

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

**STATE OF OHIO
DEPARTMENT OF REHABILITATION
AND CORRECTION,
FRANKLIN MEDICAL CENTER**

The Employer

And

**Service Employees International Union,
District 1199 AFL-CIO**

The Union

DRC-2023-00331-12
Arbitrator: Jerry B. Sellman
Decision Dated: March 11, 2024
Issue: Removal of Carl Bridgeforth

APPEARANCES

FOR THE EMPLOYER:

Philip Rader, Esq. - Labor Relations Officer 3, Ohio Department of Rehabilitation and Correction (DRC), representing the DRC, Franklin Medical Center
Christy Wilson – Former Intern with the DRC Franklin Medical Center, Witness
Ms. Diana Jackson – Education Specialist (Teacher) with the DRC Franklin Medical Center, Witness
Mr. Jason Jones – Corrections Assistant 1 Investigator with the DRC Franklin Medical Center, Witness
Malcom Heard – DREC Franklin Medical Center Warden, Witness

FOR THE UNION:

Geoff Davies – Service Employees International Union, Local 1199 Representative, representing Grievant
Carl Bridgeforth – Former Correctional Program Specialist (Case Manager) with the DRC Franklin Medical Center, Grievant and Witness

I. NATURE OF THE CASE

Just Cause for Termination; Burden of Proof; Weight of Witnesses Credibility; Violation of Workplace Violence, Anti-Discrimination and Sexual Harassment Policies: This matter came for hearing before Arbitrator Jerry B. Sellman on January 23, 2024. The hearing was held at the Offices of District 1099 of the Service Employees International Union, 1395 Dublin Rd, Columbus, OH 43215. The proceeding arises pursuant to the provisions of the Collective Bargaining Agreement (hereinafter “CBA” or “Agreement”) between the State of Ohio (hereinafter the “Employer”) and SEIU/District 1199, WV/KY/OH (hereinafter the “Union” or “SEIU”). This case concerns a Grievance filed by Carl Bridgeforth, a Correctional Program Specialist (Case Manager) with the Department of Rehabilitation and Correction, Franklin Medical Center (hereinafter “Grievant”) protesting the Employer’s action to terminate his employment for violations of various Rules contained in the Employee Rules of Conduct regarding alleged actions of unwanted and repeated sexually charged comments to and unwanted sexual contact with an Intern at the Franklin Medical Center during the summer of 2022. Grievant, a 28-year career employee with no active disciplinary record, argues that there was no just cause to terminate his employment because (1) he did not engage in any of the alleged misconduct; (2) the intern (alleged victim) fabricated all of the incidences; and (3) the lack of any witnesses to any of the alleged misconduct demonstrates the lack of any corroboration of her allegations. The Employer argues that it had just cause to terminate the Grievant for violations of its Employee Rules of Conduct because (1) the Intern/victim was the more credible witness; (2) the results of a Computerized Voice Stress Analyzer (CVSA) bolstered the truthfulness of her allegations; (3) it has a duty to protect the workplace from acts of violence, anti-discrimination and sexual harassment by removing any employee engaging in such misconduct.

At the beginning of the hearing, the Parties stipulated that the matter was properly before the Arbitrator for resolution. At the conclusion of the hearing, the Parties requested permission to file post-hearing briefs, which request was granted. Post-hearing briefs were filed on February 26, 2024.

The Parties stipulated that the issue in this proceeding is:

Was the Grievant terminated for just cause? If not, what shall be the remedy?

The applicable provisions of the Agreement in this proceeding are as follows:

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 8 **DISCIPLINE**

8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

PERTINENT EMPLOYEE RULES OF CONDUCT

. . .

- Rule 12A: Making obscene gestures or statements, or false, abusive, or inappropriate statements.
- Rule 13: Improper conduct or acts of discrimination or harassment on the basis of race, color, sex, age, religion, national origin, disability, sexual orientation, gender identity or military status.
- Rule 39: Any act that would bring discredit to the employer.
- Rule 49: Sexual conduct or contact, while on state time, with a person not under the supervision of the Department, regardless of consent.

II. SUMMARY OF THE TESTIMONY AND POSITION OF THE PARTIES

Grievant, at the time of his removal, was a 28-year employee of the Ohio Department of Rehabilitation and Correction (ODRC or DRC) at Franklin Medical Center (FMC). He was a Correctional Program Specialist (Case Manager) and had no active discipline. During summer of 2022, Ms. Christy Wilson (Wilson or victim), was a student studying criminal justice at Columbus State Community College in Columbus, Ohio. In order to complete her degree, she needed to fulfill an intern requirement in the field. During the months of June through September, she was placed as an unpaid intern by ODRC at FMC. She was paired with the institution's Unit Management Team, and assigned to shadow four (4) employees, all males. Two (2) of the employees were Unit Sergeants, and the other two (2) were Case Managers. Carl Bridgeforth (Grievant) was the primary staff member with whom she was assigned to work.

