BEFORE THOMAS F. LEVAK, ARBITRATOR
AMERICAN ARBITRATION ASSOCIATION NO. 01-24-0008-7589

In the Matter of the Grievance Arbitration Between:

WASHINGTON STATE DEPARTMENT OF CORRECTIONS

The Department or DOC

and

WASHINGTON FEDERATION OF STATE EMPLOYEES, on Behalf of Jameika Durr, the Grievant

The Federation or Union

DISCIPLINARY DEMOTION

ARBITRATOR'S OPINION AND AWARD

This matter came for hearing on May 8 & 9, 2025, via Zoom. The Department was represented by Eric Leonard and the Federation by Sarah Smith. Monique Luckett of Buell Realtime Reporting was the reporter. Post hearing briefs were received on June 23, 2025. Based upon the evidence and the parties' arguments, the Arbitrator decides and awards as follows.

OPINION

I. BACKGROUND FACTS AND THE ISSUE.

The case concerns the Reynolds Reentry Center (RRC), a Minimum Security Classification Facility which houses 120 male residents, operated by the Employer in Seattle, Washington.

Prior to the Grievant's hire in May of 2022 as an RRC Food Service Manager (FSM), she had significant years of service in food service. The Kitchen she was assigned to manage was allocated to have one FSM, three full-time Cook 2's and two on-call Cook 2's. Her position description included such duties as, "Manage and provide supervisory direction relating to operational effectiveness of the facility and kitchen that serves 3 meals daily for up to 120 residents *** [50% of the time]; manage and provide supervisory direction relating to kitchen staff [25% of the time]; participate in the preparation and service of all food on a shift [15% of the time]; and other duties [10% of the time].

From the time she was hired, the Kitchen was actually staffed only by the Grievant and a part-time Cook 2, Liz Crooks. As the sole full-time Cook in the Kitchen, the Grievant's days consisted of cleaning, ordering, labeling, putting away groceries, and preparing three meals a day for the residents.

From May through August of 2022, the Grievant's Manager was Andrea Galando. From August until October, the Grievant was without a Manager. In October 2022, Vicky Neufeld became Acting RRC Manager.

The March 25, 2024 grievance concerns the March 4, 2024 demotion of the Grievant from FSM1 to Cook 2, which provided:

Notification of Disciplinary Action	This is your official notification that I am demoting you from position#IH83, Food Service Manager 1, to position #IH84, Cook 2, effective March 24, 2024. This disciplinary action is being taken pursuant to Article 27 of the Collective Bargaining Agreement between the State of Washington and the Washington Federation of State Employees (WFSE).
Misconduct	This disciplinary action is for the following misconduct:

Allegation 1: From December 2022 to January 2023 you failed to communicate with Reynolds Reentry Center staff including but not limited to:

1. Failed to respond to staff phone calls and messages

2. Failed to respond to emergency staffing issues

Allegation 2: From December 2022 to February 2023, you failed to follow appropriate policy, procedure and/or guidelines, to include but not limited to:

1. Failed to utilize and maintain Department of Corrections (DOC) forms for Food Accountability and storage
2. Failed to adhere to food handling accountability in the kitchen
3. Failed to maintain posting of current food handler permits
4. Failed to dispose of expired food
5. Failed to correct unsanitary conditions in the kitchen and refrigerators
6. Failed to direct or implement proper handling and/or storage of raw and/or cooked food
7. Failed to maintain and/or order food preparation equipment

Allegation 3: From December 2022 to January 2023, you failed to fulfill the operational duties of your role as Food Service Manager, to include but not limited to:

1. Failed to maintain sufficient food supplies to prepare planned meals
2. Failed to meal prep food from frozen to thawing for upcoming meals
3. Failed to maintain consistent start times for mainline
4. Failed to open the dining room for use by residents

The grievance asserted that the demotion violated Articles 2, 8 and 27 of the parties' collective bargaining agreement (the Agreement). The stipulated issue is whether the demotion violated those Agreement Articles, and if so, what is the appropriate remedy? The parties further stipulated that no substantive or procedural arbitrability issues exist. Finally, the parties stipulated that should the Arbitrator find

in favor of the Federation, he should render a general award and retain jurisdiction to resolve any disputes concerning specifics.

