BEFORE THE AMERICAN ARBITRATION ASSOCIATION

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Association, and WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, Employer.	Austin Lyman Separation Grievance

AAA Case Number 01-21-0017-2527

ARBITRATOR'S DECISION AND AWARD

I. INTRODUCTION

This matter was heard by Zoom on November 2, 2022. Frank D. Prochaska, Labor Advocacy Specialist, represented the Association. Assistant Attorney General Amee J. Tilger represented the Employer.

II. PROCEEDINGS

The Association and Employer are parties to a collective bargaining agreement (CBA) effective July 1, 2019-June 20, 2021 (Exh. U1).

By letter dated June 3, 2021 (Exh. U2), Austin Lyman was notified that he would be separated from employment as a Wildland Fire Operations Technician 2 effective June 20, 2021.

The Association filed a Step 2 grievance (Exh. E4) alleging the Employer violated the CBA by terminating and disciplining Lyman without just cause and due process. The Association asked that the termination be rescinded and that Lyman be reinstated with make whole relief. A Step 2 grievance hearing was held on June 18, 2021. The Employer denied the grievance (Exh. E5).

The Association advanced the grievance to Step 3 (Exh. U3, fifth page). A Step 3 grievance hearing was held on July 19, 2021. The Employer denied the grievance (Exh. E6).

The Association advanced the grievance to Step 4 (Exh. U3, third page). A Pre-Arbitration Review Meeting was held on October 14, 2021 but the grievance was not resolved (Exh. U3, second page; Exh. E8).

The Association advanced the dispute to arbitration (Exh. U3, first page). At the arbitration hearing, the parties gave opening statements, introduced exhibits, and examined and cross-examined witnesses. The parties agreed to submit written post-hearing briefs. The briefs were received by the Arbitrator and the record was then considered closed. The Arbitrator issues this Decision and Award.

III. ISSUES

In their post-hearing briefs, the parties stated the issues as:

Association

Did the Department of Natural Resources violate the Collective Bargaining Agreement when it discharged Austin Lyman? If so, what is the proper remedy?

Employer

Should this grievance of a non-disciplinary separation be dismissed as not arbitrable under Article 28 of the parties' CBA?

If this non-disciplinary separation is arbitrable under Article 28, should this grievance be denied because DNR has just cause to separate Mr. Lyman and provided him with due process?

If the Arbitrator finds DNR violated the CBA, what is the appropriate remedy?

IV. RELEVANT PROVISIONS OF THE CBA (Exh. U1)

ARTICLE 4
HIRING AND APPOINTMENTS

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4.4 Types of Appointment

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E. Seasonal Career Employment

1. The Employer may make seasonal career appointments that are cyclical in nature, recur at the same agency at approximately the same time each year, and are anticipated to last for a minimum of five (5) months but are less than twelve (12) months in duration during any consecutive twelve (12) month period.

2. Upon completion of a six (6) or twelve (12) month probationary period (in accordance with Subsection 4.5 A below) completed in consecutive seasons at the same agency, employees in seasonal career employment will assume the rights of employees with permanent status.

3. The layoff and recall rights of seasonal career employees will be in accordance with the provisions in Article 35, Layoff and Recall.

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ARTICLE 9
LICENSURE AND CERTIFICATION

9.1 The Employer and the Union recognize the necessity for bargaining unit employees to maintain appropriate licensure and/or certification to perform the duties of their assigned position.

9.2 Agencies will follow their policies and/or practices related to licensure and certification.

9.3 Employees will notify their Appointing Authority or designee if their work-related license and/or certification has expired, or has been restricted, revoked or suspended within twenty-four (24) hours of expiration, restriction, revocation or suspension, or prior to their next scheduled shift, whichever occurs first.

ARTICLE 25
OFF-DUTY CONDUCT

25.1 The off-duty activities of an employee may not be grounds for disciplinary action unless said activities are a conflict of interest as set forth in RCW 42.52 or a nexus exists between the employee's activities and employment. Employees shall report all arrests and any court-imposed sanctions or conditions that affect their ability to perform assigned duties to the Appointing Authority within twenty-four (24) hours or prior to their scheduled work shift, whichever occurs first.

25.2 Protected activities will not be grounds for discipline or retaliation.

ARTICLE 28
DISCIPLINE

28.1 The Employer will not discipline any permanent employee without just cause.

28.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, discharges, and reductions in accrued annual leave (overtime exempt employees only), to a maximum of three (3) days per occurrence. Oral reprimands will be identified as such.

28.3 When disciplining an employee, the Employer will make a reasonable effort to protect the privacy of the employee.

28.4 Only documentation maintained in the employee's personnel file, or supervisory file, in accordance with Article 32, may be used for the purpose of establishing a history of progressive discipline.

28.5 All agency policies regarding investigatory procedures related to alleged staff misconduct are superseded. The Employer has the authority to determine the method of conducting investigations.

28.6 Upon request, an employee has the right to a Union representative at an investigatory interview called by the Employer, if the employee reasonably believes discipline could result. The Employer will inform the employee of the purpose of the investigatory interview.

28.7 Disciplinary investigations will be processed in a timely manner. The Employer will begin the investigative process within fourteen (14) calendar days from the date it is determined that an investigation is required and will notify the employee(s) being investigated at that time. After each subsequent thirty (30) day period, the employee, upon request, will receive a status update of the investigation. At the conclusion of any investigation where the Employer elects not to take disciplinary action on the employee being investigated, the employee will be provided with a notification that the investigation is completed and that no discipline will be imposed on them. An employee may also have a Union representative at a pre-disciplinary meeting. Pre-disciplinary meetings will be offered prior to imposing reductions in pay, reductions in accrued annual leave, suspensions, demotions and discharges. Employees seeking representation are responsible for contacting their representative.

