#1725

IN THE MATTER OF THE ARBITRATION BETWEEN
OHIO DEPARTMENT OF PUBLIC SAFETY
-AND-
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION AFSCME LOCAL 11

Appearing for the Department of Public Safety
Cassandra Brewster, Sergeant OHP
Amy Tait, Labor Relations Specialist–OCB
Reggie Lumpkins, Lieutenant
Renee Byers, Attorney DPS
Brook Zavala, Witness
Joe Berkermer, Deputy Registrar

Appearing for OCSEA
Loyella Jeter, Steward
Terry James, Grievant
William A. Anthony, OCSEA
Michelle Black-Hosang, DX1
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Arlynne F. Gilkey, DXSS
Diana Sterling, Clerk
Jill Hartsell, Clerk
Erma Sommerville, Dietary Aide
John Slack, DX (Driver License Examiner)

CASE-SPECIFIC DATA
Grievance No.
Grievance No. No. 15–00-030610–0080-01–09
Hearing Held
September 23, 2003
Case Decided
November 25, 2003

Subject
Failure of Good Behavior–Hostile Environment Sexual harassment

The Award
Grievance DENIED

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Proceedings

The parties to this dispute are the Ohio Department of Public Safety ("The Agency") and the Ohio Civil Service Employees Association ("OCSEA" or "The Union"),[1] which represents Mr. Terry L. James ("The Grievant"). The Ohio State Highway Patrol launched an administrative investigation on April 7, 2003 in response to charges that the Grievant had violated the Agency's Standards of Employee Conduct.[2] On May 27, 2003, the Grievant was notified that the Agency intended to terminate his employment due to his "failure of good behavior" and that a pre-disciplinary hearing was scheduled for June 3, 2003.[3] On June 4, 2003 the Pre-disciplinary Hearing Officer submitted his report, finding just cause for discipline. On June 4, 2003, the Agency informed the Grievant that his employment was terminated for having violated Rule 501.01 (C)(10) (D)–Failure of Good Behavior. On June 6, 2003 the Union filed grievance No. 15–00-030610–0080-01–09, alleging that the Grievant's discharge violated Articles 2 and 24 of Collective-Bargaining Agreement.[4] On June 27, 2003, the parties opted to skip the mediation phase of their negotiated grievance procedure and proceed to Step 5.[5] On August 22, 2003, the Ohio Department of Job and Family Services determined that the evidence presented to that Department did not justify the Grievant's discharge.[6]

On September 23, 2003, the Undersigned presided over an arbitral hearing in this dispute. At that hearing, the Parties agreed that the dispute was free of procedural issues and was properly before the Undersigned. Both Parties were duly represented by their advocates throughout the hearing. The Parties made opening statements and introduced documentary and testimonial evidence. All documentary evidence was available for proper and relevant challenges, and all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings and testified in his own

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[1] Collectively referred to as "The Parties."
[2] Joint Exhibit No. 4, at 6.
[3] Joint Exhibit No. 3A.
[4] Joint Exhibit No. 2.
[5] *Id*
[6] Union Exhibit No. 1.

behalf. The Parties elected to submit Post-hearing Briefs, which were to be postmarked by October 15, 2003. The Briefs were e-mailed to the Undersigned on that date, and the arbitral record was officially closed.

II. The Facts

The Grievant was employed in the Great Western Driver's Examination Station as a Drivers License Examiner I and had approximately thirteen years of tenure with the State when he was terminated on June 4, 2003 for violating Rule 501.01(10)(B) of the Agency's Standards of Employee Conduct, "Failure of Good Behavior." Specifically, the Grievant was removed for directing sexual comments and other types of nonverbal sexual conduct–hostile environment sexual harassment–toward Ms. Brooke Zavala, a former Deputy Registrar employee who was stationed at the Westside License Agency ("WLA"). The Great Western Driver's Examination Station and the Westside License Agency share the same building.

