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

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Union,

and

STATE OF WASHINGTON, DEPT. OF LICENSING,

Employer.

(Bruce Roberts Suspension Grievance)

ARBITRATOR'S DECISION AND AWARD

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I. INTRODUCTION

Grievant Bruce Roberts challenges a five-day disciplinary suspension. At the time the dispute arose, Mr. Roberts was employed as a supervisory Investigator in the Department's Business & Professions section, a unit that investigates complaints regarding the conduct of real

estate agents and appraisers.[1] A number of investigators reported to him, including one named Vince Lester, and Mr. Lester had been, at least at times, a challenging employee to supervise. On June 23, 2009, Grievant and Lester got into a verbal altercation in the workplace. Mr. Roberts approached Lester at his cubicle to ask about his apparent noncompliance with a directive, set forth in an email, that all emails from Mr. Roberts must be opened and read by employees before being deleted. The purpose of the directive was to generate a return receipt so that Grievant could maintain a record that important communications had been received by his employees. Mr. Roberts asked if Lester had been "joking" when he deleted the email without complying with the directive.[2] Lester took offense at what he perceived to be the "tone" of the inquiry, and voices were raised during the ensuing discussion.[3]

Grievant's supervisor, Sandy Spencer, heard the commotion and intervened, eventually granting Mr. Lester's request to be allowed to leave for the day. Although Ms. Spencer testified that she indicated to Mr. Roberts that he should withdraw from the area so she could talk to Lester alone, Grievant instead followed Spencer and Lester toward the lobby door, telling Mr. Lester as he did so that if Lester left the premises his job "could be in jeopardy." Two days later, when Spencer informed Grievant that Mr. Lester would be allowed to return to the workplace, Mr. Roberts strenuously objected[4] that he had been "victimized" by Lester's behavior and that Ms. Spencer had improperly intervened in his handling of the situation. Eventually, the

[1] Following the events at issue, Mr. Roberts transferred to another State agency.

[2] Mr. Roberts had received a receipt for his email to Mr. Lester indicating that the email had been deleted without being read. Mr. Lester, on the other hand, testified that he had read the email in the "preview" window of MS Outlook and had not seen the directive about opening all supervisory emails (which was contained beneath Mr. Roberts' signature). Apparently, Outlook treats an email as "read" only if it has been opened.

[3] It is undisputed that Mr. Lester raised his voice, but whether Mr. Roberts also raised *his* voice was the subject of inconsistent testimony from the numerous witnesses who observed at least a portion of the incident.

[4] Ms. Spencer testified that Grievant was "yelling" at her in a manner she considered "threatening." Tr. at 24.

Department determined that Mr. Roberts should receive a five-day disciplinary suspension without pay for “escalating” the situation on June 23 (instead of meeting the Department’s expectation of supervisors to “de-escalate” conflicts) and for responding inappropriately in his interaction with his supervisor, Ms. Spencer, two days later.

At a hearing held in the offices of the Attorney General in Tumwater, Washington on October 10-11, 2011, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine witnesses. The proceedings were transcribed by a certified court reporter, and I have carefully reviewed the transcript in the course of my analysis of the evidence. The advocates filed simultaneous electronic post hearing briefs on November 28, 2011, and with my receipt of the briefs, the record closed. Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties were unable to agree on a precise statement of the issue to be decided, but after considering the evidence and the parties’ arguments in their post hearing briefs, I find that a “standard just cause” formulation is appropriate, i.e.

> Did the Department have just cause to suspend Grievant Bruce Roberts without pay for five days? If not, what should the remedy be?

III. FACTS

Late in the workday on June 23, 2009, Grievant approached one of his subordinates, Vince Lester, to ask why Mr. Lester had deleted an email message without opening it. Although Mr. Roberts had been involved in the hiring of Mr. Lester, and had originally appreciated his

sense of humor, their relationship had deteriorated over time. Nevertheless, Mr. Roberts thought Grievant might have been "joking" when he deleted the email without opening and reading it as required. He approached Mr. Lester's cubicle and leaned over the side to say something like "I hope you were joking" or "I hope you were being funny." Mr. Lester testified that he did not know what Roberts was talking about, and he found Grievant's tone "threatening." Tr. at 37. According to Mr. Lester, when he told Grievant that he did not understand what he was being asked, Mr. Roberts became even more "intimidating and threatening." Tr. at 39-40. Eventually, Lester asked Grievant just to "leave him alone," but Mr. Roberts said "no." Lester admitted that he raised his voice during this interaction with his supervisor, but said he did so because he felt "unsafe."[5]