28.8 Prior to imposing discipline other than reprimands, the Employer will inform the employee in writing of the reasons for contemplating discipline and provide an explanation of the evidence. The Employer will provide the Union with a copy. The employee will be provided an opportunity to respond either at a meeting scheduled by the Employer, or in writing if the employee prefers. A pre-disciplinary meeting with the Employer will be considered time worked.

28.9 The Employer will provide an employee with fifteen (15) calendar days' written notice prior to the effective date of a reduction in pay or demotion. An employee being suspended or dismissed must be notified in writing no later than one (1) day before the suspension or dismissal takes place.

28.10 The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 30. Oral reprimands, however, may be processed only through the Agency Head step of the grievance procedure.

ARTICLE 29
PRESUMPTION OF RESIGNATION

29.1 Unauthorized Absence
When an employee has been absent without authorized leave and has failed to contact the Employer for a period of three (3) consecutive days, the employee is presumed to have resigned from their position. The Employer will make two (2) attempts to contact the employee to determine the cause of the absence, ...

29.2 Notice of Separation
When an employee is presumed to have resigned from their position, the Employer will separate the employee by sending a separation notice to the employee by certified mail to the last known address of the employee. The Employer will provide a copy of the separation notice to the Union President through certified mail or personal service.

29.3 Petition for Reinstatement
An employee who has received a separation notice may petition the Employer in writing to consider reinstatement. The employee must provide proof that the absence was involuntary or unavoidable. The petition must be received by the Employer or postmarked within ten (10) calendar days after the separation notice was deposited in the United States mail. The Employer must respond in writing to an employee's petition for reinstatement within ten (10) calendar days of receipt of the employee's petition.

29.4 Grievability
Denial of a petition for reinstatement is grievable. The grievance may not be based on information other than that shared with the Employer at the time of the petition for reinstatement and will only be processed through the Agency Head step of the grievance procedure.

ARTICLE 30
GRIEVANCE PROCEDURE

30.1 Terms and Requirements

The Union and the Employer agree that it is in the best interest of all parties to resolve disputes at the earliest opportunity and at the lowest level. The Union and the Employer encourage problem resolution between employees and management and are committed to assisting in resolution of disputes as soon as possible. In the event a dispute is not resolved in an informal manner, this Article provides a formal process for problem resolution.

A. Grievance Definition

A grievance is an allegation by an employee or a group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement. The term "grievant" as used in this Article includes the term "grievants."

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E. Contents

The written grievance must include the following information or it will not be processed:

1. The nature of the grievance;
2. The facts upon which it is based;
3. The date upon which the incident occurred;
4. The specific Article and Section of this Agreement violated;
5. The specific remedy requested;
6. The name of the grievant(s); and
7. The name and signature of the Union representative.

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N. Discipline

Disciplinary grievances will be initiated at the level at which the disputed action was taken.

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30.2 Filing and Processing

A. Filing

A grievance must be filed within thirty (30) days of the occurrence giving rise to the grievance, or the date the grievant knew or could reasonably have known of the occurrence, whichever is later. For discipline, disability separation, and layoff grievances, the date the grievant could have reasonably known is the date of notice. This thirty (30) day period will be used to attempt to informally resolve the dispute.

B. Processing

Step 1 – Responsible Supervisor or Designee: If the issue is not resolved informally, the Union may present a written grievance to the Human Resources Office, within the thirty (30) day period described above. The responsible supervisor, manager or designee will meet or confer by telephone with a Union representative and the grievant within fifteen (15) days of receipt of the grievance, and will respond in writing to the Union within fifteen (15) days after the meeting or conference.

Step 2 – Appointing Authority or Designee: If the grievance is not resolved at Step 1, the Union may move it to the next step by filing it to the Human Resources Office, within fifteen (15) days of the grievant's receipt of the Step 1 decision. The Appointing Authority or designee will meet or confer by telephone with a Union representative and the grievant within fifteen (15) days of receipt of the appeal and will respond in writing to the Union within fifteen (15) days after the meeting or conference.

Step 3 – Agency Head or Designee: If the grievance is not resolved at Step 2, the Union may move it to the next step by filing it with the Agency Head, with a copy to the Human Resources Office, within fifteen (15) days of the Union's receipt of the Step 2 decision. The Agency Head or designee will meet or confer by telephone with a Union representative and the grievant within fifteen (15) days of receipt of the appeal, and will respond in writing to the Union within fifteen (15) days after the meeting or conference.

Step 4 – Pre-Arbitration Review Meetings: If the grievance is not resolved at Step 3, the Union may file a request for a pre-arbitration review meeting (with a copy of the grievance and all responses attached). It will be filed with OFM State Human Resources Labor Relations (LRS) at labor.relations@ofm.wa.gov and the agency's Human Resources Office within fifteen (15) days of receipt of the Step 3 decision. Within fifteen (15) days of the receipt of the request, the LRS will schedule a pre-arbitration review meeting that will take place within sixty (60) days of receipt of the request, with the LRS designee, the agency's Human Resources Office representative, and the Union's representative to review and attempt to settle the dispute.

If the matter is not resolved in this pre-arbitration review, within thirty (30) days of the meeting, the Union may file a demand to arbitrate the dispute with the American Arbitration Association (AAA).

C. Selecting an Arbitrator

The parties will select an arbitrator by mutual agreement or by alternately striking names supplied by the AAA, and will follow the Labor Arbitration Rules of the AAA unless they agree otherwise in writing.

