BEFORE THOMAS F. LEVAK, ARBITRATOR

In The Matter of the Grievance
Arbitration Between

THE STATE OF WASHINGTON,
and its DEPARTMENT OF SOCIAL
& HEALTH SERVICES

The State and the Department

and

DISCHARGE FOR ASSAULT

THE WASHINGTON FEDERATION OF
STATE EMPLOYEES, AFSCME,
COUNCIL 28, AFL-CIO

ARBITRATOR'S OPINION
AND AWARD

The Union, on Behalf
Scott Croy, the Grievant

This matter came for hearing on October 3, 2024, via Zoom. The State was represented by Assistant Attorney General Janelle Peterson, and the Union by its Labor Advocate Sarah Smith. The parties' advocates closed orally at the end of the hearing on October 3. The hearing was reported by Nicole Bulldis, and the Arbitrator received the transcript on October 17, 2024. Based upon the evidence and the parties' arguments, the Arbitrator decides and awards as follows.

OPINION

I. THE ISSUE.

This case concerns a September 28, 2023 Step 2 grievance which asserted that the September 21, 2023 Notice of Discharge issued to the Grievant by Michael Crane, the Superintendent of the Department's Rainier School, was not for just cause.

The stipulated issue is: Was the Grievant discharged for just cause under the parties' 2023-25 collective bargaining agreement (the "Agreement"), and if not, what is the appropriate remedy? The parties further stipulated: (1) that no questions of substantive or procedural arbitrability exist, and (2) that should the Arbitrator find in favor of the Union, he would render a general award and retain jurisdiction to resolve any conflict between the parties concerning the amount of back pay or benefits due the Grievant.

I. THE AGREEMENT.

ARTICLE 47, WORKPLACE BEHAVIOR

47.1 The Employer and the Union agree that all employees should work in an environment that fosters mutual respect and professionalism. The parties agree that inappropriate behavior in the workplace does not further an agency's business needs, employee well-being or productivity. All employees are responsible for contributing to such an environment and are expected to treat others with courtesy and respect.

47.2 Inappropriate workplace behavior by employees, supervisors and/or managers will not be tolerated. If an employee believes they have been subjected to inappropriate behavior the employee, and/or the employee's union representative, is encouraged to report this behavior to the employee's supervisor or the Human Resources Office and/or file a grievance in accordance with Article 29, Grievance Procedure. At no time will retaliatory behavior be tolerated for reporting inappropriate workplace behavior. Employees and/or union representatives should identify complaints as inappropriate workplace behavior.

47.3 The Employer will look into the complaint and/or grievance and take appropriate action as necessary. If a complaint was filed, the employee and/or the union representative will be notified at the conclusion.

47.4 The Employer and the Union shall jointly make available training on this Article in electronic or in-person format. The training will be provided to union representatives (UMCC committee members, shop stewards, paid Union

staff, Union officers), supervisors, managers and Human Resource Office staff.

47.5 Grievances related to this Article may be processed through Step 4 of the grievance procedure outlined in Article 29.

II. ADMINISTRATIVE POLICIES.

Administrative Policy 18.64 "Standards of Ethical Conduct for Employees" states in part:

A. **Required Standards of Behavior and Conduct**
All employees, contractors and volunteers are require to perform their duties and responsibilities in a manner that maintains standards of behavior promoting public trust faith and confidence as described below:

3. Strengthen public confidence in the integrity of state governmentby demonstrating the highest standards of personal integrity, fairness, honesty, and compliance with law, rules, regulations, and DSHS policies.

4. Interact with the public, DSHS staff and other state employees with respect, concern, and responsiveness.

5. Create a work environment free from all forms of discrimination and sexual/workplace harassment. This includes but is not limited to:

a. Following and abiding by DSHS policies regarding nondiscrimination, sexual harrassment, workplace harassment, and client rights.

c. Creating an environment free from intimidation, retaliation, hostility, or unreasonable interference with an individual's work performance.