On August 4, 2022, Diana Jackson (Jackson), an Education Specialist (Teacher) with the DRC Franklin Medical Center, filed an Incident Report about her observations of an incident occurring on August 2, 2022, and a subsequent conversation with Wilson about alleged misconduct involving Grievant. In her Incident Report, she described an incident occurring on August 2, 2022, as follows:

"I approached the CO's desk in the 2South hallway. I believe it was after 10:30 count cleared, but I do not remember the actual time. I have stated 11:00 AM on this report, but I am not certain that is correct. Mr. Bridgeforth and Ms. Wilson were also at the desk. A number of inmates were also present. Ms. Wilson was standing in front of the desk when Mr. Bridgeforth moved behind her to sit in the chair next to the desk. As he passed her, he made prolonged contact with her from behind. After he sat down, Ms. Wilson made eye contact with me, and her expression and body language led me to believe that there was something wrong about the situation.

The following morning (August 3) while Ms. Wilson was waiting in front entry for her escort, Ms. Wilson disclosed to me that Mr. Bridgeforth had been sexually harassing her for several weeks. She reported that the harassment had consisted of sexually explicit comments and unwanted sexual contact. After her disclosure, I understood her response when Mr. Bridgeforth made contact with her and that it was part of a pattern of harassment

that she had experienced. For this reason, I am writing the report now rather than when the Incident occurred, as I did not realize at the time the gravity of the incident.”

Based upon the filing of the Incident Report, Grievant was immediately placed on Administrative Leave that same day, and an investigation was initiated.

A subsequent review of video footage during the investigation revealed that Grievant was already sitting at the desk at the time Jackson approached the desk. Prior to Jackson arriving at the scene of the incident, Grievant had walked to the desk in front of Wilson, and there was no contact. When Grievant got up from the chair and left the area, he did walk behind Grievant, but the video revealed that there was no contact with Wilson in his brief passing. For several additional minutes after Grievant left the area, Jackson and Wilson continued to talk in a seemingly jovial manner.

Jackson testified at the hearing that from her angle, it did look as if Grievant made contact with Wilson, but admitted the video demonstrated otherwise.¹ She held firm in her belief that when Grievant passed behind Wilson she observed Wilson’s facial expression change to one of a fearful look. and a “help me” type of look on her face. She indicated that she did not report the incident on the day of its occurrence, because she did not have any context into which the event could be placed. She recalled that on August 3 or 4, 2022, when Wilson did disclose to her that she (Wilson) was being assaulted, harassed, and threatened by Grievant for weeks, she recalled she had heard repeated allegations of sexual harassment and intimidation at the Grievant’s hands from female staff members at FMC and another institution at which the Grievant previously worked. It was awareness of these situations, coupled with a change in the victim’s demeanor, that cued her into assessing something was wrong.

¹ It is clear from the video that any perceived contact would have occurred when Grievant left the area, not when he walked to the desk to sit down.

Wilson also filed an Incident Report on August 4, 2022, indicating that during the week of July 14, 2022, Grievant started making inappropriate sexual comments and engaged in inappropriate touching while in his office. She indicated that thereafter he commented on multiple occasions that he would like for her to have his children, that he inappropriately touched her chest and smacked her buttock in an elevator. She further stated that on Friday July the 29, Grievant asked her to meet him after work at a service station, and he would pick her up; that when she was with him at home, she would have to meet his sexual demands; and he continually asked her what she likes to do sexually. She also indicated that Grievant sent her into sections of the facility unescorted.

Wilson provided additional information in a report on August 8, 2022, indicating that she was worried and has panic attacks about Grievant finding out that she filed a report, that Grievant had forced her to give him her phone number, had put his hands around her neck and threatened to strangle her, and that on two occasions Grievant said he would “tear my ass up.”

In the course of the investigation, and as testified at the hearing, Wilson stated that the harassment initially took the form of sexual comments beginning on July 11, 2022, which included requests for oral sex, saying he wanted her to have his babies, asking what her sexual preferences were, sharing what his sexual preferences were, and what she would need to do to satisfy him sexually if they lived together. This occurred “almost every day, multiple times per week” for several weeks. Wilson testified that she repeatedly told the Grievant these comments were unwanted and asked him to stop. He did not respond to her requests. She indicated that Grievant escalated his behavior to include physically touching her breasts and thighs both over and under her clothes in his office at 3S. He had cornered her a couple of times in his office and forced her to kiss him. He also touched her buttocks in an elevator.

She described intimidation tactics the Grievant employed to gain compliance from her. These tactics included standing in doorways, impeding her ability to leave his office until she gave him her phone number, telling her she better answer when he calls her, telling her nobody would believe her story, and ultimately placing his hands around her neck while stating he wanted to strangle her. She testified that inmate Jackson (no relation to Diana Jackson, the teacher) witnessed the “strangulation incident” and ran out of the office, although Jackson denied this in a prepared statement. Wilson did not perceive any of these actions to have been made in a joking manner. She testified that no other staff members at FMC engaged in this behavior around her.