When the Grievant was removed, Ms. Zavala had been employed with WLA for approximately six months and had previously worked for WLA on two other separate occasions. On one occasion, Ms. Zavala left the agency to relocate to Atlanta Georgia with her husband, but she subsequently returned to the Ohio area and was rehired by WLA. On a second occasion, Ms. Zavala quit her job extemporaneously after becoming outraged by continual racist/ethnic slurs from customers and fellow employees about Blacks and Mexicans; Ms. Zavala's husband is a Mexican-American.

During Ms. Zavala's six-months employment with WLA, she often took smoking breaks outside the rear of the building, while the Grievant oftentimes happened to be taking his smoking breaks. Ms. Zavala took her smoking breaks in the rear of the building rather than in front in order to avoid the frequent stream of questions from customers.

Ms. Zavala testified that she could recall only some of the Grievant's sexual statements and conduct because there were so many episodes between September 2002 and April 2003. According to Ms. Zavala, the Grievant first made a sexual comment to her during a smoking break in September 2002. From then until April 2003, the Grievant allegedly bombarded Ms. Zavala with almost daily unwelcomed and offensive

sexual comments, innuendoes, and facial expressions. The first sexual comment was made during a conversation the Grievant and Ms. Zavala were having about breast-feeding her infant. Ms. Zavala mentioned that she would telephone the nursery to check on her infant who was being weaned from breast-feeding. The Grievant inquired further about the breast-feeding, and Ms. Zavala indulged him with a detailed explanation of her experiences in that regard. At some point in their conversation, the Grievant allegedly said something to the effect of, "Well, that's one lucky baby; if I got latched on, I'd never get off."

Ms. Zavala said that she was astonished by that unvarnished sexual comment, during what she thought was a civilized conversation about a serious subject. She had mistakenly thought such comments were beneath a professional employee like the Grievant.[7] On another occasion the Grievant allegedly based his sexual comments on Ms. Zavala four children, stating that she must "wear her husband out," presumably alluding to the frequency of sexual activity between Ms. Zavala and her husband.

The Grievant also voiced frequent, gratuitous complements about Ms. Zavala's attire, using his expression and tone of voice to impart a sharp sexual edge to the comments. Sometimes Ms. Zavala tried to act as if the comments did not bother her; other times she responded by rolling her eyes with an expression of disgust or annoyance. In any event, the Grievant persisted.

Eventually, the Grievant focused his attention on Ms. Zavala's breasts and nipples and frequently subjecting her to sexually-laced comments, stares, facial expressions, and teeth-sucking sounds. For example, while they were on a smoking break one cold day, the Grievant said that Ms. Zavala's sweater was too thin as he stared at her nipples that were hard and erect from the cold air. On another occasion, as they took a wintry smoking break, Ms. Zavala stated she was cold and, staring at her hardened nipples, the Grievant responded along the line of, "yeah, I see."[8]

Persistent comments of this genre by the Grievant eventually forced Ms. Zavala to wear loosely

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[7] Joint Exhibit No. 7, at 3.

[8] Joint Exhibit No. 4, at 2.

fitting or heavy fabrics and padded bras in an effort to conceal her breast and nipples and stem the relentless wave of lewd gazes and comments from the Grievant. The Grievant's fixation on Ms. Zavala's breasts and nipples became so intense and aggressive that on one occasion he pulled the front of her sweater aside to gain a better view of her breasts[9] and then commented "those damn sweaters."

Finally, in an effort to stop the comments, in January or February 2003, Ms. Zavala approached the Grievant as he sat in his truck in the back of the building taking a smoking break. After she declined the Grievant's invitation to join him, Ms. Zavala informed the Grievant that his comments made her uncomfortable, whereupon he advised her not to take his comments seriously. He mentioned that the Agency had previously fired him for sexually harassing another female employee and that Ms. Zavala should consider herself fortunate because "The things I've said to you are nothing compared to what I said to her, and you are far better looking."[10] At that moment, Ms. Zavala sensed the futility of trying to discourage or deter the Grievant.