6. Comply with the requirements of this policy. Failure to comply with requirements of this policy may result in disciplinary action up to and including discharge from employment.

Administrative Policy 18.66, "Discrimination, Harassment, and Other Inappropriate Behaviors" states in part:

A. Prohibited actions

1. The following actions are prohibited:

A. Sexual harassment is prohibited: Sexual harassment is defined as unwelcome language or conduct of a sexual nature, or language or conduct that is because of sex, when:

i. Such language or conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment (this can happen even if the complaining party is not the intended target of the sexual harassment);

ii: Such conduct is made either explicitly or implicitly a term or condition of employment; or,

iii: Submission to or rejection of such conduct is used as the basis for employment decisions.

C. Inappropriate behaviors:

1. **Inappropriate behaviors prohibited**. It is the policy of the DSHS that all employees have the right to conduct their work activities in an environment that is free from any form of inappropriate behavior. Inappropriate behavior means behaviors that create a disrespectful, intimidating, or offensive environment or that interfere with an employee's work performance. Inappropriate behavior does not include behaviors based on a person's protected group status that are covered in section A.1 of this policy.
2. Conduct that violates section C.1 may include, but is not limited to verbal, non-verbal, and physical behaviors or conduct.

III. BACKGROUND.

The Department maintains several habitation centers for individuals with intellectual and developmental disabilities, known as "Schools." Each School is separately managed and supervised by a Superintendent, who has final authority over every aspect of his or her School, including discipline and discharge; and Crane

credibly testified that he possessed that authority.

This case concerns the Rainer School, an intermediate care facility, located within the city of Buckley, Washington. Rainier has several separate "Houses," each of which has several bedrooms and bathrooms. This case specifically involved the San Juan House, which houses several adult male "Clients" who bed separately but utilize five common bathrooms. Bargaining unit staff responsible for day-to-day care of Clients and the cleaning of the House are classified as Attendant Counselors, some of whom also have non-supervisory "lead" capacity. Attendance Counselors ("ACs")work separate day and evening shifts, one to three to a shift. Night shift starts at 10 p.m. Clients sleep during the night shift. During shift overlap, day shift and night shift Attendance Counselors confer and work together for a short period of time.

On January 27, 2011, the Department and the Union entered into a Settlement Agreement that, basically, removed a demotion from the Grievant's record, and moved him up from AC1 to AC2. On June 14, 2013, he was promoted to AC3. The Notice of Disciplinary Hearing and the Discharge letter both noted the existence of the Settlement Agreement under "Background." Crane credibly testified that, in deciding to terminate the Grievant, he did not consider that stale prior discipline. Thus, there was no record of "active" prior discipline in his file. Further, he had very good performance evaluations.

On the date in question, December 25, 2023, AC2 Cassie Argo, AC1 Wayne Wise, and AC1 Amber Tamika, worked the first shift. The Grievant, a 20+ year employee, and previously a long term first shift employee, an AC3, recently moved to the night shift because he suffered from certain medical problems, and felt the night shift would be easier on him.

IV. THE PARTIES' CLOSING ARGUMENTS.

The State's Closing Argument.

First, we have not heard any evidence from the Union that the sufficiency of the investigation or the process is in question.

Second, Crane credibly testified that he did not consider the Grievant's prior stale discipline, and there was no evidence to the contrary.

Third, the State does not believe that the Union challenges that the sexual assault and yelling would be against the Policies.

Fourth, then, it appears that we only have two questions: One, is it clear that the alleged conduct occurred, and two, is the level of discipline warranted?