Wilson testified Grievant obtained her telephone number and called her, but she blocked his number and never returned his calls. Those calls were found on call logs submitted into evidence. Grievant testified that Wilson was looking for an apartment, and the purpose of the calls was to inform her of available apartments.

Wilson testified Grievant told her if she ever told anybody what was going on, he would come to her home and take her to a property he had in Tennessee where nobody would find her. It was this statement that caused her to seek a protection order against the Grievant.²

The Employer’s administrative investigation consisted of interviewing several employees, including Wilson and Grievant. Of the several witnesses interviewed, Diana Jackson was the only witness that observed any interaction between Wilson and Grievant. While Jackson initially recollected seeing Grievant in the Hallway brush against Wilson that was longer than would be casual behavior from her angle of view, viewing a video at the hearing demonstrated that Grievant did not brush against Wilson, and his passing was momentary. She nonetheless continued to express the opinion that Grievant’s presence changed Wilson’s facial expression and body

² A copy of a Protective Order was not requested in discovery, nor produced at the hearing.

movement in a negative way. While Corrections Officer Pearson did not witness Wilson being left unescorted in the facility, the officer did state that Wilson commented to him that Grievant made her feel uncomfortable. Inmate Jackson, whom Wilson stated was in the room when Grievant put his hands around her neck, denied witnessing the event. With only one eyewitness to an event related to the investigation (with the exception of observing Wilson unattended in the facility), the Employer's Investigator testified that he needed to assess the credibility of Wilson and Grievant to draw a conclusion in the investigation.

Regarding the credibility of Wilson, he corroborated her allegations that she had received phone calls from Grievant and was left alone without an escort in the institution when assigned to the Grievant. To further test her credibility, he asked her to submit to a Computer Voice Stress Analyzer (CVSA) test, which she did, and an assessment of the test results was that Wilson was being truthful about her allegations against Grievant. Based upon her demeanor when questioned and the above investigative results, he believed Wilson's allegations to be credible.

The Investigator was of the opinion that Grievant was less credible because he was untruthful about several questions posed to him. The first incident involved his answer to an inquiry if he had ever been accused of, or interviewed for, the same or similar allegations as those made by the victim (physical touching, harassing comments, impeding her ability to leave, etc.). Grievant responded that he had not. The Investigator knew this to be a false statement because he had three investigation summaries indicating that (1) on December 14, 2017, an investigation summary alleged Grievant hit an Inmate on the buttocks and told her to "get out of here with your fine ass;"³ (2) on November 20, 2020, an investigation summary alleged Grievant made inappropriate comments towards a female Officer and requested her phone number repeatedly; and

³ Grievant is alleged to have apologized to that victim, stating he wasn't thinking about there being a camera around "when I smacked your ass".

(3) on December 14, 2017, an investigation summary alleged Grievant had hit a female on the buttocks. The Investigator testified that these allegations involved Grievant's fixation on female buttocks, wanting phone numbers, and making inappropriate comments. Grievant testified that he did not mention these instances because they were not of the same magnitude of the accusations in this investigation, and nothing transpired as a result of the accusations.

The Investigator concluded that the second incident of his untruthfulness was his denial that he left Wilson unattended and unescorted in the facility. The fact that she was seen unescorted in the facility was corroborated by other witnesses.

After the Investigator completed his investigation, which concluded that Grievant engaged in the alleged misconduct, and some form or disciplinary action should be considered, a Predisciplinary Meeting was held on December 27, 2022. The allegations and charges against Grievant were presented, and Grievant denied the charges. Grievant's Representative argued that this was a "he said/she said" case, and there was no credible evidence to substantiate the accusations.

On January 17, 2023, the Hearing Officer issued his Report finding Just Cause to Remove Grievant for violations of the cited Employee Rules of Conduct.

On February 1, 2023, Warden Malcom Heard issued Notice to the Grievant of his Removal. On February 2, 2023, Grievant filed the instant Grievance. Unable to resolve the Grievance in subsequent Step meetings, the Grievance was referred to arbitration.

Position of the Employer

The Employer argues that this is a case of credibility, and Wilson is not only the more credible witness, but she is also the victim of Grievant's sexual harassment, which constituted a violation of four Employee Rules of Conduct. The removal of Grievant should be upheld because

(1) testimony and documentation support Wilson (the Victim) as the more credible witness; (2) a thorough investigation was undertaken, giving all parties the opportunity to present their positions; (3) Grievant violated four Employee Rules of Conduct; (4) Wilson had no motive to lie, but Grievant does; and (4) the Union's attempts to discredit Wilson are unavailing.

