007, Grievant was in the reception area performing maintenance on Ms. Yahn's computer, and as he worked they discussed her pending grievance. Grievant apparently believed from personal experience that Yahn was unlikely to get anywhere with a grievance against her supervisor, and he advised her to focus her efforts instead on performing her job to Fenton's expectations. At some point during the conversation,

[1] By the time of the hearing in this matter, Ms. Yahn's name had changed to Rohr, but I use the surname Yahn in this Decision because the documentary evidence refers to her in that way.

another employee who worked in reception returned from a break, and Grievant and Ms. Yahn went to a nearby conference room to continue their discussion in private. Shortly after 3:00 PM, Ms. Yahn realized that she was going to be late in meeting her children when they arrived home on the school bus, so she got up to leave. What happened next is a matter of vigorous contention. Yahn testified that Grievant hugged her tightly, pressing his body against her breasts, while at the same time grabbing her buttocks with his hand. She also claims that he got his face so close to hers that she thought he was going to kiss her. Grievant testified, by contrast, that when Yahn got up to leave, she actually came around the conference table toward him (moving away from the door as she did so) and gave him a hug, not the other way around. He strongly denies grabbing her buttocks.

Two days later, Fenton noticed that Yahn seemed to be emotionally upset. Yahn appeared to have been crying and was staggering from side to side while walking down the hall. Fenton asked Yahn to come to her office so they could talk about what was wrong. Yahn seemed reluctant to talk about what was bothering her, but she did indicate that it was work related. Exh. E-18. Fenton suspended the discussion while she tried to arrange for someone else to join them to provide support for Yahn. Yahn left Fenton's office and a short time later, apparently spoke with Union representatives by telephone about what was troubling her. A Union rep then called another Associate Superintendent and informed him of Yahn's allegations concerning Grievant's conduct in the conference room.

Supt. Nelson turned the matter over to the Thurston County Sheriff's Office for a criminal investigation, which was conducted by Detective Louise Adams. Detective Adams interviewed a number of witnesses, in person or by telephone. During the course

of the investigation, Ms. Yahn told Detective Adams that Grievant had sexually harassed her in the past (prior to the conference room incident), e.g. by telling her that she looked perky and grabbing her breast, by making comments about her appearance, or by grabbing her buttocks. Exh. E-9 at 5. Yahn also told Detective Adams that she had witnessed Grievant touch the breast of another female employee, Gina Jacobsen, and Jacobsen confirmed that fact in a subsequent telephone interview with the Detective. As Ms. Jacobsen described the incident, she was taking off her sweatshirt one day at work when Grievant said "I love it when you don't wear a bra" and reached over and grabbed her breast. Jacobsen also noted that Grievant frequently referred to female employees as "ho bags." *Id.*

Another employee, Brandy Freo,[2] told Detective Adams that Grievant gave her back rubs without being invited, which made her uncomfortable. She confirmed that Grievant called female employees "ho bag." Freo said that when she told Grievant not to call her "ho bag" he would respond "If I wanted any lip from you, I'd open my zipper." *Id.* at 6.[3] She also told Detective Adams that she had observed Grievant rubbing Yahn's shoulders from behind, then slipping his hands down over her shoulders onto her chest "under the guise of joking." Freo quoted Yahn as telling Grievant to stop because "those weren't his to touch." *Id.*[4] A female security officer, Nicole Berg, told Detective Adams that she had heard Grievant calling female employees "ho bags." One time he referred to

[2] At the time of the hearing, Ms. Freo's surname had changed to Watson, but I refer to her as Freo throughout this Decision and Award for the same reasons previously described.

[3] Sometimes the phrase has been quoted as "If I wanted any lip from you, I'd wiggle my zipper." *See.*, e.g. Tr. I at 134. I do not find the variation material.

[4] In response to a direct question at the hearing, however, Ms. Freo stated that she never saw Grievant actually touch Ms. Yahn's breasts, nor did Grievant ever touch hers (although on one occasion he moved his hand toward her breasts and she smacked it away). Tr. I at 166; *see also,* Exh. E-9 at 6.

her that way, but she told him not to do so again and he stopped. *Id.* at 9. In addition, on another occasion Grievant grabbed Berg's stomach from behind. She told him to knock it off, and Grievant later sent her an apology via e-mail. He did not touch her again. *Id.*