D. Authority of the Arbitrator

1. The arbitrator will:

a. Have no authority to add to, subtract from, or modify any of the provisions of this Agreement;

b. Be limited in their decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;

c. Not make any decision that would result in the violation of this Agreement;

d. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement; and

e. Not have the authority to order the Employer to modify their staffing levels or to direct staff to work overtime.

2. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision-making process....

3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

E. Arbitration Costs

1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room will be shared equally by the parties.

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ARTICLE 33
FITNESS FOR DUTY/REASONABLE ACCOMMODATION/
DISABILITY SEPARATION

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33.7 Disability Separation

A. An employee with permanent status may be separated from service when the agency determines that the employee is unable to perform the essential functions of the employee's position due to a mental, sensory or physical disability, which cannot be reasonably accommodated. Determinations of disability may be made by the agency based on an employee's written request for disability separation or after obtaining a written statement from a physician or licensed mental health professional.

B. The Employer may separate an employee after providing at least fourteen (14) calendar days' written notice when the Employer has medical documentation of the employee's disability and has determined that the employee cannot be reasonably accommodated in any available position. The Employer may immediately separate an employee that requests separation due to disability.

C. An employee separated due to disability will be placed in the General Government Transition Pool Program if they submit a written request for reemployment in accordance with WAC 357-46-090 through 105 and has met the reemployment requirements of WAC 357-19-475.

D. Disability separation is not a disciplinary action. An employee who has been separated because of a disability may grieve their disability separation in accordance with Article 30, Grievance Procedure, unless the separation was at the employee's request.

ARTICLE 35
LAYOFF AND RECALL

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35.9 Formal Options

A. Employees with permanent status will be laid off in accordance with seniority, as defined in Article 34, Seniority, and the skills and abilities of the employee….

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35.14 Recall

A. The Employer shall maintain an internal layoff list for each job classification. Employees who are laid off may have their name placed on the list for the job classification from which they were laid off or bumped. Additionally, employees may request to have their name placed on the internal layoff list for other job classifications in which they have held permanent status, at the same or lower salary range, regardless of a break in service. An employee will remain on internal layoff lists for two (2) years from the effective date of their layoff.

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ARTICLE 36
MANAGEMENT RIGHTS

36.1 The Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, shall include but not be limited to, the right to:

A. Determine the Employer's functions, programs, organizational structure and use of technology;

B. Determine the Employer's budget and size of the agency's workforce and the financial basis for layoffs;

C. Direct and supervise employees;

D. Take all necessary actions to carry out the mission of the state and its agencies during emergencies;

E. Determine the Employer's mission and strategic plans;

F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;

G. Determine or consolidate the location of operations, offices, work sites, including permanently or temporarily moving operations in whole or part to other locations;

H. Establish or modify the workweek, daily work shift, hours of work and days off;

I. Establish the method and means by which work performance standards are set, and the performance standards themselves, which include, but are not limited to, the priority, quality and quantity of work;

J. Establish, allocate, reallocate or abolish positions, and determine the skills and abilities necessary to perform the duties of such positions;

K. Select, hire, assign, reassign, evaluate, retain, promote, demote, transfer, and lay off employees;

L. Determine, prioritize, modify and assign work to be performed;

M. Determine the need for and the method of scheduling, assigning, authorizing and approving overtime;

N. Determine training needs, methods of training, employees to be trained, and training programs to be offered;

O. Determine the reasons for and methods by which employees will be laid-off; and

P. Suspend, demote, reduce pay, discharge, and/or take other disciplinary actions.

36.2 The Employer agrees that the exercise of the above rights shall be consistent with the provisions of this Agreement.

ARTICLE 47
ENTIRE AGREEMENT

47.1 This Agreement constitutes the entire agreement and any past practice or agreement between the parties, whether written or oral, is null and void, unless specifically preserved in this Agreement.

47.2 With regard to WAC 357, this Agreement preempts all subjects addressed, in whole or in part, by its provisions.

47.3 This Agreement supersedes specific provisions of agency policies with which it conflicts.
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V. THE PARTIES' POSITIONS

Association

Lyman worked for the Employer for seven fire seasons. As a permanent, seasonal career employee, Lyman had property rights to his position and was recalled by seniority for each successive fire season. He was never made aware of any complaints about his work performance. He had good performance evaluations and was promoted quickly during his career. Management had complained about Lyman reporting safety concerns. His supervisor made a threatening statement to Lyman and the appointing authority made a trip from Olympia to Yakima to urge Lyman and his crew to stop complaining (Association brief at page 2).

In February 2021, while in layoff status, Lyman was pulled over for a traffic infraction that could result in his driver's license being restricted in the future. The next business day, Lyman reported the incident to his supervisor. Lyman made numerous suggestions to his supervisors of how he could continue to perform his job if his license was restricted (Association brief at pages 2-3).

After he started work for the 2021 season, Lyman was notified that his driver's license would be restricted for 90 days, from June 6-September 3, 2021. Lyman could have continued to drive for work if the Employer signed a waiver regarding an ignition interlock device (Association brief at page 3).

On June 3, the Employer gave Lyman two weeks' written notice of separation from employment. Lyman was directed to work from home during the two-week period. The letter stated that Lyman's appeal rights were contained in the civil service rules. The Employer later acknowledged the letter was inaccurate and Lyman could instead use the CBA grievance procedure. No pre-disciplinary meeting under CBA Article 28.8 was held before Lyman was discharged (Association brief at pages 3-4, 11-12).