Testimony and documentation support the Victim's allegations, and she is a more credible witness. Wilson's statements that Grievant left her unattended at the facility were corroborated, her statements that she was uncomfortable around Grievant was corroborated by two witnesses, and an expert review of her CVSA (lie detector test) that she was truthful about her allegations, and the Grievant's false answers in the investigation, support this conclusion.

The Union tried to discredit the results of the CVSA examination, but their attack on the test should be rejected by the Arbitrator. During the investigation, the Union did not object to the use of the CVSA, the results of the CVSA, or testimony about the CVSA. Further, the reports presented at the hearing challenging CVSA tests as unreliable were not presented to the Employer prior to the hearing and were written sixteen (16) years ago. As testified by the Employer's expert, CVSAs have been proven reliable today. If the Union had presented reports challenging the reliability of CVSA tests prior to the hearing, Management would have been able to provide current countervailing information. Additionally, the results of the CVSA examination were not introduced as the sole determinant factor in the investigation regarding proof of the reliability of the victim's accusation, but as an additional factor in determining, in light of other corroborated testimony, the truthfulness of the victim.

Presenting evidence at a hearing for the first time places Management at a disadvantage and is frowned upon, as noted by Arbitrator Robert Stein in *DRC and OCSEA Local 11*, Grievance No. 27-16-20021020-3778-01-03, (Stein 2004). Arbitrator Robert Stein opined that "...

withholding information that would contribute to such a settlement frustrates the very purpose of the grievance procedure.” The attempt by the Union to present evidence challenging the reliability of a CVSA examination should be rejected.

The veracity of the Victim was contrasted by the lying of Grievant in the interview process. The Employer demonstrated that Grievant lied about seemingly unimportant facts, which caused significant concerns for his credibility. If he is willing to lie about the small, insignificant points, what else is he willing to lie about? Grievant denied that he sent the Victim around the facility without an escort, which we know to be false; Grievant denied that allegations of sexual harassment were brought against him in the past, which we know to be false; Grievant had no reason to obtain the Victim’s phone number and call her under the guise of providing information about searching for an apartment; and the Victim would have not have known about a property of Grievant’s in a remote area of Tennessee without the Grievant relating that information.

As noted by a number of arbitration decisions, an accused employee is presumed to have an incentive for not telling the truth, and when testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed. That principle is applicable in this situation. In the instant case, the victim stands to gain nothing by continuing to speak out against the Grievant. She was not and is not eligible for his position as alleged by the Grievant at the arbitration (awarding the position is covered by the Collective Bargaining Agreement, which does not apply to her). While the Union insinuated that Grievant’s removal was influenced by the filing of a civil lawsuit by Wilson, the lawsuit was filed months after her initial allegations were made and has no bearing on the truthfulness of her testimony. The Grievant, on the other hand, has a clear interest in lying about the allegations and has been proven to be willing to do so.

In summarizing the credibility of the Victim and Grievant, the Employer has both affirmed credibility of its witnesses and discredited the Grievant in the following manner: (1) Grievant lied about being accused (three times) of the same and similar behavior within the previous five (5 years) (to include a fixation on buttock areas, inappropriate comments and demanding phone numbers); (2) Grievant lied about Ms. Wilson being without an escort on the days she was assigned to him; (3) the Victim's statements have been corroborated through eyewitness testimony and documentation; (4) an eyewitness observed the victim have an uncontrolled physical reaction to being near the Grievant; (5) the victim reported the Grievant made very specific statements, which are identical to statements the Grievant made to other female employees; (6) Grievant absent-mindedly admitted to owning a property that was "out of the way" on direct examination at the hearing; and (7) the victim passed a CVSA.

The Union has complained that Management's investigation has failed to meet the test of being fair, impartial, and complete. To the contrary, Management exhausted every possible avenue available to it to uncover the truth in this case. In fact, to demonstrate the fair and impartial nature of the investigation, the Employer's Investigator stated on cross examination that he decided to include a contradictory statement from an Inmate because "it was part of the investigation." The Investigator testified, however, that the Inmate was Grievant's porter. Porters are coveted positions in institutions that come with good pay and additional privileges. The Inmate would have a vested interest in providing a statement favorable to Grievant, who could have him removed from his job of office porter. The Victim testified on direct examination that the Inmate "ran out of the room" when he witnessed the Grievant's actions, indicative of the Inmate's desire not to be involved. Management has demonstrated a fair and impartial investigation was completed, which clearly substantiated the victim's allegations.

Grievant violated the following Rules of Employee Conduct: Rule 12A, *Making obscene gestures or statements, or false, abusive, or inappropriate statements*; Rule 13, *Improper conduct or acts of discrimination or harassment on the basis of race, color, sex, age, religion, national origin, disability, sexual orientation, gender identity or military status.*; Rule 39, *Any act that would bring discredit to the employer*; and Rule 49, *Sexual conduct or contact, while on state time, with a person not under the supervision of the Department, regardless of consent.* The Employer has a clear and obvious obligation to provide a safe and secure work environment. The cited Rules are in place to make that obligation a reality for all persons that enter the institution, with no exception. The Grievant's actions grossly violated each of these policies.