Detective Adams interviewed Grievant after completing her interviews of his co-workers. She testified that she had come to a tentative conclusion that the female employees were telling the truth, and she candidly admitted that her goal in the interview was to get Grievant to confess that he had assaulted Yahn in the conference room. In any event, during his interview with Detective Adams, Grievant admitted that he had used the term "ho bag" when addressing female co-workers, but said he was just "teasing." In fact, he told Detective Adams, occasionally he referred to his own wife that way. Grievant repeatedly denied any improper touching of any of his female co-workers. *Id.* at 10. Despite Grievant's denials and explanations, however, Detective Adams concluded that "probable cause exists to believe that Glenn Teeter committed the crime of Assault 4th Degree with Sexual Motivation." She referred the matter to the County Prosecutor who declined to charge, believing that the issue would more appropriately be handled as a civil sexual harassment issue.

Supt. Nelson reviewed the report prepared by Detective Adams and reached a preliminary conclusion that Grievant should be disciplined. He issued a "Notice of Intent to Discipline" dated October 17, 2007, relying essentially on allegations derived from Detective Adams' interviews with employees Yahn, Jacobsen, Freo, and Berg. Exh. J-3. He set a *Loudermill* hearing for October 31, 2007 to give Grievant an opportunity to respond to the charges against him, to provide additional information, or to present any mitigating circumstances he wanted the Department to consider. Following the

Loudermill, at which Grievant was accompanied by a Union Representative, Supt. Nelson determined that he should be discharged:

> As a supervisor, you are held to a higher standard of professional conduct and compliance with agency policy. Your conduct jeopardized the work environment and the safety and security of staff at Maple Lane School. This kind of behavior cannot be tolerated.
>
> I have carefully considered all the evidence and have come to the conclusion that your conduct warrants dismissal.

Exh. J-4 at 3. The Union filed a grievance on Mr. Teeter's behalf, which the parties were unable to resolve in the preliminary steps of the grievance and arbitration process. These proceedings followed.

IV. DECISION

A. Brief Summary of the Parties' Contentions

The Department urges that any employee, but especially someone with supervisory authority, should expect to lose his job for the conduct involved in this case. As DSHS describes the situation, Grievant engaged in a longstanding pattern of boorish and harassing behavior "that is so outrageous as to be entirely outside the bounds of what would commonly be accepted in a professional work environment." Department Brief at 2. In that circumstance, the argument continues, the fact that Grievant was a good and well-liked employee for a number of years, and that he had no prior disciplinary record, cannot save him from summary dismissal.

The Union notes, on the other hand, that the claims of the female employees should be viewed with suspicion because, although the alleged incidents occurred over the course of several years, none of the employees ever complained about Mr. Teeter's conduct prior to the complaint of Ms. Yahn which led to the criminal investigation by

Detective Adams. Moreover, the Department did not do its own investigation, but rather relied on the summary of the criminal investigation prepared by Detective Adams. The Department did not even have copies of the transcripts of the actual interviews until just prior to the hearing in this matter. Therefore, according to the Union, the Department failed to investigate properly and to make its own determination as to the reliability and credibility of the complaints against Grievant. The Union also points to evidence, evidence which I will discuss in the course of my analysis of the issues, that Ms. Yahn willingly engaged in flirtation with Grievant, and that both Ms. Yahn and Ms. Jacobsen actively participated in banter laced with sexual innuendo. The evidence establishes, says the Union, that Grievant believed his language and the neck and shoulder rubs were welcome, and in the few cases in which someone complained about something he had said or done, he promptly ceased (and in one instance, wrote an apologetic e-mail). The Union also notes that the Department terminated Grievant shortly after receiving a letter from Ms. Yahn's attorney threatening sexual harassment litigation, and argues that the financial self-interest of several of the witnesses might have led them to exaggerate Grievant's conduct. In any event, the Union contends, Grievant did not engage in any improper touching, and if his language was inappropriate, a penalty less than discharge would be sufficient to produce necessary changes in his behavior. That way, Grievant could be salvaged as an employee, a desirable outcome for the State because Mr. Teeter consistently achieved performance ratings of "far exceeds expectations."

B. Burden of Proof, Quantum of Proof

The parties are agreed that the Employer bears the burden of proving in a discharge case that Grievant in fact engaged in the conduct for which he was terminated.

They differ, however, over which party bears the burden of proof on the question of the appropriateness of the penalty imposed. The Department contends that the Union bears that burden, while the Union argues the Employer must prove each and every aspect of the case, including that the severity of the penalty is consistent with principles of just cause. While I find the question interesting from an arbitral jurisprudence point of view, for reasons that will appear in the course of this Decision and Award, I do not believe that assigning the burden of proof on the penalty issue to one party or the other here would affect the outcome, and thus I need not decide the issue.