II. THE AGREEMENT.

ARTICLE 2.1.
DISCRIMINATION

2.1

Under this Agreement, neither party will discriminate against employees on the basis of religion, age, sex, status as a breastfeeding mother, marital status, race, color, creed, national origin, political affiliation, military status, status as an honorably discharged veteran, disabled veteran or Vietnam era veteran, sexual orientation, gender expression, gender identity, any real or perceived sensory, mental or physical disability, genetic information, status as a victim of domestic violence, sexual assault or stalking, citizenship, immigration status or because of the participation or lack of participation in union activities. Bona fide occupational qualifications based on the above traits do not violate this Section.

ARTICLE 8.
TRAINING AND EMPLOYEE DEVELOPMENT

8.1 The Employer and the Union recognize the value and benefit of education and training designed to enhance employees' abilities to perform their job duties.

A. Training and employee development opportunities will be provided employees in accordance with agency policies and available resources.

B. The Department of Social and Health Services and the Department of Children, Youth, and Families will make reasonable attempts to schedule Employer-required training during the employee's regular work shift.

ARTICLE 27.
DISCIPLINE

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

27.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. Oral reprimands will be identified as such.

III. EMPLOYER CONTENTIONS.

First, the Federation failed to carry its burden of proving a violation of Article 2. In the first place, the Employer did not retaliate against the Grievant for seeking Federation assistance. Reynolds Reentry Center (RRC) Administrator, Reentry Division, Carrie Stanley, did not even know that the Grievant had sought Federation assistance until after the investigation was underway, and did not start the investigation because the Grievant had contacted the Federation. Moreover, as Stanley testified, food concerns existed well before the time the Grievant went to the Federation in regards to concerns about timecards.

In the second place, the Grievant was never instructed by anyone to falsify timecards; to the contrary, she was instructed to not utilize a timecard until it was approved. Indeed, Carrie Trogdon-Oster, Operations Administrator, RRC, sent out two emails that made it clear to the Grievant that timecards had to be approved.

In the third place, the fact that Grievant passed probation did not excuse subsequent failures to perform. Regarding those failures, the Grievant not only misstated the correct sequence of events, she misstated the reasons underlying the discovery of concerns with her performance.

Second, the Employer did not violate Article 8.1. In the first place, at all times, the Grievant was provided sufficient training to fully perform her job. Moreover, no specific additional training was required for her position. Indeed, she already possessed the qualifications for the position. In any event, she actually was trained

on-the-job in all food service policies and procedures. On the other side of the coin, the persuasive evidence established that when she was provided mentoring and coaching, she became resistant to it.

In the second place, the Employer even brought in additional resources to enable the Grievant to complete her overdue required non-kitchen service training. Regarding the alleged failure to provide the Grievant with supervisory training, Stanley convincingly testified that because she realized such training had not been provided, she did not include such in her investigation. In a similar vein, the allegation that the Grievant received much of her training during her reassignment was unsupported by the evidence. Furthermore, the form that the Federation claims demonstrates a failure to provide adequate training was not applicable to the Grievant.

Third, the Employer did not violate Article 27.1. All of the *Daugherty* seven tests were satisfied. In the first place, the Grievant received forewarning and foreknowledge. In the second place, WAC and DOC policies alleged to have been violated were reasonably related to the orderly, efficient, and safe operation of the RRC. In the third place, a thorough investigation was conducted. In the fourth place, the investigation was fair. In the fifth place, the investigation established proof of the Grievant's misconduct; Investigator 3 Anthony Branchini made all appropriate findings. In the sixth place, the DOC acted consistently. In the seventh place, the level of discipline was reasonably related to the seriousness of the offense and the Grievant's record.

Fourth, the Grievant's requested remedies should be denied. First of all, the charges were proven. In the second place, the Grievant had previously been disciplined. In the third place, the Grievant accepts no responsibility for her actions. Finally, she does not even want to return to employment with the DOC.