Fifth, there are two types of conduct that Crane found were more likely than not to have occurred: One, he found that a sexual assault had occurred. Two, he found that the Grievant's yelling caused a disruption to the work environment. Both were violations of Policies 18.66 and 18.64. There was sufficient credible evidence that both incidents occurred, and the Union failed to produce any persuasive evidence that would tend to show that any of the witnesses to the conduct had a motive to lie. Thus, there is no reason to usurp Crane's authority to determine that the conduct had occurred. Cassandra Argo may have been the only witness to the sexual assault, but such is not unusual in these type of situations. Employers should not have to produce video evidence or eyewitnesses in order to substantiate a victim's statement. And again, the Union did not present any evidence tending to show that Crane was unreasonable in believing Argo. The yelling and profanity were witnessed by several employees, and Crane reasonably determined that the Grievant's denial that it was he who had yelled or was profane was not credible. At the arbitration hearing, the Grievant still seemed to be in denial and equivocating that he had been out of control.

Sixth, the Arbitrator should not disturb Crane's reasonable decision. Neither should the Arbitrator disturb the penalty Crane imposed. Clearly, the Grievant lied about not yelling profanities; so why assume that he did not lie about grabbing Argo's breasts? The belaboring of the condition of the bathrooms and rank speculation about what the Grievant admitted was mere gossip about the romantic lives of witnesses, without any supporting information.

The Union's Closing Argument.

First, due process/fairness deficiencies existed. In the first place, Wayne Wise and Amber Tamika both credibly testified that Administrative Investigator Brittany

Barber did not write down their statements correctly. Therefore, the investigation was in fact flawed, and therefore insufficient for Crane to rely upon. In the second place, evidence provided by the Union demonstrated that the Grievant was not treated fairly in comparison with other employees in his position.

Second, the evidence against the Grievant was not substantial, and therefore Crane was not reasonable in relying upon it. In fact, Wise's and Tamika's testimony lined up with the Grievant's. Indeed, the Grievant "ranted and raved," but it was about the condition he found the House in when he started work, it was not directed towards any employee. Moreover, he apologized for his behavior.

Third, the allegations that the Grievant had been drinking, had had past anger issues, and had had no-calls/no-shows were unsupported by any credible evidence.

Fourth, even assuming, for the sake of argument, that substantial evidence of guilt existed, the degree of discipline was not reasonably related to the penalty of discharge, given the facts: One, that the Grievant had an excellent record, and two, that it was a one-time event and no active prior discipline existed.

V. FINDINGS OF FACT.

The Arbitrator finds that the State proved the following facts through clear and convincing evidence. In particular, the Arbitrator finds that Argo, Wise and Tamika testified in an entirely forthright and credible manner, and that their testimony was corroborated by their prior statements and all documentary evidence, including statements made to Barber. The Arbitrator further notes that while the Grievant testified that "everyone knew" that Argo and Wise were in an intimate relationship, Argo, Wise and Tamika all credibly testified that they were not; and no Union witness corroborated the Grievant's claim.

At 9:55 p.m., December 24, 2023, the Grievant arrived to start his night shift. Argo, Wise and Tamika were finishing up the day shift. The Grievant was upset and agitated. Neither during the course of the investigation, at the Pre-Disciplinary Hearing, nor during the course of the grievance procedure did he offer documentary

evidence of any specific medical condition, although at that hearing he stated that his health was not good and that he had trouble sleeping. Also, he previously told Argo that he suffered from Parkinson's, and at the arbitration hearing he testified he had problems relating to his Thyroid Gland. It is certain, in any event, that something caused him to move from the day shift to the less stressful night shift, and that he was tired and agitated when he arrived. As an aside, the August 29, 2023 Notice of Pre-Disciplinary Meeting advised him of his right to take advantage of the Employee Assistance Plan ("EAP"), but there was no evidence that he elected to do so.

When the Grievant started work, Wise was waiting out the last five minutes of his shift in a sofa. The Grievant and Argo together did a "house check." He found that there was exposed feces in one or more bathrooms, and that there was tracked urine from the bathrooms to the bedrooms. As he walked around the House, he uttered loud complaints, directed at no particular staff members, accompanied by repeatedly using the F-word, saying loudly to Argo, words to the effect of, no one had been doing their job. Clients were sleeping behind closed doors and did not hear the Grievant. He then walked outside through a service door and, for some unknown reason, did not leave to go home, and just stood there.