With respect to the quantum of proof, the Department urges that I apply a preponderance of the evidence test, while the Union argues that the Employer should be required to prove its case by clear and convincing evidence. According to the Department, the agency that formerly heard this kind of case prior to the enactment of collective bargaining rights for State employees used the preponderance of the evidence test. Thus, the State urges that I continue that approach. But over the last seventy years or more, labor arbitrators considering questions of just cause for discipline have developed more stringent standards of proof, at least in cases involving significant disciplinary penalties such as discharge or a lengthy suspension. In the absence of evidence to the contrary, I presume that the parties to a CBA are aware of and intend to incorporate that more stringent arbitral approach in their Agreement. In addition, it seems to me that it is inconsistent with notions of industrial due process, i.e. “just cause,” to deprive a long-term employee of his livelihood on the barest preponderance of the evidence. That is particularly so in a case involving discharge based on conduct which, at least in part, would properly be regarded as reprehensible (if not criminal) by most people in our

society. Therefore, I will apply the test I customarily apply in this kind of case—namely, I will look to see if the record convincingly establishes that Grievant is guilty of the elements of misconduct charged in the letter of dismissal.

C. The Merits

The Union contends that Ms. Yahn's allegations should be discounted for a variety of reasons, including her purported "highly sexualized" character, her pending lawsuit asking for $500,000 in damages from the State for sexual harassment, and the inconsistencies between her statement to Detective Adams and her testimony at the hearing. The Union also makes much of the fact that other witnesses described Yahn as flirting with Grievant, as welcoming and even inviting his shoulder rubs, and of being generally sexually charged in her conduct and language. In sum, the Union observes, "Ms. Yahn is hardly the demure office-worker she professes to be." Union Brief at 8.

After carefully reviewing the record, and after having had the opportunity to observe the demeanor of the witnesses who testified at the hearing and thus to evaluate their credibility, I agree that if this case were simply a question of whether to believe the testimony of Ms. Yahn or Mr. Teeter, the record might well support a conclusion that some of Ms. Yahn's claims have not been established by convincing evidence. But this is not a simple case of "he said, she said" limited solely to what happened (or did not happen) between Grievant and Ms. Yahn in the conference room on April 24, and I find that the testimony of other female employees about their interactions with Grievant tends to corroborate important portions, at least, of Ms. Yahn's claims. One example, of course, is Grievant's use of the term "ho bag" to address his female co-workers. Yahn's testimony that Grievant engaged in that conduct—which, to be fair, Grievant admitted in

his interview with Detective Adams and in his testimony (although he attempted to minimize it)[5]—was clearly supported by the testimony of Jacobsen, Freo,[6] and Berg.

But another, and more important, way in which the other witnesses tended to support Ms. Yahn's claims is the testimony that corroborates Ms. Yahn's allegation that Grievant inappropriately touched, or attempted to touch, women's breasts and/or buttocks. The most compelling illustration of that kind of testimony was offered by Gina Jacobsen, a subpoenaed witness who clearly would have preferred not to be required to testify about what she knew. Jacobsen was friendly with Grievant at work and described him as a good supervisor that she could count on for help. Nevertheless, she related an incident which closely tracked testimony given earlier in the hearing by Ms. Yahn.[7] Jacobsen confirmed, just as Ms. Yahn had said, that on one occasion while removing her sweatshirt, i.e. the outer layer of her clothing, Grievant said "I like it when you don't wear a bra" and then reached over and grabbed her breast. Tr. I at 176-77. Jacobsen testified that Grievant had also grabbed her breast in the workplace on at least one other occasion, as well. Tr. I at 174. Both times, she felt "a line had been crossed," even though she considered Grievant to be a friend and had willingly engaged in joking around with

[5] As an aside, Grievant seriously undermined his credibility with me by claiming at the hearing that he did not use the term "ho bag" with the commonly understood meaning of "ho." Tr. II at 176-77. I simply cannot believe that Grievant would think "ho bag" has anything to do with garden implements, and in any event, because he was aware by his own admission that "ho" is often used to mean "whore," he cannot escape responsibility for conveying that meaning, even if it were true (which I seriously doubt) that he subjectively thought "ho bag" meant something like "bonehead."