IV. FEDERATION CONTENTIONS.

Preliminarily, the Employer failed to prove by a preponderance of the evidence that it had just cause to demote the Grievant. The *Daugherty* seven tests were not satisfied. The thirteen reasons relied upon by the Employer for the Grievant's demotion were merely minor ones, mostly not preceded by warning or training.

First, then, the Employer failed to provide adequate notice that any of the thirteen reasons could potentially be a source of demotion. First of all, a failure to respond to phone calls and messages does not appear in the Grievant's position description. In the second place, similarly, a failure to respond to emergency staffing issues also does not so appear. In the third place, the Grievant had no way of knowing that she could be held accountable for the actions of others in her understaffed kitchen. In the fourth place, the Grievant had no responsibility to maintain the posting of current food handler permits. In the fifth place, there is no requirement in the FSM position that an FSM dispose of expired food. In the sixth place, there similarly is no requirement that the Grievant maintain consistent start times. In the seventh place, the opening of the dining room for use by residents is not in her description.

Second, in three respects, progressive discipline was not followed. First of all, no one ever counseled the Grievant that she might be demoted for empty spaces on DOC forms. In the second place, management failed to provide the Grievant with adequate notice that she might be disciplined for failing to oversee the residents who were supposed to clean the kitchen at night. In the third place, while the direction or implementation of proper handling and storage of raw food was within the Grievant's responsibility, she was not adequately warned that continuing to correcting the issue would result in demotion.

Third, the Employer failed to consider both the unfair standards to which the Grievant was held, and mitigating standards. First of all, regarding unfair standards, the Grievant was never given the authority to order items, or to access a budget or credit card. Morever, the Grievant directly asked if she could order shelves for the fridges and dry storage. In the second place, regarding her alleged failure to maintain sufficient food supplies to prepare planned menus, it was wildly unfair to hold those things against her, given both the fact that the DOC never provided specific instances of shortages, and the shortages were hypothetical. In the third place, there is no requirement anywhere that she was expected to meal prep food from frozen to thawing for upcoming meals. Fourth, the Employer failed to call important possible witnesses.

Fourth, Article 2 was clearly violated. The Grievant was past forty and a member of a minority group. It is hard to imagine that the reason she was disciplined was not because of her race. Clearly, she was treated as a "lazy black woman."

Fifth, Article 8.1 was violated by the Employer's failure to provide the Grievant

the supervisory training she requested, and by failing to afford her any relief until December to complete DOC training. Indeed, the Employer even improperly suggested that she complete training at home on her own time.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Employer proved by clear and convincing evidence that the Grievant was demoted for just cause. Accordingly, the grievance will be denied. The following is the Arbitrator's rationale.

Whether an employee has been discharged for just cause commonly involves an analysis of whether one or more of three basic components of that term have been satisfied: 1) Was the employee afforded fundamental due process rights implicit in the just cause clause—e.g., did he or she have forewarning or foreknowledge that his or her conduct would lead to discipline, and was a fair investigation conducted; and was the employee treated fairly—e.g., were the employer's rules consistently enforced? 2) Was the charged offense proved by clear and convincing evidence? And 3), was the penalty imposed reasonably related to the seriousness of the offense, the employee's disciplinary record and any mitigating or extenuating circumstances? The first component must be satisfied by the employer. The second and third components fall within the area of affirmative defenses and, therefore, must be properly raised and established by the defending labor organization.[1]

The Arbitrator will start with the only relevant due process component, that relating to the sufficiency of the investigation. He has studied Investigator 3 Anthony Branchini's 14 interview summaries and testimonies, and has carefully examined all of the 871 pages of the joint exhibits. The Arbitrator finds that Branchini's testimony was entirely credible—his demeanor was that of a person intent upon providing a truthful rendition of the facts—and that his investigation was full and fair. Further,