Grievant violated Rule 12A by making comments of a sexual nature toward the victim, including requests for oral sex, asking what her sexual preferences were, describing his sexual preferences and telling her what she would need to do to him to keep him satisfied sexually. Grievant violated Rule 13 by making the above statements based on the victim belonging to a protected class (female), and Grievant's actions were threatening and harassing in nature. Grievant violated Rule 39 because his actions are a discredit to the agency, and FMC in particular, which works with local colleges for interns to be placed at worksites in the hopes it will translate to future applicants for employment. The Grievant's actions have had an adverse impact on these relationships as colleges could question if the agency can truly protect their students. And Grievant violated Rule 49 when he groped the victim's breasts and buttocks in a pattern of continued harassment and intimidation while he was on the clock at Franklin Medical Center.

In assessing the entire situation, it is clear the Victim had no reason to lie. She was an Intern, not a full-time employee seeking career employment; she did not accuse any of her other

male supervisors with any misconduct, which she could have if she wanted to “make up a story;” and she had nothing to gain by getting Grievant removed from his job.

The Union’s attempt to discredit Wilson was unavailing. Citing the fact that she filed a lawsuit against the state of Ohio the day before Grievant was issued his removal on February 1, 2023; referencing a perjury conviction thirteen (13) years ago in 2011, when she was twenty-two (22); and emphasizing that she mixed up specific dates as to when one of the alleged events occurred (meeting at a gas station); have no relevance to determining her credibility in bringing the charges of sexual misconduct against Grievant.

The Employer did not lose its head and terminate Grievant to try to fight off the pending legal action (the Complaint that was filed against the State of Ohio) as argued by the Union. The Employer does not issue removals based on the existence of lawsuits, and removing staff (Grievant, in this case) does not absolve the agency from liability. The Victim reported the Grievant’s actions and participated in investigatory interviews several months prior to the filing of the lawsuit, Grievant is not named in the lawsuit, and reporting Grievant’s actions and testifying against the Grievant does not benefit the Victim in any form. The disciplinary process was well under way before the lawsuit was filed. The Predisciplinary Meeting was held on December 27, 2022, a full month prior to the lawsuit being filed, and Warden Heard would not have had knowledge of the lawsuit at the time of the removal.

The evidence of an old perjury conviction has no relevance to the Victim’s current credibility. Notwithstanding the fact that the Union had no documentation to support their claim, the Victim readily acknowledged the conviction. She readily admitted that she provided false information when she was trying to help a friend get through a divorce, and has learned from her

mistake, and concluded it was possibly the worst decision she's ever made. If everybody were judged by their acts of transgression as youth, nobody would ever be deemed to be credible.

The Union finally attempted to discredit the Victim by demonstrating the Grievant was not working on a specific date she claimed Grievant ordered her to meet him at a local gas station/carry out. On re-direct, the Victim acknowledged she knew the Grievant would be on vacation the week noted on his timesheet, and simply got her dates mixed up.

While the Rules cited afford lesser penalties such as working suspensions, given the egregiousness and pervasiveness of Grievant's actions, removal is the only reasonable outcome for Grievant to protect the worksite from his behavior, even in consideration of his tenure and no active discipline. Grievant should be removed because his misconduct involved harassment and intimidation through verbal and physical actions, which actions were unwelcome or unwanted and created discomfort. Here the Victim distinctly stated the actions were unwelcome. These actions interfered with the ability of the Victim to perform her duties and created a hostile and intimidating work environment.

Position of the Union

The Union also argues that is a case of credibility but argues that Grievant is the more credible of the two because the alleged Victim Wilson's testimony was contradictory and inconsistent, and because of her prior conviction of perjury, her testimony cannot be accepted as honest or truthful. It argues that the Employer did not have just cause to terminate the Grievant for several reasons: (1) there were no eye witnesses to any of the alleged misconduct of Grievant; (2) one cannot trust the testimony of a convicted perjurer to be honest; (3) while an investigation took place, it yielded no evidence of Ms. Wilsons allegations, and it was not fair; and (4) the Employer

failed to meet its burden of proof to demonstrate that Grievant violated the Rules cited by clear and convincing evidence.

While the Employer considered testimony and statements of others interviewed to corroborate the allegations of Wilson, there were no eyewitnesses to any of the alleged misconduct of Grievant. Of the ten witnesses interviewed in the investigation, there were only three people who either claimed or had been claimed to have been a witness to any of the allegations: Wilson, the teacher Diane Jackson, and Inmate Jackson. The video of the encounter about which Diane Jackson submitted an incident report and testified demonstrated that Grievant did not brush up against Wilson and at no point throughout the video does any party appear anything other than relaxed and talking freely, even laughing in some instances. Inmate Jackson said he saw absolutely nothing inappropriate, only a “work like environment in my presence.” That leaves the Employer with no eyewitnesses to corroborate any of Wilson’s claims.