No such thing as a non-disciplinary separation is here involved. The CBA preempts the Washington Administrative Code (WAC) and civil service rules. Washington law supports the Association's argument (Association brief at pages 1, 6, 8, 9; Transcript (Tr.) at pages 7-10). The Employer is required to show just cause for Lyman's separation. There was not just cause to discharge Lyman. The Employer accommodated other employees whose licenses had been restricted but refused to accommodate Lyman. Lyman was treated disparately and was retaliated against for his safety complaints (Association brief at pages 10, 11, 12, 14, 16-18).

Employer

As a Helitack Helicopter Manager, Lyman was required to drive work vehicles so his position required a valid, unrestricted driver's license (Employer brief at pages 2, 3). Before the 2021 fire season began, Lyman was arrested for Driving Under the Influence (DUI). Pending adjudication of the DUI charge, Lyman was recalled to work (Employer brief at page 3). Later, his driver's license was withdrawn from June 6-September 3, 2021. This was during the height of the fire season and Lyman was not able to perform the essential function of driving required for his position (Employer brief at pages 3-4).

Due to loss of his driving privileges, Lyman was given two weeks' notice of non-disciplinary separation from employment. In meetings with management, Lyman and the Association were given the opportunity to share reasons why Lyman should not be separated and whether the Employer could accommodate Lyman's loss of driving privileges (Employer brief at pages 4-5).

The grievance is not arbitrable under CBA Article 28 because the separation from employment was not a disciplinary action (Employer brief at page 6). The CBA did not address non-disciplinary separations based on Lyman no longer meeting the qualifications for his position (Employer brief at page 7). The separation letter reference to the WAC was in error (Tr. 10). However, nothing in the CBA prohibited the Employer from looking to the WAC for guidance regarding a non-disciplinary separation. The Employer previously used the same process with another Association-represented employee whose driver's license was restricted (Employer brief at pages 7-8).

If the just cause standard applies, the Employer had just cause to separate Lyman. Lyman was aware of the Employer's policy; he knew his position description required him to have a valid, unrestricted driver's license; and driving was an essential function for his position. Lyman was told why he was being separated. He had an opportunity to present reasons why he should be accommodated instead of separated. The Association did not show employees previously accommodated were similarly situated to Lyman (Employer brief at page 9).

The Association failed to prove that Lyman was retaliated against for making safety complaints. Those complaints had no bearing on the decision to separate him (Employer brief at page 10).

If the Arbitrator finds that the Employer violated the CBA and wrongfully separated Lyman, compensation should be limited to the time he lost in the 2021 fire season. Lyman failed to reasonably mitigate his damages (Employer brief at pages 10-11).

VI. EVIDENCE AT THE ARBITRATION HEARING

Joe Thorpe testified that he is the Aircraft Operations Manager and has been with the Employer for 15 seasons (Tr. 26). Lyman was within his chain of command (Tr. 28).

Early in 2021, Lyman's supervisor, Callan Wilkins, informed Thorpe that Lyman received an off-duty DUI citation (Tr. 30-31). Thorpe notified his supervisor and Cindy Sanders of Human Resources (Tr. 32). Driving was an essential function of Lyman's job (Tr. 33).

Thorpe was aware of safety concerns Lyman raised (Tr. 38) but those complaints did not play a role in the decision to separate him (Tr. 39).

Cindy Sanders testified that she is a Human Resources Consultant 4 and has been with the Department of Natural Resources (DNR) for 26 years (Tr. 47).

In February 2021, Sanders was contacted by Joe Thorpe about Lyman having a DUI (Tr. 49-50). After receiving a driving abstract, and because Lyman still had a valid license, DNR recalled Lyman from layoff (Tr. 52-53). DNR policy requires that to operate a state-owned vehicle, an employee must have a valid, unrestricted driver's license (Tr. 53). CBA Article 9 contains language about licensing for positions (Tr. 54-55). In May 2021, Sanders was informed by Joe Thorpe that Lyman's driving privileges would be restricted from June 6-September 3, 2021. Lyman provided a Department of Licensing form for the Employer to fill out that would allow Lyman to continue driving work vehicles (Tr. 55-57).

Sanders conferred with the Appointing Authority, Chuck Turley (Tr. 57). DNR did not sign the Department of Licensing form provided by Lyman (Tr. 58, 69-70). Sanders never discussed with Lyman or anyone in his chain of command whether his inability to drive could in some way be accommodated during the period his license would be restricted (Tr. 59). After reviewing Lyman's position description, the decision was made to separate Lyman from employment. There was no discussion of disciplining Lyman under CBA Article 28. Instead, DNR considered this a non-disciplinary separation for Lyman not meeting his conditions of employment (Tr. 60). Sanders drafted the separation letter given to Lyman (Exh. U2). The separation letter referenced WAC 357-46-195. Sanders was not aware of any CBA provision providing for a non-disciplinary separation for not meeting conditions of employment. For this reason, DNR looked to the WAC for a process to follow. The letter notified Lyman that he had appeal rights as provided in the WAC (Tr. 61-63). However, Sanders admitted that Lyman's position was governed by the CBA so any rights he had to challenge the separation would be under the CBA (Tr. 63). Sanders had not previously been involved in a discharge case or drafted a non-disciplinary separation letter (Tr. 71-72).

Lyman had the opportunity at a meeting to provide information for Turley to consider why Lyman should not be separated (Tr. 65-66). There was no discussion about Lyman having made safety complaints (Tr. 68).