On a dress-down day at work in April 2003, Ms. Zavala was rather frazzled with personal matters and hurriedly donned a swishy warmup suit for work. She was standing out back on a smoking break with the Grievant when he commented that it was dress-down day at the office. Ms. Zavala said she was dressed down, and the Grievant responded, "No, I mean all the way down." He then wondered aloud why WLA had not adopted such a dress code or policy. Interpreting these comments to mean that she should report to work naked, Ms. Zavala told the Grievant to "fuck off" and walked away to resume work at her station.

When returning to her workstation, Ms. Zavala decided to place her partially consumed bottle of ice tea in a refrigerator that employees from both agencies used. She later returned to consume the remainder of the ice tea and actually took a big gulp of it when she felt something in her mouth and observed a translucent, semi-gelatinous glob at the bottom of the bottle and realized that she had swallowed some of that

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[9] Joint Exhibit No. 2, at 3.
[10] Joint Exhibit No. 4, at 3.

material, which ultimately turned out to be "Amylase, a component of saliva and other body fluids."[11] She thought it was either sputum or phlegm that someone had deposited in the bottle. That thought caused her to gag and ultimately to regurgitate several times. The ice tea incident convinced Ms. Zavala to report it along with a history of the Grievant's sexual misconduct to her supervisor, Mr. Joseph Burkemer. The ice tea incident triggered an administrative and a criminal investigations by the highway patrol on or about April 7, 2003. In addition, that incident together with the cumulative effects of the Grievant's sexually harassing behavior caused Ms. Zavala to quit her job for yet a third time, though it is unclear which event played the larger role in her decision.[12]

Before the ice tea incident, Ms. Zavala had mentioned the Grievant's conduct to her husband and a few female coworkers, including Ms. Nancy Buckingham. Ms. Zavala's husband and Ms. Buckingham strongly urged the Grievant to apprise Mr. Berkermer of the problem. In fact, Ms. Zavala's husband became so adamant about her reporting the matter that she stopped telling him about the Grievant's conduct because she felt that her husband did not understand, and she did not want to be pressured into reporting the Grievant. Actually, she voiced several reasons for not reporting the Grievant. First, she did not feel comfortable talking to Mr. Berkermer about the problem, in part because he was a male.[13] Second, the Grievant apparently had a relative employed by the Highway Patrol. Third, Ms. Zavala did not want to appear too sensitive because coworkers might feel that they could not relax and jest in her presence. Fourth, she was still a relatively new employee in WLA and did not wish to rock the boat. Finally, Ms. Zavala felt that she could handle the situation herself, a view that she also communicated to Ms. Jill Hartsell, a coworker.[14]

In November or December 2002, Ms. Buckingham alerted Mr. Berkermer to Ms. Zavala's plight with the Grievant. Mr. Berkermer subsequently mentioned the problem to the Grievant and to Ms. Zavala. He

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[11] Joint Exhibit No. 9, at 17 (OSHP Crime Lab Report)
[12] Joint Exhibit No. 4, at 6.
[13] *Id.* at 3.
[14] *Id.* at 9.

broached the subject with Ms. Zavala when she happened to came into his office for an unrelated reason. They thoroughly discussed the events that had occurred up to that time.[15] In November or December 2002, Mr. Berkermer advised the Grievant that he should watch his comments, some of which were inappropriate and unappreciated and the Grievant responded along the lines of, "Oh yeah, right."