Lester eventually stood up as if to leave, and witnesses described Mr. Roberts as moving from the side of Lester's cubicle toward the entrance. At least one witness (Abrahamson) said that Mr. Roberts appeared to be blocking Mr. Lester's exit, which Grievant denies, but it is undisputed that Mr. Roberts at least maintained a position that required Mr. Lester to go around him to head toward the exit. Sandra Spencer, Mr. Roberts' supervisor, heard "agitated" voices from her own work area. She moved toward Lester's cubicle to determine what was happening. Just before she arrived, she heard Mr. Roberts tell Lester that he was not authorized to leave. Tr. at 19. When she did arrive, Lester turned around and yelled "Sandy, I'm leaving!" Spencer then stepped between Grievant and Lester, and as Mr. Lester headed toward the lobby, she "put [her] hand up to [Grievant], shook [her] head, meaning you don't need to come." *Id*. Spencer then followed Lester with the intention of talking to him about the situation, but Grievant followed close behind them, calling out to Mr. Lester that if he left, his job could be in jeopardy. It became

[5] Some witnesses testified, in fact, that they had the impression Mr. Lester had raised his voice as a "cry for help."

clear to Ms. Spencer that Grievant was not going to allow her to talk to Lester privately, so she authorized Mr. Lester to leave for the day. As she walked back toward the cubicle area with Grievant, he remarked that Lester was "crazy" and "had to go," and he objected that Spencer "had no business coming and interfering." He also stated that he "didn't need [her] going out and consoling Mr. Lester." Tr. at 20.

Ms. Spencer testified that during the incident with Lester, Grievant "was getting louder and louder" and that "Mr. Lester had to go around him." She also said that Grievant's "face was getting red. He was getting—he was angry, very angry. And Mr. Lester was very frightened and angry, too." Tr. at 21-22. And some witnesses testified (at least implicitly) that both parties to the dispute had raised their voices, i.e. they described loud *voices* and/or expressly said that *both* Grievant and Mr. Lester were "loud." On the other hand, some witnesses said that Mr. Roberts only spoke in a low voice, and at least one went so far as to say he "did nothing wrong." Tr. at 20-21. As previously noted, some drew the impression that Mr. Lester had raised his voice as a "cry for help" because he was frightened and wanted to alert his co-workers. It is apparent that the witness accounts cannot be fully reconciled. I do not find it necessary, however, to analyze the differences in the testimony in detail. It suffices to say that after considering all the various witness accounts of the events and how they might reflect on the credibility of the direct participants—Grievant, Mr. Lester, and Ms. Spencer—I find the most credible testimony to be that of Investigator Vanessia Johnson.

I found Ms. Johnson's testimony to be the most believable of the several witnesses for a number of reasons. First, she presented herself as a careful and thoughtful witness, and there is no evidence that she had any personal interest in this situation. Second, as a former police officer, she has relevant professional experience in reading body language and in recognizing

similar aspects of confrontational situations that may signal the possibility of physical violence, and she has been formally trained in techniques of de-escalation in those situations. Thus, her views of how the situation before me spiraled out of control are entitled to greater weight than those of witnesses lacking a similar background. Third, as a former police officer, she has both training and experience in the calm observation of conflict situations and thus a greater ability to observe—and later to recall accurately—significant details of those occurrences.[6]

According to Ms. Johnson, she initially heard what sounded like an argument as she returned to her work area from the legal section in the back of the building. As she arrived at her cubicle, she heard Mr. Lester saying "get away from me" and "move" in a loud voice several times. Tr. at 85. She heard Grievant say "you're not allowed to leave," and then the voices seemed to be moving away from her, as if toward the front door. *Id*. Eventually, she saw Lester and Grievant standing by the front door:

> I recall that both men appeared to be, kind of, posturing. Mr. Roberts, his voice was not loud, but it was definitely authoritarian and direct, very direct words, he was using a very direct tone and it was intended to give the listener the impression that there was an order being given. . . . I have had the opportunity—over the years I've had the opportunity to see people get ready to get into physical altercations and the posturing that I saw, the body language was familiar to me and it looked like it was about to go from verbal to physical.