Wilson is a convicted perjurer who stands to gain from making false accusations against as many ODRC employees as possible. None of her allegations were corroborated. One of her claimed incidents (request to meet at a gas station) occurred on a date when Grievant was not even in the same location as the accuser, who in fact was many miles away, in a different state on this date. Details matter and when concocting a lie, the details are often where the lie comes unraveled. She claimed in testimony that she previously lied under oath for good reason and learned her lesson. That may be the case, but that you’ll lie under oath for what you think is the right reason is a revelation of character: whether you’ll tell the truth or not under oath depends on the circumstances. Ms. Wilson was not able to pinpoint precise dates of the alleged violations save one, which proved wholly incorrect and therefore quite suspect.

While an investigation took place, it was not fair and objective. The definition of fair is: “marked by impartiality and honesty: free from self-interest, prejudice, or favoritism” or “conforming with the established rules” (Dictionary.com). The conclusion of the investigation certainly seems to be favorable to the accuser, without any evidence. The Warden himself says that his decision was based on the testimony of one individual, but that was solely the alleged victim.

The Employer disregarded its own policy on the use of the CVSA. The results of the CVSA examination should be disregarded. Not only is it unreliable, as evidenced by the articles submitted into the evidence, the Employer’s own policies provide that “in no case shall the results of the CVSA be the sole determining factor for offering employment or a final determinant factor in an administrative investigation.” It additionally provides that “no incarcerated person or staff member shall be found guilty in a disciplinary proceeding or otherwise discriminated against in any other institutional proceeding or assignment solely on the basis of the results of a CVSA examination, unless there is supporting evidence, which is both reliable and probative.” Here there was no other reliable and probative evidence.

The definition of objective is “expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations.” The Investigator himself said that his conclusion came down to the fact that he found Ms. Wilson to be more credible. His feelings guided him. Warden Heard stated something very similar. When asked on cross examination why he chose termination when there was a potential for suspension in the disciplinary policy he replied: “Based on the seriousness of the acts. Based on her testimony.” Warden Heard, in making his decision, accepted blindly what Ms. Wilson said. No attempt to

weigh what Ms. Wilson said against anything else, let alone what Grievant said. That is not objective.

The Employer failed to meet its burden of proof to demonstrate that Grievant violated the Rules cited by clear and convincing evidence. Without clear and convincing evidence, they are taking the word of one person over the other. This is a “she said/he said” case, and even to satisfy a minimum preponderance of the evidence standard it MUST tip at very least 51% to 49% in favor of the employer, as the one who bears the burden of proof. There is no logical way to conclude that the allegations of Ms. Wilson are to be believed over the denials of the Grievant and the evidentiary proof of the video, the recanted statements of Ms. Jackson, the statement of the inmate who literally saw two people interacting in a professional manner, and an allegation that Grievant was somehow at two places at the same time, Tennessee and at Franklin Medical Center. All of the evidence, when viewed objectively, amounts to no just cause.

If the offense were proven to be true, then of course it would carry a serious penalty. However, the employer provided no evidence to a clear and convincing standard. They gave no consideration to Grievant’s 28 years of service and his clean disciplinary record. The answer to this question must be a definite and unqualified no. No reasonable person can look at the outcome of the investigation and make a failsafe determination of guilt. It is preposterous to conclude that a convicted perjurer is now being believed to the extent that with zero corroboration and no evidence of guilt, a veteran employee, a mere 2 years from retirement, would have a career cut short based on a lie, or at least an unproven allegation.

Based upon a lack of any clear and convincing evidence, there was no just cause to remove Grievant from his position, and Grievant must be reinstated and made whole in every way.

III. DISCUSSION AND OPINION

The issue before the Arbitrator is whether the Employer had just cause to terminate the employment of the Grievant for his conduct, considered by the Employer to consist of numerous incidences of misconduct in violation of the Employee Rules of Conduct.

The burden of proof in demonstrating just cause for discipline rests upon the Employer. I would agree with the Union that the proper standard for determining just cause when considering the issue of termination or removal from employment, which I have so held on many occasions, is based upon a demonstration of clear and convincing evidence. To that degree, it is incumbent upon the Employer in this case, at a minimum, to demonstrate through clear and convincing evidence that the Grievant committed the infractions for which he is charged, and that the discipline meted out by the Employer was for just cause.

To establish that a “just cause” standard of review has been met, arbitrators have applied several tests in the past. Fundamental among the criteria to be examined is whether a grievant had notice that he/she could be disciplined for certain misconduct, whether the grievant engaged in the misconduct alleged, and whether the discipline issued was just and not unreasonable, capricious, or arbitrary. Arbitrators have also considered the following factors in determining whether a discharge for cause was appropriate: (1) whether the employer relied on a reasonable rule for the disciplinary action; (2) whether there was prior notice to the employee of the rule and the consequences for violating the rule; (3) whether the disciplinary investigation was adequately conducted; (4) whether the employer was justified in concluding that the employee engaged in the conduct as charged; and (5) whether the discipline issued was appropriate given the relative gravity of the offense and has been consistently applied to other employees charged with violation of similar rules.