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[1] *See generally,* Brand, Ed., *Discipline and Discharge in Arbitration*, BNA, pp. 209 *et. seq.* & 260; Elkouri & Elkouri, *How Arbitration Works*, Ruben, Ed., ("*Elkouri*"), (citing at fn. 39, *City of Havre, Montana*, 100 LA 866 (Levak 1992), and re: Daugherty, Ch. 2.I.A; Ch. 15, "Discharge & Discipline," BNA, 6th Ed.; Bornstein, Gosline & Greenbaum, Gen. Eds., *Labor & Employment Law Arbitration*, 2d Ed., Ch. 14, Zack, "Just Cause and Progressive Discipline," Matthew Bender.

there is no valid reason to question any of the interview summaries. Thus, the Arbitrator can only find that the investigation satisfied the due process component of the just cause clause. Moreover, the investigation also established substantial evidence of misconduct.

Because both parties have referenced the *Daugherty* "7-tests," It is appropriate to comment on them. Ordinarily, those tests are not utilized in grievance arbitrations because they were developed by Daugherty for use by a Railway Labor Act "referee," whose authority was limited to determining whether management accorded a grievant due process. A *Daugherty* referee does not conduct a full arbitral hearing under a collective bargaining agreement containing a just cause standard, but rather conducts only a due process review of a management-appointed "judge's" resolution under a collective bargaining agreement not containing a just cause standard. To emphasize, as a referee, Daugherty did not hear witnesses testify about the events surrounding the discipline, the grievant did not appear before him, and he did not receive new evidence. Instead, as referee, he merely heard representatives of the parties argue over the meaning of facts uncovered earlier by the investigation of the judge and presented to a division of the Adjustment Board. Thus, and again, the nature of work of a Daughery referee consists solely of conducting a due process review. In several writings that followed *Grief Brothers*, Daugherty clarified the use of the 7-tests. *See also,* "Arbitral Discretion: The Tests of Just Cause," Dunsford, *42 Proceedings of the National Academy of Arbitrators*, Ch.3; and the due process discussion in ***55 Proceedings of the National Academy of Arbitrators*, Ch 5.** In any event, because the parties have both relied upon *Daugherty*, the Arbitrator here makes a specific finding that the seven tests were satisfied by the Employer.

Turning to the second just cause component, that concerning persuasive and convincing proof of the commission of the charged offenses, the Arbitrator finds that the Employer met its burden. Specifically, the Arbitrator adopts all of the Employer's allegations and contentions as fact.

The starting point here is with a general discussion on demotions in general and, more specifically, disciplinary demotions. General principles relating to demotions may be found in various sources, including, but not limited to, Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., Ch. 13.21; *Discipline and Discharge in Arbitration*, 3rd Ed., Ch. 4.V; and Hill & Sinicropi, *Management Rights*, pp. 365-368. Principles relating to both nondisciplinary and disciplinary demotions may be summarized as follows.

Non-disciplinary demotions are "performance related" and generally relate to a deterioration in ability that results in lower productivity. Where an employee gradually or even somewhat suddenly demonstrates a decline in quality in the skill level, general ability, competence or qualifications necessary to perform the duties and responsibilities required by a job classification, arbitrators are in general agreement that the employee properly may be demoted from the job to the next highest ranking job within the employee's capabilities. A deterioration in ability may be age related, injury related or the result of the onset of mental disorder or disease. Such demotions fall within simple ineptness or "pure incompetence."

Disciplinary demotions fall under two general categories, performance related and misconduct related. Performance related demotions resulting from lowered productivity often occurring after an employee, for no reason readily apparent to an employer, such as aging, injury, etc., begins to perform in a subpar manner. Many employers have chosen to treat such a deterioration in performance properly as a disciplinary matter. In such cases, the employer usually starts with nondisciplinary counseling, then moves to oral reprimand, written reprimand, suspension, and finally, to demotion. A good example of this type of performance related demotion may be found on line: *State of Washington, Dept. of Corrections and Teamsters Local 17 (Smet Demotion)*, Arbitrator Katrina Boedecker, 9/30/13. Boedecker set aside Smet's demotion, finding that her lowered productivity after years of satisfactory service occurred only after she returned from treatment for cancer, and that the employer had failed to utilize progressive discipline.