Tr. at 86-87. Ms. Johnson reiterated that she did not hear Grievant speaking in a loud voice: "I did not hear loud and out of control. I heard authority." Tr. at 92. On the other hand, she agreed with counsel for the Department that someone who is not being loud or out of control may nevertheless "escalate" a situation. Tr. at 96. And her belief was that Grievant *had* "escalated"

[6] I recognize that Mr. Roberts also has significant law enforcement experience in his work history, a factor I will discuss later. Nevertheless, as a direct participant in this emotional event, his perceptions and recollections are not necessarily as reliable as Ms. Johnson's.

the incident with Mr. Lester. Tr. at 97.[7] One factor that led her to that conclusion was Grievant's "aggressive" posture: "If I had a man of Mr. Roberts' size standing with his fists clenched and his chest forward, I would definitely consider that aggressive behavior." Tr. at 98.

For his part, Mr. Roberts testified that he attempted to utilize his police background as a hostage negotiator to defuse the situation with Mr. Lester. That is, he said, he attempted to "maintain a stable demeanor" and to ask Mr. Lester to "calm down" while he waited for Lester's anger to "burn itself out." Tr. at 217. The incident *started*, however, says Grievant, when Mr. Lester immediately responded to his question "I hope you were being funny" with "Don't tell me what to do. Are you going to treat me like I'm in kindergarten and teach me my ABC's?" Tr. at 249. Thus, according to Grievant, Mr. Lester did not express any confusion with respect to what he was being asked. Rather, he immediately launched into an objection to being told what to do by his supervisor, even though the obligation to open and read all of Grievant's emails was a legitimate request, and one that had been previously set forth in writing in a letter of expectation Lester had received. In any event, Mr. Roberts testified that Mr. Lester was the one who escalated the conflict, e.g. "I kept saying to him, you need to calm down and lower your voice. Every time I did, he raised it." Tr. at 250.

In addition, Mr. Roberts testified that as a result of a prior incident of Mr. Lester's leaving the workplace without authorization, he had been counseled by HR to say "if you leave,

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[7] Although the transcript does not reflect a pause in the testimony, I distinctly recall that Ms. Johnson took several moments to think about the accuracy of her testimony before answering counsel's question about whether she believed Mr. Roberts had escalated the situation: "Yes. I can say yes without applying today's feelings to it." *Id*. This is just one example of the thoughtfulness and care I found in her testimony

your job is going to be in jeopardy." Tr. at 251-52.[8] He fully expected that HR would be taking some disciplinary action against Mr. Lester "for his third and final outburst," Tr. at 253, and his "concern at the time was safety of everybody else." *Id*. For that reason, says Mr. Roberts, he did not feel it was appropriate to disengage and leave Ms. Spencer alone with Lester. Moreover, Mr. Roberts testified, after Mr. Lester left, several witnesses said Grievant had done nothing wrong. At the same time, Mr. Roberts concedes that "Sandy [was] mad at me because I didn't do what she had told me to do." *Id*.

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

IV. DECISION

The Department's primary reasoning for imposing a five-day suspension on a supervisory employee without prior discipline on his record is that Mr. Roberts acted in an extremely inappropriate manner by escalating, rather than attempting to de-escalate, a confrontation with a troubled employee.[9] Mr. Roberts, by contrast, asserts that he actually applied his background and training as a hostage negotiator by lowering his voice and attempting to get Mr. Lester to calm down. The totality of the evidence convinces me otherwise, however. It is clear to me that Mr. Roberts persisted in engaging Lester even after it should have been obvious that it was unproductive to do so. Ms. Johnson confirmed, for example, that when Lester expressed a desire (or perhaps an intention) to leave, Mr. Roberts responded "you are not authorized to leave." And

[8] HR Representative Beth Hesse testified, by contrast, that she would not have given such advice because it would raise the possibility of a "double jeopardy" argument, i.e. that the statement itself could be construed as "discipline" that would preclude a penalty the Department might later find to be appropriate after a full investigation. Tr. at 269.

[9] Vanessia Johnson testified that she believed Mr. Lester perhaps was in need of some mental health assistance in connection with something that was occurring in his life, and Mr. Roberts himself said to Ms. Spencer, following the incident with Lester on June 23, that Mr. Lester was "crazy." Thus, it is obvious to me that there was substantial reason to believe Mr. Lester was a troubled employee and that Mr. Roberts was aware of that fact.

when Ms. Spencer arrived on the scene and instructed Mr. Roberts to disengage,[10] he refused to do so, instead following Spencer and Lester as they walked toward the lobby door while continuing to inflame the situation by telling Mr. Lester that his job would be in jeopardy if he left.[11] Moreover, while standing near the front door, Grievant maintained a physical posture that signaled "aggressive behavior" in the well-founded opinion of Ms. Johnson based on her law enforcement training and experience.