[6] Also, Freo testified that when she voiced objection to being called "ho bag," Grievant often responded "If I wanted any lip out of you I'd wiggle my zipper." Tr. I at 134. Ms. Yahn testified that Grievant said the same thing to her. Tr. I at 120. Even if intended as a joke, this kind of language is highly demeaning to women, especially in the context of a request not to be called a "ho bag."

[7] One of the reasons Ms. Jacobsen was willing to come forward, she explained, was that "they were trying to make [Ms. Yahn] look like a liar." Tr. I at 172-73. She did not explain precisely who "they" were, but I suspect, based on some testimony that I will discuss later, that she was referring to her perception of the position taken by Grievant's immediate supervisor, Dennis Harmon.

him, including risqué banter.[8] Similarly, Brandy Freo testified that although Grievant never touched her breasts, one time he "jokingly" reached toward her breasts while giving her a shoulder rub, but she "smacked his hands" away. Tr. I at 136-37. Ms. Freo informed Detective Adams that she had seen similar interactions between Grievant and Ms. Yahn. Exh. E-9 at 6.

In light of this testimony that tends to corroborate the kinds of conduct Ms. Yahn described, and especially the testimony of Jacobsen (whom I found to be a thoroughly credible witness), I give Ms. Yahn's testimony more credence than I might have otherwise. Consequently, I do not see this as a case in which the entirety of Yahn's testimony can or should be discounted. And I strongly suspect that Grievant has understood the case in the same way. I say that because I note that in response to the strikingly similar claims contained in the testimony of Yahn, Jacobsen, and Freo, Grievant asserts that *all three* are lying. He notes that Yahn is suing the State for $500,000 and that Freo has engaged the same attorney as Yahn and does not seem to have ruled out the possibility that she will file suit as well. He speculates that Yahn, and perhaps Freo, have offered to split the proceeds of a successful suit with Ms. Jacobsen in exchange for her favorable testimony,[9] i.e. that the three women are engaged in a conspiracy against him—a conspiracy, of course, that would entail committing a crime by lying to Detective Adams as well as perjuring themselves under oath at the hearing before me.

[8] It is not entirely clear to me whether I am being asked to excuse Grievant's unwelcome intimate touching of female employees because Ms. Yahn and Ms. Jacobsen had allegedly engaged in verbal joking with Grievant with sexual connotations. If so, I cannot accept the argument. For one thing, Grievant denies that he touched Yahn and Jacobsen inappropriately. Therefore, I fail to see the relevance of any such defense. More importantly, the fact that a female co-worker may not object to risqué banter does not equate to an invitation to touch her breasts or buttocks.

[9] *See*, Tr. II at 185.

The record does not support Grievant's conspiracy theory, however, and there is evidence to the contrary. I note, for example, that Detective Adams interviewed the three women separately, at a time when Jacobsen had not been working directly with Yahn and Freo for some time and had not had social contact with them, and yet their descriptions of Mr. Teeter's behavior were remarkably consistent. Moreover, I carefully observed Freo and Jacobsen while they were testifying, and I saw nothing that suggested a lack of candor. Frankly, I found Ms. Jacobsen, in particular, much more credible than Mr. Teeter. Therefore, I reject Mr. Teeter's speculation about a conspiracy to fabricate claims of sexual harassment in order to share a potential monetary award from a court or jury.

Nor can I accept the theory that I should find the female co-workers' testimony about Grievant's conduct toward them unreliable because they did not complain to anyone at the time. The record contains a reasonable explanation, in my view, for their reticence. For example, when asked on cross examination why she failed to complain, Yahn stated "I was afraid no one would believe me." *See*, e.g. Tr. I at 101-02. And with respect to Grievant's immediate supervisor, at least, Yahn turned out to be correct. In his testimony at the hearing, Security Manager Dennis Harmon made it clear that he simply could not believe that any of the allegations against Grievant could possibly be true. That is so, he said, because "Ms. Yahn is one of the most flirtatious, sexually motivated people I've ever known. That's her MO." Tr. I at 240. He added a few moments later that "her nature, period, is sexual." *Id*. at 241. And similarly, while claiming that he and Ms. Jacobsen are "real good friends," *Id*. at 201, Mr. Harmon testified that "one of my reasons for being so shocked that it's Tasha and Gina is, you know, [they are] two of the

most inappropriate people I've ever known." *Id*. at 242.[10] Harmon readily conceded, however, that inappropriate *touching* "rises to a whole other level" as compared to sexual banter. *Id.* at 220. Yet despite the allegations that Grievant had grabbed women's breasts and their buttocks at Maple Lane, and despite the fact that one of the employees making such an allegation was a woman he considered a "real good friend," he spoke forcefully against any possibility that Grievant could be guilty of the misconduct they described:

> . . . my trust level is just gone. I would have considered both Natasha and Gina—and I've got to lean more toward Gina, as a really close-knit friend, you know. And so the trust factor was just out the window. I cannot believe that, if there ever was an issue of concern, the relationship that I had with Gina and Tasha, they would have not come to me and said something. Absolutely cannot buy it.