Russell Lane testified that he is the Wildland Fire Management Division Manager for DNR. In February 2021, Joe Thorpe emailed that Lyman received a DUI. Lane directed Thorpe to coordinate with Cindy Sanders of Human Resources (Tr. 73, 85). After conferring with Sanders, Thorpe communicated to Lane that if Lyman's license was restricted then he would be subject to a non-disciplinary dismissal (Tr. 85). Lane was not aware of any CBA provision for non-disciplinary separations of employees who no longer met conditions of employment (Tr. 79-80). Lyman's safety complaints did not come up in discussions and were not a factor in the decision to separate him (Tr. 81).

George Geissler testified that he is the Washington State Forester and the Deputy over the Wildland Fire Management Programs (Tr. 91). In May 2021, he met with his subordinate, Chuck Turley, and Susanna Fenner, who was responsible for labor relations for DNR. He was then made aware of Lyman's restricted license (Tr. 93). Geissler had no role in the decision to separate Lyman. That was left to the Appointing Authority, Turley (Tr. 94). Because of his position, Geissler became involved in the grievance as part of the Step 3 meeting (Tr. 95). At that meeting, Lyman had the opportunity to discuss why he thought the separation decision was wrong (Tr. 96). Lyman discussed the potential for an interlock device. He mentioned the Department of Licensing waiver form. He brought up the situation of another employee who was accommodated (Tr. 96-98). Following the meeting, Susanna Fenner drafted a letter for Geissler upholding the separation of Lyman (Tr. 103-105; Exh. E6).

Amanda Hacker testified that she is the Contract Administration Director for the Association and was previously a staff representative (Tr. 109). She has been with the Association for 17 years and the DNR representative for most of that time (Tr. 111).

About February 2021, Lyman contacted her about his citation (Tr. 111). Lyman was a seasonal career employee with property rights to his position (Tr. 113). He was subject to recall by seniority (Tr. 114). Hacker was part of a virtual meeting with Chuck Turley when Lyman received his separation letter (Tr. 114-115). Hacker asked when they were going to go through due process and have a *Loudermill* hearing (Tr. 115-116). Turley was unwilling to discuss why there was no option other than termination.

Hacker filed a grievance on behalf of Lyman. There is no non-disciplinary separation under the CBA (Tr. 116). The Employer cannot discipline a permanent employee without just cause. The CBA lists discharge as a form of discipline (Tr. 117). The Employer violated due process by not holding a *Loudermill* or pre-disciplinary hearing under CBA Article 28.8 before making its decision (Tr. 118). At such a hearing, the Employer is required to give the employee the evidence against them and the charges. The Association is allowed to bring up mitigating circumstances or reasons why the employee should not be terminated (Tr. 118-119). Hacker had never seen a non-disciplinary separation. The separation letter contained appeal options that did not apply to Lyman (Tr. 120). The Employer later acknowledged the reference to those appeal options was incorrect (Tr. 126; Exh. E8).

In meetings, the Association suggested ways Lyman could be accommodated (Tr. 121-122). The Association brought up other employees who had been accommodated when they were unable to meet the essential functions of their positions. Hacker asked Turley about bringing Lyman back after the 90 days restricted period. Turley responded that Lyman could apply for positions in the future (Tr. 127). Hacker said the Employer could have brought Lyman back after the 90 days restriction for the rest of the fire season (Tr. 122, 127). Austin Marshall had a job requiring more driving than Lyman, yet Marshall was allowed to work in dispatch for a couple months before returning to his regular duties (Tr. 123-124). Hacker believed Lyman was retaliated against due to his safety complaints (Tr. 128-130, 156-157). Hacker testified that Joe Thorpe said Lyman was a "rogue employee" and Chuck Turley drove from Olympia to Yakima to tell Lyman and others to stop making safety complaints (Tr. 159).

Austin Lyman testified that he was a helicopter manager for DNR (Tr. 166). He started in 2014 as an engine crew member. The next year he was promoted to engine leader (Tr. 166-167). In 2016 he took a year off to do an internship to complete a Bachelor of Science degree in Occupational Health and Safety Management at Central Washington University. In 2017 he returned to DNR as a helicopter crew member. In 2018 he became a squad boss. In 2020 he became a helicopter manager and was in that position until separated (Tr. 167). At the time of separation, he was a permanent seasonal career employee typically working March-November (Tr. 168). About November he would be laid off and then recalled by seniority for the next fire season (Tr. 169). He never heard any complaints about his work performance from DNR management. DNR management did comment about Lyman's safety complaints to the point where he felt threatened (Tr. 198-200).

On February 13, 2021, Lyman was pulled over by police (Tr. 170) and charged with DUI (Tr. 204). The charge was later reduced to reckless driving (Tr. 170, 204-205). Although the charge was when he was off duty before he was scheduled to return to work at DNR (Tr. 173-174), the next business day he contacted his supervisor, Callan Wilkins (Tr. 170-171,). Lyman also spoke to Wilkins' supervisor, Joe Thorpe, in February (Tr. 173). In a dozen or more discussions with Wilkins and Thorpe, Lyman made accommodation suggestions in case his license was restricted in the future (Tr. 175-176, 179-180). His suggestions included a Department of Licensing exemption or waiver form that would allow him to continue to drive work vehicles (Tr. 176); using his personal vehicle; or having someone else drive (Tr. 177-178). As a helicopter manager he rarely drove State vehicles on the job (Tr. 182-183). He frequently drove his personal vehicle to and from assignments (Tr. 187).

Lyman started work on March 26, 2021 (Tr. 172). There was a 10-day delay in DNR taking him back. No one at DNR told him that if he lost his license he could be discharged (Tr. 174-175). On May 18, 2021, he learned that his license was going to be restricted (Tr. 175; Exh. E2). Lyman contacted Amanda Hacker of the Association (Tr. 172). On June 3, they received by email a separation letter and attended a virtual meeting with Chuck Turley (Tr. 192-193). Although Lyman and Hacker tried to make arguments, there was little discussion (Tr. 192-193). Lyman was directed to work from home for the next 14 days (Tr. 193).