It may well be true that Grievant, based on *his* law enforcement background, was taking a defensive posture in case Mr. Lester was the one who chose to escalate to physical violence. But in evaluating that aspect of the case, it is necessary to go back to the beginning and consider how the situation reached that point in the first place. For example, if Grievant believed that Mr. Lester was openly defying the expectations expressed in the email Lester had deleted without opening, it would have been more appropriate to raise those issues with him in private—say in a conference room, and with another supervisor or manager or someone from HR as a witness—rather than on the floor where Mr. Lester's co-workers could overhear a conversation potentially leading to discipline. Preserving employee privacy in the discipline process, after all, is a basic tenet of effective supervision, but one that appears not to have occurred to Mr. Roberts on June 23.

[10] Incidentally, during his testimony, Mr. Roberts did not dispute Ms. Spencer's testimony that she had clearly signaled to him that she expected him to disengage. Therefore, I consider him to have conceded that he understood what was expected and that he failed to comply, a concession that is confirmed by his own testimony that "Sandy was mad at me because I didn't do what she had told me to do." Tr. at 253.

[11] Even if it is true, as Mr. Roberts testified (although his testimony was contradicted by Ms. Hesse), that HR had given him a script to deliver the next time Mr. Lester threatened to walk off the job, it was nevertheless inappropriate to disregard the instruction of his direct supervisor on June 23 to disengage from Mr. Lester. At that point, if Ms. Spencer's instructions violated the expectations of HR, a matter I need not decide, it would be her problem, not Grievant's. And I find, in addition, that it should have been clear that insisting on delivering the message under those precise circumstances was unlikely to have the effect of calming down Mr. Lester while waiting for his anger to "burn out."

Be that as it may, once Mr. Lester responded as forcefully as he did, it would have been appropriate for Mr. Roberts to disengage immediately and to defer the issue to the following day and in private, perhaps after consulting with HR for guidance. It strikes me that would have been a far more effective approach if the goal, as stated, was to get Mr. Lester to "calm down." That is true, by the way, even if Mr. Lester unreasonably interpreted Grievant's tone as inappropriately "aggressive."[12] It is also important, it seems to me, that several witnesses described Mr. Lester as "frightened," and I can understand why he might have responded with fear when Mr. Roberts told him that he was not authorized to leave while at the same time moving to block the exit to his cubicle (witness Abrahamson) or, at the very least, taking up a position that required Lester to move around him to proceed toward the lobby exit (Spencer).[13]

In sum, I find that the Department has convincingly proved that Mr. Roberts failed to act appropriately to de-escalate the incident with Mr. Lester on June 23, 2009, and that is so even if, as I also find, Mr. Lester acted inappropriately as well. Grievant compounded his error two days later by yelling at Ms. Spencer when she notified him that Mr. Lester would be returning to the workplace and that he should be prepared to communicate with Lester in a professional

[12] For the purposes of this discussion, I am willing to assume that Grievant was not initially "aggressive" or "threatening" in his approach to Mr. Lester. I got the impression from Grievant's testimony however, that he had simply tired of dealing with Mr. Lester because he remained a "difficult employee" despite continuing efforts to hold him accountable. Perhaps Mr. Lester misconstrued that frustration as "aggression." But in any event, dealing with difficult employees is inherent in the job of supervisor—in fact, I have often heard supervisors and managers observe that they spend 90% of their time dealing with the 10% of their employees who are "problems"—and a supervisor is appropriately expected to follow supervisory protocols, e.g. to de-escalate conflict, even when it is frustrating to do so because the supervisor believes the employee is being unreasonable.

[13] In addition, Ms. Johnson's testimony that she heard Lester repeatedly asking Grievant to "move" and/or "get away from me," followed by Mr. Roberts' statement that Lester was "not allowed to leave," is consistent with the conclusion expressed by some of the direct witnesses, i.e. that Grievant was giving the impression, whether intentional or not, of interfering with Mr. Lester's egress. Therefore, if Mr. Lester walked toward Grievant with his fist clenched, as Mr. Roberts testified, Grievant must bear at least partial responsibility for escalating the situation to that point.

manner.[14] On the other hand, to the extent, if any, that the Department has relied upon Mr. Roberts' "threat" during their meeting to file an "ethics complaint" against Ms. Spencer, or the fact that he asked for Union representation, or that he demanded the expectations with respect to dealing with Mr. Lester be reduced to writing, I do not find that those circumstances support a disciplinary response.[15]