A. The Grievant's Version–Absolute Denial

During an administrative investigatory interview and before the Undersigned in the arbitral hearing, the Grievant flatly denied any and all of the foregoing comments that Ms. Zavala attributed to him. Furthermore, he even *denied* that Mr. Berkermer ever spoke to him about making offensive comments to Ms. Zavala or any other female employee,[16]

The Grievant denied ever having a confrontation with Ms. Zavala[17] and that he tampered with her ice tea on April 4, 2003. The Grievant also denied telling Ms. Zavala about his prior encounters with charges of sexual harassment. Instead, he claimed that Ms. Buckingham informed Ms. Zavala about that subject and told her to stay away from the Grievant. Indeed, when asked why Ms. Zavala would marshal so many scurrilous complaints against him, the Grievant said that Ms. Zavala and Ms. Buckingham had conspired to take him down. He further claimed that when he heard about Ms. Buckingham's statement he told Ms. Zavala that if he ever said or did anything offensive to her, she should confront him about it and he would stop.[18] In other words, the Grievant's explanation of why Ms. Zavala had lodged complaints against him was that he simply had been set up.[19]

III. Relevant Contractual Provisions and Work Rules

ARTICLE 2–NON-DISCRIMINATION

Neither the Employee nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex. . . ..

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[15] Joint Exhibit No. 7, at 8.
[16] Joint Exhibit No. 4, at 4
[17] *Id.*
[18] *Id.*
[19] *Id.*, at 5.

24.01- Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

24.02- Progressive Discipline

The Employer will follow principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

A. one or more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. a fine in an amount not to exceed five (5) days pay; for any form of discipline; to be implemented only after approval from OCB;
D. one or more day(s) suspensions;
E. termination.

Rule 501.01 (C)(10) (D) – Failure of Good Behavior.

IV. Summaries of the Parties Arguments

A. Summary of the Agency's Arguments

1. Ms. Zavala's testimony was concise, consistent and unimpeachable.
2. The Grievant's demeanor throughout the course of the administrative investigation and during the period is indicative of his lack of credibility and untruthfulness.
3. Sgt. Brewster's training includes Successful Interview and Interrogation Techniques.
4. The Union's witnesses showed obvious bias or provided testimony that was irrelevant to the underlying issue in the case.
5. The Grievant was on clear notice that his behavior was unwelcome and offensive.
6. The Employer has satisfied the "Clear and Convincing" standard in this case.

B. Summary of the Union's Arguments

1. Ms. Zavala's testimony was rife with internal and external inconsistencies. Therefore, her credibility as a witness in this dispute is severely damaged.
2. Ms. Zavala's past also impugns her credibility and character.
3 The Grievant had nothing the hide and categorically denied all of Ms. Zavala's accusations.
4 The Grievant's sexual harassment training taught him to recognize and avoid sexually harassing conduct.
5 Sergeant Brewster admitted that her interview techniques were less than 100 percent accurate.

V. The Issue

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

VI. Discussion and Analysis

A. Evidentiary Standards, the Contract, and External Law

The Collective-Bargaining Agreement contains a nondiscrimination provision that referentially

incorporates both federal and state Antidiscrimination law. However, the Arbitrator will resolve this dispute under the contractual *just cause* clause, without a rigorous application of external law but still following the general guidelines and structure of federal law so that the opinion and award are not repugnant to that law.

Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion with respect to its charges against the Grievant. Also, because sexual harassment is a particularly stigmatizing charge with potentially far-reaching and damaging effects on the subjects of that charge, the Agency must establish its case against the Grievant by *clear and convincing* evidence in the arbitral record as a whole, rather than by the customary preponderance of the evidence. In anticipation of this heightened standard, the Agency has offered a definition of clear and convincing evidence as evidence that establishes the "truth of the facts asserted is *highly probable*." Accordingly, in this case, the Agency must adduce evidence in the arbitral record as a whole, showing that: (1) The Grievant engaged in the alleged misconduct; (2) The conduct constitutes "Failure of good behavior"; and (3) The penalty imposed is neither unreasonable, arbitrary, nor capricious. Doubts with respect to these issues shall be resolved against the Agency.