Based upon an examination of the facts in this proceeding and considering the above criteria, it is the Arbitrator's opinion that the Employer did have just cause to terminate the employment of the Grievant for the reasons set forth below.

It can be concluded from an examination of the DRC's Employee Standards of Conduct, as applicable to the charges brought against Grievant, that the rules stated therein are reasonable and clearly defined. Making obscene or inappropriate statements (Rule 12A); harassment on the basis of sex, or gender identity (Rule 13); sexual conduct or contact, while on state time, with a person not under the supervision of the Department, regardless of consent (Rule 49); and any act that would bring discredit to the employer (Rule 39), are all not only reasonably related to the efficient operation of a rehabilitation and correction facility, but are also necessary to fulfill its obligation to provide a safe and secure work environment.

In order for an employee to be subject to discipline for violation of the above rules, it must be demonstrated that the employee had notice of the rules and was aware of the consequences of violating them. Notice is generally determined under the standard that a reasonable person would have known, or should have known, that such action would not be tolerated and would result in disciplinary action as a consequence. In this day and age, without any training or instruction, a reasonable person would, or at the very least should, know that it is improper and conduct subject to discipline for a male supervisor to make obscene or inappropriate statements toward or sexually harassing or improperly touching of a female subordinate in the workplace. Notwithstanding such general knowledge, Grievant was given copies of the Employee Rules of Conduct and attended mandatory training courses on the subject. In this case, evidence supports a finding that Grievant was aware of the Employee Rules of Conduct and was aware misconduct under the Rules could result in discipline, up to and including termination.

The crux of this case is whether the evidence presented was sufficient for the Employer to meet its burden that Grievant did engage in conduct constituting violations of the Employee Standards of Conduct cited by the Employer. This is a very unusual case for, as noted by both the Employer and the Union, this case must be decided on the credibility of the two witnesses, the alleged victim and Grievant, because there were no other witnesses to the misconduct alleged by the victim. It is complicated because the career of a 28-year employee is being pitted against serious allegations of sexual harassment and misconduct, which, if found to be substantiated, the Employer has a duty to stop and protect the workplace environment from any potential future harm. Based upon the investigation interviews, the testimony and demeanor of the witnesses at the hearing, and consideration of the totality of the evidence presented, I find that the Employer did demonstrate with clear and convincing evidence that Grievant engaged in the misconduct alleged by the victim.

First, it must be stated that clear and convincing evidence is not evidence beyond a reasonable doubt. In legal contexts, the “clear and convincing” standard is a level of proof that falls between the preponderance of evidence (more likely than not) and beyond a reasonable doubt (a higher standard typically applied in criminal cases). Meeting the “clear and convincing” standard generally results in a finding that the degree of certainty is highly probable and reasonably certain. As stated above, based upon the investigation interviews, the testimony and demeanor of the witnesses at the hearing, and consideration of the totality of the evidence presented, I determined that it is highly probable, and I am reasonably certain that Grievant engaged in the misconduct alleged for the reasons set forth below.

The determination that it was highly probable that Grievant engaged in the misconduct alleged was based upon an assessment of each witness' demeanor; consistency and corroboration of statements in interviews; and background and history.

The demeanor of the alleged victim and Grievant was a factor in the case. At the hearing, the Victim, as would be expected, was forthright in her testimony, yet sheepish in discussing the events. As a trier of fact, one would expect a female to not embellish the details of sexual harassment by a supervisor over a relatively short period of time. She did not want to look at her abuser. In contrast, Grievant was matter of fact and mild-mannered in not only discussing his background, but in denying every aspect of the allegations, including the alleged stranglehold (even if it was a joke) and the allegation of leaving the victim unattended in the facility. As a trier of fact, one would expect a male accused of sexually harassing and assaulting a female to be indignant, angry, frustrated, or insulted. Grievant did not testify in that manner, even under cross examination. The demeanor of Grievant, when viewed in light of other evidence provided by the Employer, did not portray a person of innocence.

The consistency and corroboration of the statements in interviews of the two witnesses weighed in favor of the Victim and not Grievant. As noted by the Employer, the statements made by the Victim that were witnessed by others were corroborated by them. That included feeling uncomfortable around Grievant (Jackson and Pearson) and being unattended at times in the facility (Cosby). Additionally, the Victim's allegations and statements were deemed to be truthful by an expert as a result of the CVSA.⁴ Regarding Grievant, he denied that the Victim was ever unescorted in the facility, which was determined to be false; he denied that allegations of sexual harassment

⁴ The reliability of the test will be discussed below.

had been lodged against him in the past, which was untrue; and he alleged the Victim voluntarily gave him her phone number, which is less than believable.