The remaining question, then, is whether the disciplinary penalty imposed, i.e. a five-day unpaid suspension, is consistent with principles of just cause. I find that it is not. Several important aspects of the just cause analysis support that conclusion. First, I note that Mr. Roberts has no prior history of discipline. Progressive discipline, of course, does not necessarily require a lockstep progression up the ladder of disciplinary penalties, beginning with an oral warning and culminating in discharge—but only after interim stops at written warning and suspension. Rather, under appropriate circumstances, an Employer is free to skip one or more rungs of the ladder if doing so is commensurate with the severity of the employee's misconduct considered in light of the employee's overall record.

On the other hand, even when an Employer determines that one or more disciplinary steps should be skipped, the central principle of progressive discipline still applies, i.e. that the

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[14] Once again, Mr. Roberts did not directly dispute Ms. Spencer's testimony that he had yelled at her during their meeting on June 25. Tr. at 24-25. Therefore, I consider the yelling described by Ms. Spencer to have been established by the evidence.

[15] As an aside, the Union has contended that the investigatory process was deficient in a number of respects, e.g. that Ms. Spencer conducted a preliminary "investigation" even though she was a participant in the events, and that the "outside investigator" ultimately assigned was a former colleague of the appointing authority, Ralph Osgood (who made the ultimate disciplinary decision), when they were both employed at the Department of Revenue. I need not address the merits of these arguments, however, because in reaching my decision I have not relied on facts developed during the investigation, but rather on the facts developed through direct witness testimony at the hearing itself. Those facts are sufficient to support a disciplinary penalty at some level, and thus it is immaterial whether the Department could have conducted a more "pristine" investigation. Moreover, in determining whether the penalty imposed here comports with just cause principles, I will consider only those facts convincingly established by the testimony.

penalty imposed should be "rehabilitative" if at all possible. That is, the purpose of workplace discipline is not so much to *penalize* misbehavior as it is to *reform* employee conduct. Therefore, the disciplinary penalty in any particular case should be sufficient to impress upon the employee the importance of meeting the Employer's legitimate expectations while at the same time offering a clear path, going forward, for the employee to demonstrate that he or she is capable of conforming to the expected standards. Disciplinary actions that go beyond the level necessary to meet these twin objectives, i.e. those that cross the line between "rehabilitation" and "punishment," are inconsistent with principles of progressive discipline that are inherent in the concept of just cause.

That being said, once an Employer has met its burden to establish misconduct, as the Department has done here, the choice of penalty is ordinarily a matter within the Employer's sound discretion. In other words, in the absence of evidence of disparate treatment or an abuse of discretion, an Arbitrator will generally defer to the Employer's choice. Here, the Department has argued that a one-week suspension, even for a first offense, is consistent with discipline in comparable cases. Exh. E-13. From the labels applied to those cases in the Department's exhibit, however, and the cryptic descriptions of the misconduct involved, it is impossible for me to judge how "comparable" they truly are to Mr. Roberts' situation because of the lack of detailed information about the particular circumstances involved. I am also hampered in my consideration of those cases by the absence of information about the specific disciplinary records and work histories of the employees disciplined.[16] Thus, I can neither say that the prior cases cited by the

[16] The Department need not—and would not be allowed to—present evidence of the prior disciplinary actions in the form of a series of "mini-trials" at the hearing. Parties frequently provide me the final discipline letters, however, and those letters often describe the offense and the chosen penalty, usually with a brief description of the employee's disciplinary history and work record. That form of evidence tends to be more helpful to me in considering disparate treatment issues than the list before me in this case.

Department support a one-week suspension in Grievant's situation, nor that they establish the opposite conclusion.

Consequently, I am left to judge the propriety of the disciplinary penalty imposed here according to my understanding of what is "fair" under all the circumstances. While I still must grant considerable deference to the Department's choice, if the penalty seems too severe when compared to my sense of what other Employers do under similar circumstances, I have the authority to find the penalty inconsistent with just cause. For example, I note that the Department has given Mr. Roberts the maximum suspension allowable under the law to a salaried employee. Tr. at 101. Another way to phrase that observation, of course, is that the disciplinary penalty the Department imposed on Mr. Roberts is just one step below the ultimate workplace penalty (termination), i.e. it is as severe a penalty as the Department could impose without discharging him. There may well be circumstances in which such a penalty would be appropriate, even for an employee with no prior discipline on his record, but this situation does not strike me as one of them.