B. Proof of Sexual Harassment

The threshold issue here is whether the Grievant subjected Ms. Zavala to sexually the inappropriate comments and conduct that she alleges. Because there are no eye witnesses other than Ms. Zavala and the Grievant, the resolution of this dispute turns entirely on their credibility. Furthermore, as discussed below, the Grievant's and Ms. Zavala's positions suffer from some internal and external inconsistencies.

1. Internal Inconsistencies of Ms. Zavala's Account

Ms. Zavala's account of her encounters with the Grievant is not entirely consistent. For example, during her criminal investigatory interview on April 8, 2003,[20] her administrative investigatory interview on September 9, 2003,[21] and the arbitral hearing on September 23, 2003, Ms. Zavala said she made the "fuck

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[20] Joint Exhibit No. 9, at 23.

[21] Joint Exhibit No. 7, at 14.

off" statement in response to the Grievant's comment about dressing "all the way down." But in her written statement set forth below, she asserted that she told the Grievant to "fuck off" in response to his specific comments about her breast. Following is the relevant portion of the written statement Ms. Zavala drafted on April 5, 2003:

> I was outside and he had made the comment about seeing *less of me and more of those referring to my breast and I told him whatever, fuck off* I was not in the mood that day for nasty comments I was drinking ice tea and took a few drinks of it and put it in the breakroom refrigerator. . . .[22]

In fact, the April 5 written statement suffers from internal inconsistencies. On one page, Ms. Zavala attributes the "fuck off" statement to the Grievant's reference to her breast.[23] On the very next page, however, she attributes that same statement to the Grievant's suggestion that she dressed "all the way down."[24]

Clearly, Ms. Zavala is confused, which is one problem. The other problem is that she produced the written statement comes before the other three and, absent some plausible explanation, one would expect Ms. Zavala's recollection to have been clearer on April 5, 2003 than at any subsequent time. Furthermore, other things equal, a written statement affords the writer more time to contemplate, consider, and recall the events in question.

Ms. Zavala also stated, during her administrative interview, that she had reported the Grievant's behavior to Supervisor Polly Radel on April 5, 2003.[25] She told Ms. Radel that the Grievant had been sexually harassing her since October 2002.[26] Yet, during the arbitral hearing, Ms. Zavala specifically stated that the Grievant had been harassing her since September 2002.

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[22] Joint Exhibit No. 4, at 19 (emphasis added).
[23] *Id*
[24] Joint Exhibit No. 4, at 20.
[25] *Id* at 5.
[26] *Id.* at 1.

C. The Grievant's Denials

As pointed out above, the Grievant flatly denied all accusations against him, including the fact that Mr. Berkermer spoke to him about making sexual comments. The difficulty for the Grievant is that even though Ms. Zavala's case suffers from some internal inconsistencies, the allegations that she made are sufficiently consistent to establish that *something untoward occurred* between her and the Grievant. In addition, the Arbitrator finds that Mr. Berkermer credibly testified that he spoke to the Grievant about his offensive language toward Ms. Zavala and perhaps other female employees, which tends to reinforce the position that the Grievant was engaged in sexual misconduct. Nor would Mr. Berkermer have any apparent reason to falsely accuse the Grievant.

Furthermore, the Grievant's position also contains internal inconsistencies. On September 5, 2003, Sergeant C. L. Brewster and Sergeant C. R Bower held an investigatory interview with the Grievant in the presence of Labor Relations Representative Louella Jeter. During the early stage of the interview, the following exchange occurred between Sergeant Brewster and the Grievant:

Sergeant Brewster:	Have you ever approached . . . [Ms. Zavala] at work and told her she looks nice?
The Grievant:	I have uh, done that.
Sergeant Brewster:	On how many occasions would you say you've done that?
The Grievant:	Probably in the last. . . I mean, it's uh. . . I mean, she's. . . I know she don't have money, you know, and she um, don't dress as well as everybody else. . . .
Sergeant Brewster:	Mmm hmm
The Grievant:	You know, and I'll maybe. . . I'll say you look nice, you know. And she might have spots on her or wherever, you know, on her clothes. But I tell her she looks nice anyway, you know, to make her feel good, and that's cause I. . . cause I know she don't have a lot of money, you know. . . .[27]