Lyman later reapplied to work at DNR without success (Tr. 194-195). He applied to work in the Idaho fire service (Tr. 213). He did not apply to work in the field of occupational health and safety (Tr. 213). His discharge affected his financial status and relationship with his family and others (Tr. 196-197). He was unemployed for about a year before finding work as a truck driver for a guardrail company (Tr. 197).

VII. APPLICATION OF EVIDENCE AND DECISION

A. Should the grievance be dismissed as not arbitrable under CBA Article 28?

The separation letter (Exh.E3) notified Lyman he was to be separated from employment pursuant to WAC 357-46-195 and DNR Policy PO002-006, Driver Responsibility. The letter stated:

WAC 357-46-195 provides:
An employer may separate a permanent employee from a position or from employment for non-disciplinary reasons such as failure to comply with the conditions of employment which may or may not have existed at the time of initial appointment or failure to authorize or to pass a background check required by the position. The employer may consider other employment options such as transfer or voluntary demotion in lieu of separation.

DNR Policy PO002-006 provides:
State Drivers Must Have a Valid Driver's License – DNR additionally requires state drivers possess a license that is not suspended, revoked, or restricted (for example; Occupational/Restricted Driver Licenses or requirements for ignition interlock devices will not be accepted). The above-described license must be in the driver's possession at all times while operating any motor vehicle used for official state business.

The separation letter stated that Lyman's position required that he hold a valid driver's license; driving was an essential function, as described in the position description; and since Lyman's license would be restricted starting June 6, he would no longer meet the requirements of his position. The letter stated that a permanent employee separated under WAC 357-46-195 could appeal as provided in chapter 357-52 WAC.

The Arbitrator notes that DNR Policy PO002-006 also states (Exh. E3, page 3): All state drivers are to report to their manager or supervisor by the end of the next business day any time the applicable license-issuing authority notifies the driver their driver's license has been revoked, suspended, or otherwise is no longer valid or meets the above definition of a driver license. Employees in positions where driving is an essential function who do not possess a driver's license as described above may no longer be employable by the agency.

The emphasized language appears to leave discretion with the Employer as to the continued employability of an employee facing license action where driving is an essential function.

RCW 41.80.020, Scope of bargaining, provides in part:

(6) Except as otherwise provided in this chapter, if a conflict exists between an executive order, administrative rule, or agency policy relating to wages, hours, and terms and conditions of employment and a collective bargaining agreement negotiated under this chapter, the collective bargaining agreement shall prevail. A provision of a collective bargaining agreement that conflicts with the terms of a statute is invalid and unenforceable.

RCW 41.80.030, Contents of collective bargaining agreements – Execution, provides in part:

(2) … a collective bargaining agreement shall contain provisions that:

(a) Provide for a grievance procedure that culminates with final and binding arbitration of all disputes arising over the interpretation or application of the collective bargaining agreement and that is valid and enforceable under its terms when entered into in accordance with this chapter; and

(b) Require processing of disciplinary actions or terminations of employment of employees covered by the collective bargaining agreement entirely under the procedures of the collective bargaining agreement. Any employee, when fully reinstated, shall be guaranteed all employee rights and benefits, including back pay, sick leave, vacation accrual, and retirement and federal old age, survivors, and disability insurance act credits, but without back pay for any period of suspension.

CBA Article 30.2.D.1.a provides that the arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this Agreement.

CBA Article 36.2 provides that the exercise of management rights shall be consistent with the provisions of this Agreement.

CBA Article 47.1 provides that this Agreement constitutes the entire agreement and any past practice or agreement between the parties, whether written or oral, is null and void, unless specifically preserved in this Agreement.

CBA Article 47.2 provides that with regard to WAC 357, this Agreement preempts all subjects addressed, in whole or in part, by its provisions.

CBA Article 47.3 provides that this Agreement supersedes specific provisions of agency policies with which it conflicts.

Arbitrator's role. The arbitrator's function in rights disputes is limited to interpretation of the bargained-for agreement. Beginning with *Enterprise Wheel*, the Supreme Court limited the arbitrator's role in rights disputes to interpretation and application of the collective bargaining agreement. Although an arbitrator can look outside the contract for guidance, he does not sit to dispense his own brand of industrial justice. Elkouri & Elkouri, *How Arbitration Works* (7th ed. 2012) at 3-7 (other citations omitted).

CBA interpretation. Interpretation of a public employment collective bargaining agreement is governed by the law of contracts. *Keeton v. State*, 34 Wn App 353, 360, 661 P2d 982, 987 (1983). See also *Tondevold v. Blaine Sch. Dist. No. 503, Whatcom County*, 91 Wn2d 632, 635, 590 P2d 1268 (1979); *Hansen v. City of Seattle*, 45 Wash App 214, 221, 724 P2d 371 (1986) (cited in Employer brief at page 6). In a case involving school districts, Arbitrator Roumell noted, "… an arbitrator should avoid nonsensical or harsh results." 2008 AAA Lexis 108, 21.
Plain meaning. With respect to CBA language, the majority view of the "plain meaning" rule is that if the words of a contract are plain and clear, conveying a distinct idea, there is no occasion

to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used. Elkouri at 9-8. See also *Hansen*, supra, at 221 (other citations omitted). Arbitrators give words their ordinary and popularly accepted meaning in the absence of a variant contract definition, or extrinsic evidence indicating that they were used in a different sense or that the parties intended some special colloquial meaning. *Quadcom 9-1-1 Public Safety Communications System*, 113 BNA LA 987, 991 (1999) (Goldstein, Arb.) (cited in Employer brief at page 6). Consequently, in the absence of such evidence when each of the parties has a different understanding of what is intended by certain contract language, the party whose understanding is in accord with the ordinary meaning of that language is entitled to prevail. Elkouri at 9-22.