Argo walked alone, picked up some trash, then walked through the service hall door, and, not knowing the Grievant was there, accidentally bumped into him. The Grievant responded by grabbing her upper arms, while stating, "It's not you Cass, you know I love you." He then grabbed her breasts, released her, smiled, and walked back into the House. Wise had followed the Grievant, but did not see the assault; however, he did hear the Grievant's last words to Argo. Argo told Wise what had happened, and he advised her to file a police report or contact the Administration. She told Wise she did not want to because she didn't want the Grievant to get into trouble.

The Grievant's version was much different, and lacked credibility. In that version, he was inside the House in the living area, talking with Wise, when Argo walked through, that he turned to apologize to her for his loud talking, and that he, Wise and Argo all bumped into each other.

VI. ALLEGED DISPARATE TREATMENT.

The Union offered seven disciplinary actions issued by the heads of Department facilities, together with a spread sheet summary of some sixteen disciplinary decisions or resignations. None of the seven concerned Schools, none concerned discipline issued by Crane—although one Investigative Report concerned the Rainier School—three concerned two Child Study and Treatment Centers, three concerned different Developmental Disabilities Administration facilities, and one concerned the Fort Steilacoom Competency Restoration Program. No testimony was offered concerning any of those facilities.

VII. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the State proved by clear and convincing evidence that the Grievant's discharge was 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 charged offense proved by clear and convincing evidence? 2) 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? 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]

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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,"

Turning first, then, to the first just cause component, that concern proof of the charged facts, the Arbitrator finds that Crane's reasonable decision, supported by the weight of evidence, was confirmed by clear and convincing evidence provided at the arbitration hearing by the State. The Arbitrator found Argo to be an entirely credible and forthright witness, and that her testimony was supported by State witnesses. On the other side of the coin, the Arbitrator found the Grievant's testimony to be not credible, inconsistent with his prior statements, inconsistent with the testimony and statements of State witnesses, to be self serving, and therefore to be entitled to no weight. Specifically, the Arbitrator finds that the persuasive and convincing evidence was that both charges were proven. The Grievant, out of control, yelled profanities in the work place, and grabbed a fellow employee by the breasts. To be clear, not only was Crane's decision reasonable, the facts he relied upon were proven at the arbitration hearing.

Regarding the second just cause component, that relating to due process and fairness, the Arbitrator finds that the Union failed to prove any deficiencies. To the contrary, Barber conducted a full and fair investigation. She interviewed all persons who were able to shed light on the situation, and submitted accurate reports. Regarding the so-called disparate treatment argument, the Arbitrator finds that the examples provided by the Union are irrelevant because they did not concern the Rainier House, other Houses, nor other decisions made by Crane, Moreover, no testimony was offered concerning the examples.

Turning then to the last just cause component, that concerning the propriety of the imposed discipline, the Arbitrator finds that Crane's decision was reasonably related to the seriousness of the offense, the employee's disciplinary record and any mitigating or extenuating circumstances. Most importantly, the State proved that a sexual assault had occurred, an offense so serious that citations of authority relating to appropriate penalty are unnecessary. Moreover, the sexual assault was exacerbated by the extremely inappropriate surrounding misbehavior by the Grievant, and the Grievant's failure to take any responsibility for his most serious offense,

Regarding that third component, the Arbitrator also refers 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.

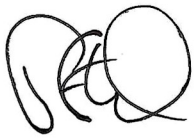
In the instant case, the only basis for overturning Crane's decision would be leniency, something the Arbitrator cannot do.

For all the above reasons, the grievance is denied.

AWARD

The Grievant was discharged for just cause. The grievance is denied.

Dated this 24th day of October, 2024,



Thomas F. Levak, Arbitrator.