Tr. I at 25-51. In essence, Mr. Harmon, as Ms. Yahn feared would happen, labeled her and Ms. Jacobsen "liars." Perhaps the perception that Mr. Harmon would support Grievant despite the allegations of the female employees explains why Ms. Jacobsen testified that she was "a little nervous around Harmon, although he was real easy-going." Tr. I at 190.[11] In light of Mr. Harmon's testimony, I can understand why Ms. Freo "didn't think it would do any good" to report Grievant's conduct to anyone. Tr. I at 139. Similarly, I can understand why Ms. Yahn was "afraid nobody would believe [her]," Tr. I at 69, or that Mr. Harmon would "call [her] a liar." Id. at 74.[12] It is true that the employees could (and should) have reported the incidents to management even if they

[10] Mr. Harmon made clear, however, that he had never seen "inappropriate" conduct in the workplace by either woman. Rather, he drew his conclusions about the nature of Ms. Yahn and Ms. Jacobsen from interactions outside the workplace.

[11] Jacobsen's testimony on this score suggests that Mr. Harmon was mistaken in his confidence that she would have told him about any problems she was having with Grievant.

[12] I hasten to add that the issue here is not whether *in fact* Mr. Harmon would have failed to take appropriate action had any of the female employees brought their concerns to his attention. He may well have responded as a supervisor should. My only point is that his testimony at the hearing did little to undermine the *perception* of Yahn, Freo, and Jacobsen that he was unlikely to come to their assistance.

thought Mr. Harmon would take Grievant's side. As it turned out, of course, Supt. Nelson acted promptly upon learning of Ms. Yahn's concerns. But in light of their belief that Grievant was likely to receive unquestioning support from his immediate supervisor—a perception that Mr. Harmon's testimony at the hearing tended to validate—I cannot say that the failure of the female co-workers to complain earlier undermines my confidence that they are telling the truth, at least in several critical respects. That is particularly the case with Ms. Jacobsen.

Grievant also argues that his conduct should be excused—or at least mitigated in its severity—because he demonstrated, particularly with Nicole Berg, an ability and willingness to alter his behavior if a female co-worker clearly objected. That argument might carry more weight if this were simply a case about the use of unprofessional language.[13] I agree that in many such cases, i.e. cases involving relatively mild sexual banter of a joking nature, it may be difficult to tell if co-employees are willing participants in the discussion or if they are silently offended. Thus, although employees, particularly supervisory employees, ought to be sensitive to the possibilities of giving offense in those situations—and therefore avoid them—there nevertheless could be reason to find in any particular case that an employee who has failed to accurately judge how suggestive language was being received should be given an opportunity to change going forward. In other words, there might be an adequate reason to accord the offending employee the benefits of progressive discipline.

[13] Even in the case of inappropriate language, however, the record is not entirely consistent with the claim that Grievant would respond appropriately if a female employee objected. For example, when Ms. Freo told Grievant not to address her as "ho bag," he did not cease calling her a name that had offended her. In fact, his response was arguably even more demeaning, i.e. "If I wanted any lip out of you, I'd open my zipper."

This case, however, in addition to being a case about inappropriate language, also involves allegations of unwelcome intimate touching. Therefore, even if the "wiggle my zipper" comments and "ho bag" epithets might be acceptable as a form of joking (at least to some of Grievant's co-workers)—and thus might present an appropriate case for a "rehabilitative" disciplinary penalty short of discharge—taking physical liberties with female co-workers "crosses a line," as Ms. Jacobsen correctly described it. It is a line that, once crossed, does not lend itself to a "second chance" kind of disciplinary penalty. That is so because the uninvited and unwelcome grabbing of the breasts and buttocks of female co-workers in the workplace is simply unacceptable, period.[14] Moreover, returning an employee to the workplace who has engaged in that kind of activity—and particularly if the offender is a supervisor—would send precisely the wrong message to every other employee, potential harassers and victims alike.[15]