Duty of good faith and fair dealing. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. This obligation prevents a party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, and it applies equally to management and labor. The covenant does not arise out of agreement of the parties, but rather out of the operation of the law. Elkouri at 9-49.

The Arbitrator notes that CBA Article 29 provides for separation for unauthorized absence and CBA Article 33 provides for disability separation. The Arbitrator does not find any language in the CBA that provides for non-disciplinary separation for failure to maintain applicable licensure or qualifications. The Arbitrator does not find any provision in the CBA that allows for a non-disciplinary separation in Lyman's case. It may be that the Employer did not want to separate Lyman by way of discipline. However, particularly in view of RCW 41.80.020(6), RCW 41.80.030(2), CBA Articles 30.2.D.1.a, 36.2, and 47.1-47.3, the Arbitrator does not agree that the Employer could rely on the WAC for a non-disciplinary separation of Lyman. The Arbitrator finds and concludes that the grievance is arbitrable under CBA Article 28 and can proceed as involving a disciplinary matter.

Burden of proof. Since the Arbitrator has concluded that the grievance can proceed as involving a disciplinary matter, the Employer has the burden of proving just cause in a disciplinary proceeding. Proof by a preponderance of the evidence is the standard most often used by arbitrators in discipline cases. Brand, *Discipline and Discharge in Arbitration* (2d ed. 2008) at page 31 and fn. 6 (other citations omitted); Elkouri at 15-25. Here the Employer must prove by a preponderance of the evidence that it had just cause to discharge Lyman.

B. Should the grievance be denied because DNR has just cause to separate Lyman and provided him with due process?

CBA Article 28.1 provides that the Employer will not discipline a permanent employee without just cause. CBA Article 28.2 provides that discipline includes suspensions or discharges. CBA Article 28.4 makes reference to progressive discipline.

To satisfy industrial due process, an employee must be given an adequate opportunity to present his or her side of the case before being discharged by the employer. If the employee has not been given such an opportunity, arbitrators will often refuse to sustain the discharge or discipline assessed against the employee. Elkouri at 15-44.

The central concept permeating discipline and discharge arbitrations is "just cause." Two principles central to just cause are employed by all arbitrators: due process and progressive discipline. Brand at 30. Just cause is a fair and honest cause or reason regulated by good faith on the part of the party exercising the power. *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wash2d 127, 139, 769 P2d 298 (1989) (cited in Employer brief at page 8).

Just cause principles require that the discipline imposed upon an employee be just and fair. Just cause, therefore, requires "reasonable proportionality between the offense and the penalty" and consideration of any mitigating factors or extenuating circumstances that are reflected in the record, such as employee's length of service, performance, prior disciplinary history, as well as management fault. Just cause also includes principles of progressive discipline. Progressive discipline is a system of addressing employee behavior over time, through escalating penalties. The purpose of progressive discipline is to correct the employee's unacceptable behavior. Brand at 65.

In discussing just cause, some questions or tests have included those numbered below:

<u>(1) Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?</u>

The evidence indicated that the decision to separate Lyman was made before his license was restricted (Lane testimony, Tr. 79-85). No pre-disciplinary hearing was held (Hacker testimony, Tr. 115-116, 118-119), as provided by CBA Articles 28.7 and 28.8.

Based on the preponderance of the evidence, the Arbitrator answers the question "no." The Arbitrator finds and concludes that the Employer did not fully comply with the CBA or just cause and due process rights.

<u>(2) Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the employer's business?</u>

The Employer's policies and rules must be consistent with the contract and contain reasonable standards and criteria, and the Employer must exercise its discretion in a reasonable manner. Numerous authorities provide that employers are obliged to exercise their management rights in a manner that is not arbitrary, capricious, discriminatory, or unreasonable. *Clark College and WPEA*, AAA Case No. 75-390-00323-06 at page 9 (2007) (Greer, Arb.) (cited in Association brief at page 16). When a grievance is filed and appealed to arbitration involving the correctness of management's decision, the arbitrator is necessarily empowered to determine from all of the evidence whether management's judgment was reasonable and conformed to the criteria and principles contemplated by the contract. *The Magnavox Co.*, 45 LA 667, 670 (Dworkin 1965) (cited by Arbitrator Greer at page 10).

The Arbitrator notes that DNR Policy PO002-006 appears to leave discretion with the Employer as to the continued employability of an employee facing a license action where driving is an essential function. The Policy also allows for using privately owned vehicles for official state business where pre-approved (Exh. E3, page 8).

CBA Article 9.1 provides for maintaining licensure and/or certification to perform the duties of an employee's position. Lyman's job description (Exh. E3, page 18) indicated that driving was an essential function so required him to have a valid driver's license.

CBA Article 25.1 provides that an employee's off-duty activities may not be grounds for disciplinary action unless a nexus exists between the activities and employment. The Arbitrator finds and concludes that it would have been reasonable for the Employer to conclude that there was the requisite nexus in view of the license restriction and the driving requirements of Lyman's position.

The Arbitrator answers the above question "yes." However, the Arbitrator notes that the Employer did not rely on Article 9 or the CBA in separating Lyman.