In reaching that conclusion, I am heavily influenced by the following factors. First, consider that if the Employer were to apply "progressive discipline" to Mr. Roberts in the future for some act of misconduct, it would have only one place to go, i.e. termination. Obviously, there are some future policy violations that would justify that penalty, but there are many others I can imagine that would call for another "rehabilitative" disciplinary response. In sum, while I find that Grievant's failure to de-escalate the conflict with Mr. Lester was a serious violation of the legitimate expectations of a supervisor within the Department, I cannot say that it was so serious as to justify discharge for *any* further violation of any kind. That the Department arguably put

itself in that situation by issuing the maximum available suspension to Mr. Roberts strongly suggests that the penalty imposed here was too severe.[17]

Second, the evidence satisfies me that Mr. Lester was, indeed, a very difficult employee to supervise, and that is no doubt particularly true for a supervisor whose background is primarily in the para-military world of law enforcement. While I agree that Mr. Roberts should have responded differently to the challenges posed by Mr. Lester, his failure to do so seems to me more likely to be a product of his background and experience than a deliberate refusal to employ supervisory methods better suited to the Department's workplace.[18] Moreover, Mr. Lester admittedly responded inappropriately when approached by Mr. Roberts on June 23.[19] That does not excuse Grievant's failure to apply appropriate de-escalation techniques, of course, but it does indicate that there is blame to be shared for the fact that matters got out of control.[20] And the fact that Mr. Lester's behavior was in direct violation of an earlier written notice of expectations added another layer of understandable frustration for Mr. Roberts. These factors tend to lessen Mr. Roberts' culpability under these precise circumstances.

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[17] The fact that Mr. Roberts has left the Department in the interim does not alter this aspect of the analysis. The appropriateness of a disciplinary penalty must be judged according to the circumstances at the time the penalty was imposed.

[18] Ms. Johnson noted that, as a former police officer, she was "familiar" with Mr. Roberts' form of supervision, but that "police experience may not be the best for a cubicle-ridden office experience." Tr. at 96.

[19] In fact, one reason that Mr. Osgood chose to give Mr. Lester an oral reprimand, instead of a more severe disciplinary penalty, was that during a meeting with Osgood he, unlike Mr. Roberts, conceded that he had acted inappropriately.

[20] At the same time, I find it somewhat ironic that Grievant, who seemed very upset at what he considered Mr. Lester's disregard of his instructions on the handing of email, apparently does not recognize the extent to which his *own* conduct bordered on the insubordinate in his refusal to comply with Spencer's direction to withdraw from the situation, as well as his direct comment to her that he "didn't need [her] going out and consoling Mr. Lester." Tr. at 20.

But most importantly, it seems to me that the disparity in the penalties meted out to the two disputants is simply too great. Certainly, I agree that harsher discipline for Mr. Roberts is justified by the Department's appropriately higher expectations of supervisors, and also by Mr. Robert's resistance to personal acceptance of any responsibility for the fact that the dispute got out of control. The Department was also entitled to consider Mr. Robert's disrespectful treatment of his supervisor, Ms. Spencer, two days later when she informed him that Mr. Lester would be returning to the office. Nevertheless, the difference between Grievant's maximum possible suspension—with termination a very possible next step—and Mr. Lester's oral reprimand (Tr. at 114) seems unjustified under all the circumstances, especially given Mr. Lester's prior disciplinary record for similar misconduct. "Proportionality" is a fundamental component of just cause, of course, whether it is "proportionality" of the punishment to the offense and/or the "proportionality" of the penalties given to individual employees involved in the same improper interaction in the workplace.

In light of these factors, I find that the one-week suspension to Grievant was not consistent with just cause. At the same time, I agree with the Department that his conduct merited a "significant disciplinary action." Department Brief at 10. Therefore, I will reduce the one-week suspension to a one-day suspension. The grievance will be granted in part and denied in part, and Mr. Roberts shall be made whole for lost wages and benefits, if any.

AWARD

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

1. The Department did not have just cause to issue a five-day disciplinary suspension to Grievant Bruce Roberts but did have just cause to impose a one-day suspension; therefore,

2. The grievance must be granted in part and denied in part; and

3. The discipline is hereby reduced to a one-day suspension and Mr. Roberts' record shall be modified accordingly; and

4. Mr. Roberts shall promptly be made whole for lost wages and benefits, if any, beyond the one-day suspension;

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

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

Dated this 27th day of December, 2011

Michael E. Cavanaugh, J.D.
Arbitrator