In assessing the credibility of the testimony and statements made in the interviews of witnesses, a factor an arbitrator always considers is the incentive for telling the truth or not telling the truth. In upholding the removal of a Parole Officer with the ODRC in a case hinging on witness credibility, Arbitrator Robert Stein noted:

An accused employee is presumed to have an incentive for not telling the truth, and when testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed. *United Parcel Serv., Inc. and Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 89*, 66-2 ARB 8703 (Dolson 1966). One arbitrator noted: "In determining credibility, the arbitrator may consider not only the demeanor of the witnesses, but the motivation of those witnesses, as well." *Teamsters Local 688 and Meridian Med. Techs., 01-1 Lab. Arb. Awards (CCH) P 3815* (King, Jr. 2001). Arbitrator King also noted: "A grievant's continued job tenure is sufficient motivation, in and of itself, to lie." *Teamsters Local 688*. "In resolving divergent claims, arbitrators are allowed to credit the testimony of disinterested witnesses over that of a grievant, absent a showing that witnesses called on behalf of the employer have a motive to lie."

(DRC and SEIU/District 1199 (Stein 2023), p. 49.)

Here, as noted by the Employer, the Victim has nothing to gain from coming forward, while Grievant has his job on the line.

The Arbitrator also considered the duration of the allegations to negatively affect the outcome of the allegation against Grievant. The misconduct was not a single event that could have been misinterpreted; it occurred on multiple occasions involving both verbal and physical abuse. While it is a fair question to ask why the Victim did not come forward earlier, it was recognized that she was a student/intern, was not trained on what procedures were available to her, and the incidences occurred over a short period of time when they were reported (mostly during the month of July).

An examination of the general background and history of the two witnesses adds to evidence supporting or failing to support a finding of credibility. The Victim was an unpaid student intern who was at the facility with no experience and for a short period of time. She was not seeking

a job there at the time, and there would be no motive for her to fabricate the sexual harassment charges. While the Union did point out her perjury conviction 13 years prior, there was no other evidence to indicate a pattern of lying or other motive to do so in this case. This information was contrasted to the background of Grievant that indicated prior allegations by females of sexual harassment. Such evidence was not considered as evidence of current wrongdoing, but certainly it weighed against Grievant for denying he had ever been previously accused of sexual harassment. The fact that Jackson heard identical rumors about Grievant at the FMC and elsewhere was also not an indication that these hearsay rumors were true, but the fact that statements were made were sufficient for Jackson to see a problem and file an incident report.

The Union argued that the CVSA results should not have been admitted into the evidence for two reasons. First, because CVSA had been deemed to be unreliable in the past, and secondly, because the Employer's own policies restrict its admission. Regarding the reliability of the CVSA, I did not give any weight to the articles submitted by the Union for two reasons: they were 13 years old and much has been improved on them since then, and the articles were not presented to the Employer prior to the hearing to enable it the opportunity to provide any evidence on the subject itself. Additionally, I did consider the results of the CVSA as an additional basis for determining the credibility of the Victim but did not consider it as the sole determinant factor in the investigation regarding proof of the reliability of the victim's accusation. That was in conformance with the policy of the Employer.

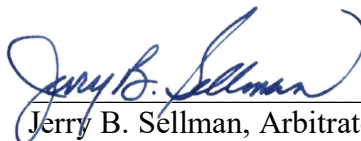
Having engaged in the misconduct cited by the Employer, it is incumbent upon the Arbitrator to determine if the discipline of discharge, in light of all of the circumstances presented, was just, reasonable, and not an abuse of discretion, capricious, or arbitrary. The issue as to the discipline imposed upon a grievant does require an arbitrator to express or apply his own views on

what discipline the arbitrator would have imposed on these facts. The arbitrator is required to consider the discipline imposed by the Employer and find whether that discipline is grounded in just cause, is based on proven misconduct that is sufficiently serious to support the level of discipline imposed and determine whether the discipline imposed by the Employer presents an abuse of discretion as it was imposed arbitrarily or capriciously or with a discriminatory intention.

I have considered the fact that Grievant is a 28-year employee with no current disciplinary actions against him. This factor weighed strongly in Grievant's favor as a mitigating factor in determining if the discipline meted out by the Employer was arbitrary or capricious. Since I have found, however, that Grievant engaged in unwelcome and unwanted verbal and physical conduct of a sexual nature, which caused discomfort that created an intimidating, hostile or offensive work environment, permitting Grievant to return to the workplace could place the Employer in position a of not providing a safe work environment. For that reason, I cannot find that the decision of the Employer to terminate Grievant's employment to be an abuse of discretion, capricious, or arbitrary.

V. AWARD

For the foregoing reasons and conclusions, the Grievance is denied.


Jerry B. Sellman, Arbitrator