<u>(3) Has the employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?</u>

Arbitrators find just cause lacking where the evidence shows the employer has been inconsistent or discriminatory in its enforcement of the work rules. Brand at 97; Elkouri at 15-76. Where the union proves that rules and regulations have not been consistently applied and enforced in a nondiscriminatory manner, arbitrators will refuse to sustain a discharge or will reduce a disciplinary penalty. Elkouri at 15-77.

The Employer was aware of other cases where DNR employees with restricted licenses were accommodated (Hacker testimony, Tr. 121-126). There was no evidence that the Employer reviewed or considered other cases before deciding to separate Lyman. Before Lyman's license issue arose, it appears that the Employer accommodated an employee for some months by assigning duties not requiring driving (Exh. E9, E10). Amanda Hacker and Lyman testified about the Employer accommodating another employee, AM (name redacted), by relieving him from driving after an injury (Tr. 123, 179, 211). After Lyman's case, it appears the Employer accommodated another employee for 65 days by assigning duties not requiring driving (Exh. U6).

The Employer may have concluded that it could not accommodate Lyman during the 90 days license restriction period. However, there was not sufficient evidence to the satisfaction of the Arbitrator to explain why the Employer did not allow Lyman to return to work after the restriction period ended or for the next, 2022, fire season. The Arbitrator notes the evidence of Lyman's safety complaints and claims of threats and retaliation (Tr. 198-200; Union brief at pages 16-18).

Based on the preponderance of the evidence, the Arbitrator has serious concerns with whether the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees.

C. If DNR violated the CBA, what is the appropriate remedy?

(4) Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee's service?

Management discretion. With respect to the appropriateness of the penalty, arbitrators often recognize the employer's discretion in determining the appropriate remedy. One arbitrator stated, "… it is generally understood that where proof of misconduct has been established, the decision as to the appropriate penalty is a determination that lies within the discretion of management. Consequently, an arbitrator should be extremely hesitant to substitute his judgment for that of management…." Brand at 103.

However, it is well settled that an arbitrator may modify or rescind a penalty where the evidence establishes that the employer's decision was arbitrary, capricious, discriminatory, or otherwise violative of fundamental notions of reasonableness, fairness and/or due process. Brand at 103. Discharge and disciplinary action by management has been reversed where the action was found to violate basic notions of fairness or due process. Elkouri at 15-44.

Arbitrators consider a variety of factors in determining whether a penalty is excessive. Several of the most frequently cited considerations are the employee's intent and attitude, the likelihood of rehabilitation or repetition, emotional distress, and the employer's degree of fault. An employee's admission of wrongdoing, an expression of remorse, or an offer of apology may lead to a finding that leniency was appropriate. Brand at 105-106.

Mitigating evidence. Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. The employee's past record often is a major factor in the determination of the proper penalty for the offense. In many cases, arbitrators have reduced penalties in consideration of the employee's long, good past record. In turn, an arbitrator's refusal to interfere with a penalty may be based in part on the employee's poor past record. Elkouri at 15-63, 15-64.

In determining the appropriate penalty for an offense, some consideration is usually given to an employee's employment record, including both the quality of performance evaluations and lack of discipline as well as length of service. Brand at 498.

The evidence indicated that Lyman had good performance evaluations and was promoted quickly during his career (Tr. 166-167). He was never made aware of any complaints about his work performance, although management did refer to his safety complaints (Tr. 198). There was no evidence of Lyman ever being counseled or disciplined.

After Lyman was separated, he reapplied to DNR without success (Tr. 194-195). He applied to work in the Idaho fire service (Tr. 213). He did not apply to work in the field of occupational health and safety (Tr. 213). His discharge affected his financial status and relationship with his family and others (Tr. 196-197). He was unemployed for about a year before finding work as a truck driver for a guardrail company (Tr. 197).

The Arbitrator has carefully considered Lyman's past record, performance, conduct, testimony, attitude, and demeanor. The Arbitrator finds and concludes that Lyman made reasonable efforts to mitigate his damages. The Arbitrator has taken into account the Employer's failure to comply with the CBA and principles of just cause, due process, and progressive discipline. Based on the preponderance of the evidence, the Arbitrator answers the question "no." The Arbitrator finds and concludes that there was sufficient mitigating evidence to warrant reducing or overturning the discharge.

VIII. CONCLUSION

The grievance is granted for the reasons indicated above and in the following Award.

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Association, and WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, Employer.	Austin Lyman Separation Grievance

AAA Case Number 01-21-0017-2527

AWARD

The Arbitrator listened to the parties and made notes during the arbitration hearing, reviewed the exhibits and transcript, conducted research, and considered the parties' post-hearing briefs. Based on the evidence and for the reasons indicated, the Arbitrator decides and awards:

1. The Union's grievance is granted in part.

2. The separation or discharge of Lyman is reduced to a suspension from June 6, 2021 through September 3, 2021. No back pay or benefits are owed for this suspension period.

3. Lyman is to be considered reinstated as of September 4, 2021 for the rest of the 2021 fire season. Lyman is to be paid all back wages and benefits minus unemployment compensation or other earnings.

4. Lyman is to retain his seniority minus the period of suspension.

5. Lyman is to be paid all back wages and benefits minus unemployment compensation or other earnings for the March-November 2022 fire season.

6. Lyman is to be recalled for the March-November 2023 fire season.

7. The Employer is to expunge from Lyman's personnel record or file any reference to the alleged non-disciplinary separation.

8. The parties will equally share the costs or fees of the arbitration in accordance with CBA Article 30.2.E.

The Arbitrator will retain jurisdiction for at least 120 days to resolve any dispute that may arise from the Decision and this Award. Either party can request further involvement of the Arbitrator.

Dated this 10 day of January 2023.

John Eberhart
Arbitrator