A misconduct related demotion is entirely different. Such a demotion results not from a decrease in performance, but rather from the commission of a serious (a.k.a., major) offense, such as dishonesty, gross insubordination, gross negligence on-the-job alcohol or drug use, etc. Such a demotion very well may be imposed by an employer in lieu of discharge as an act of leniency.

Whether performance related or misconduct related, a disciplinary demotion is viewed as permanent because it is indefinite and therefore amounts to an "indeterminate sentence," one that may permanently disqualify the employee from contractual seniority rights and significantly affect the employee's pension benefits.. (As an aside, the Arbitrator would note that in his 12 years as a labor-management attorney and in his 40+ years as an arbitrator he has never even heard of a determinate time demotion.) Indeed, the penalty is considered permanent even where management

states, at the time the demotion is imposed, that the employee always has the right to reapply for his or her former position because management always retains the right to deny any application.

In the instant case, the disciplinary demotions of the Grievant fall under both of the two general categories, performance related and misconduct related. She not only lacked inherent ability, after training, she failure to perform adequately.

Turning to another area, the Arbitrator would further refer the parties to Mittenthal & Vaughn, "Just Cause: An Evolving Concept," Arbitration 2006, Taking Stock In a New Century, *Proceedings of the 59th Annual Meeting, National Academy of Arbitrators*, BNA, 2006, and the published accompanying panel discussions, held in San Francisco, California, a presentation attended by the Arbitrator as an Academy member. As the authors note, over the years, the majority view regarding just cause remedy gradually changed from one in which an arbitrator properly deferred only where a union could prove "an abuse of discretion" to one where an arbitrator can properly find that the penalty was arbitrary or capricious—that is, unreasonable—more precisely, one that would be "unreasonable to a reasonable arbitrator." The authors caution, however, at page 36: "Notwithstanding the wide acceptance of the "reasonableness" standard, employers still possess discretion in choosing among the range of penalties appropriate for a given offense. Such discretion is wrongly undermined when an arbitrator sets aside a discharge solely on the basis of leniency (i.e., sympathy for the grievant's plight) without any justification based on stated mitigating circumstances." In sum, a decision to impose a misconduct related demotion is not one that a reasonable arbitrator should belatedly find to be unreasonable.

The Application of the Foregoing Principles to this Case.

First of all, the Employer did not violate Articles 8 and 27. The Arbitrator finds that the Employer presented clear and persuasive evidence that the Grievant was unable to perform the functions of her job; specifically, it proved that she lacked the inherent skills and ability to function as a supervisor. The Employer proved the perpetration of all the failures and commissions set forth in Allegations 1, 2 and 3. Again, Branchini's testimony and supporting investigatory documents convincingly established that inability. In the second place, the Grievant was provided adequate training for her job. While she may not have been provided all contemplated assistance, it was proven that even had she been provided such assistance, she lacked the inherent ability to function

as a supervisor. It goes without saying that not every competent employee possesses the ability to manage, and in this case, the Employer proved that the Grievant did not have that ability. The Grievant's self serving testimony to the contrary lacked any credibility whatsoever.

Secondly, even assuming *arguendo* that the Grievant possessed the inherent ability to function as a supervisor, the Arbitrator finds that the Employer provided both training and retraining, and reasonably determined that, given that training and time spent trying to perform supervisory functions, she did not adequately perform.

Accordingly, the Arbitrator finds that the Employer's determination that her misconduct and failure to perform work adequately was not unreasonable within the meaning of the above described standards, and that the Arbitrator, as a "reasonable arbitrator," should therefore not set it aside.

Thirdly, Article 2 was not violated. There was no convincing or persuasive evidence that the Grievant was disciplined because of her age or race.

Fourthly, the Arbitrator finds that there was no persuasive evidence of bias, fundamental unfairness, or a lack of consideration of mitigating factors. Again, the Employer conducted a full and fair investigation, and made a decision well-grounded in the applicable convincing facts.

AWARD

The Employer had just cause to demote the Grievant. The grievance is denied.

Dated this 30th day of June, 2025,

Thomas F. Levak, Arbitrator,
Happy Valley, Oregon.