Nevertheless, at the hearing, Grievant unconvincingly attempted to define away his misconduct. He explained his understanding that conduct does not actually become "sexual harassment" until an employee *repeats* his offensive activity, *including uninvited intimate physical contact*, over a co-worker's clear objection. Tr. II at 182-83. There are a myriad of reasons to reject this understanding, and even to reject the idea that Grievant actually believes it, but it suffices to note that if this definition of "sexual harassment" were to prevail—i.e. if grabbing a woman's breasts or buttocks does not become sexual

[14] To the extent the Award of Arbiter Christopher in the matter of *Holiday Inn Center Strip and Culinary Workers, Local 226* (Christopher, 1984) (copy attached to Union's Brief) is inconsistent with this conclusion, I respectfully disagree.

[15] Nor can I fault the Department, now that Mr. Teeter's alleged conduct has exposed the State to substantial potential liability, for being reluctant to accept additional exposure by agreeing to allow him to return to employment. To be sure, it would be unfair to deprive Mr. Teeter of his job without convincing evidence of unacceptable conduct, but once that threshold has been met, the concepts of just cause do not provide authorization for an Arbitrator to require the State to be reckless with the public purse.

harassment unless it is repeated after the woman has made clear that she finds it offensive—then *every* employee would be entitled to at least one "free" fondle of *each* of his or her co-workers. Frankly, the proposition is absurd. Any supervisor—indeed, any employee—knows or should know that unwelcome and uninvited intimate physical contact in the workplace is the kind of misconduct that can—and should—result in discharge, even for a first offense.

Nor do I agree that Grievant was prejudiced by the Department's alleged failure to investigate adequately. Grievant and the Union had an opportunity at the *Loudermill* to bring matters to Supt. Nelson's attention if they believed that the Detective's investigation missed anything of significance or got anything wrong. Moreover, Grievant had a full opportunity to present evidence to the Arbitrator. Nothing introduced in evidence at the hearing, however, convinced me that the result would or should have been different had the Department conducted its own investigation after receiving Detective Adams' report. When evidence likely to be uncovered in a "proper" investigation would not have required management to change its decision, arbitrators are generally reluctant to find a just cause violation. That is so because, in such a case, the alleged failure to conduct a thorough investigation has not resulted in actual prejudice to the Grievant. *See*, e.g. Brand & Biren, eds., *Discipline and Discharge in Arbitration* at 47-48 (Second Ed., BNA, 2008).

In sum, I find convincing evidence that Grievant grabbed Ms. Jacobsen's breast on two occasions, and that on a number of occasions he used demeaning language to Ms. Yahn and Ms. Freo, including calling them "ho bags." I also believe the testimony of Ms. Yahn, as bolstered by Ms. Freo, that Grievant said on several occasions "If I wanted any

lip out of you, I'd wiggle my zipper." I find that language offensive on its face, but it is all the more demeaning in response to a female co-worker's demand that Grievant cease calling her "ho bag." In light of the conduct that I have found to be convincingly established by the evidence, it turns out to be somewhat irrelevant whether the events in the conference room on April 24, 2007 happened as Ms. Yahn perceived them or in the way Grievant described them in his testimony, and the same is true of the question whether Grievant grabbed or brushed up against Ms. Yahn's breasts on other occasions.[16] That is so because the record convinces me that Ms. Jacobsen testified truthfully about Grievant's uninvited and unwelcome intimate physical contact with her on two occasions, and that misconduct alone, in my view—especially when committed by a supervisor—constitutes just cause for discharge from State employment. When a record of sexually demeaning epithets and slogans is added to the mix, the result is all the more appropriate.

The grievance must be denied.

[16] I would also find that it is of little relevance whether Grievant put his hand on Ms. Yahn's and Ms. Freo's chairs as they were about to sit down, as is whether he "snapped" Ms. Freo's underwear while she was bending over in the course of her work. I have not focused on those allegations, in part because they were not actually disclosed during Detective Adams' investigation—and thus they were not part of the evidence upon which Supt. Nelson determined that Grievant should be discharged—but also because they would simply be cumulative of the kind of misconduct that I find has been convincingly demonstrated by the State's evidence. That demonstrated conduct is sufficient in itself to justify the decision to terminate Mr. Teeter.

AWARD

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

1. The Department had just cause to discharge the Grievant; therefore,

2. The grievance must be denied; and

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

Dated this 15th day of October, 2009

Michael E. Cavanaugh, J.D.
Arbitrator