Yet, later in the interview, a starkly contrasting exchange takes place:

Sergeant Brewster:	Have you told . . . [Ms. Zavala] which clothes look best on her?
The Grievant:	No, cause I *don't pay no attention* to what she wears.
Sergeant Brewster:	So you've told her that, you know, you look nice today; but you haven't . . . said you should wear this sweater cause it looks better on you?
The Grievant:	No. I don't even have no idea what she wears.[28]

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[27] Joint Exhibit No. 6, at 3.

[28] Joint Exhibit No. 6, at 7-8 (emphasis added).

In the first exchange, the Grievant clearly reveals a keen interest in making Ms. Zavala feel good about her attire by offering favorable complements and was carefully observing even the spots or stains on her clothing. Conversely, in the second exchange, he categorically denied having paid any attention to Ms. Zavala's clothing. The Arbitrator therefore does not find the Grievant to be a credible witness and cannot accept his flat and categorical denial of any unacceptable interaction with Ms. Zavala from September 2002 through April 2003. In short, the evidence clearly and convincingly establishes that the Grievant engaged in debilitating sexual misconduct toward Ms. Zavala, as evidenced the details of her account and buy her decision to quit her job, which she presumably needed, at least in part because of the Grievant's repeated sexual conduct and comments toward her. Having concluded that the Grievant clearly and convincingly engaged in a pattern of sexual conduct toward Ms. Zavala, the remaining question is the extent to which that conduct was unwelcome and offensive to Ms. Zavala.

D. Proof of Hostile Environment Sexual Harassment

Conduct that creates actionable hostile environment sexual harassment must be gender-based, of a sexual nature, pervasive, sufficiently intense to adversely affect the victims ability to perform her job, offensive, and unwelcome. The facts in this case establish that the Grievant's conduct was gender-based, of a sexual nature, and sufficiently pervasive because it occurred almost daily. The remaining issues are whether the Grievant's conduct was unwelcome, sufficiently offensive, and adversely affected Ms. Zavala's job performance.

In evaluating these factors, the Arbitrator notes that Ms. Zavala's case has several rather inexplicable shortcomings, which individually and cumulatively raise some question about the extent to which she found the Grievant's conduct offensive and unwelcome. The first shortcoming is that after enduring approximately seven months of almost daily sexually harassing conduct by the Grievant, Ms. Zavala was able to recall only four or five specific events, none of which carry a date certain. Second, Ms. Zavala stubbornly refused to report those annoying, oppressive, and humiliating encounters to management, even though she was

admittedly aware of grievance machinery established for that purpose. And she readily admitted that she knew she should have quickly reported the problem to her supervisor. Finally, evidence in the record clearly establishes that Ms. Zavala is quite capable of forcefully reporting an incident that sufficiently upsets her, as evidence by her willingness not only to openly challenge her co-workers practice of making racist and ethnic slurs, but also to quit her job *on the spot* in indignant protest. Yet, she could not bring herself to report what she claims to have been a continual stream of offensive and disgusting sexual comments and conduct from the Grievant.

As pointed out above, these are noteworthy but not outcome-determinative considerations. Offsetting them is clear and convincing evidence that the Grievant's conduct was offensive, unwelcome, and hampered Ms. Zavala's ability to perform her job. Both objective and subject criteria are use to determine whether established conduct of a sexual nature is sufficiently offensive and unwelcome. The objective criterion focuses on whether a reasonable person under the same or similar circumstances as Ms. Zavala would have found the Grievant's comments and conduct offensive and unwelcome. The subjective criterion asks whether Ms. Zavala *herself* found the conduct offensive and unwelcome.

Evidence in the record establishes that the Grievant's conduct qualifies under both categories. His comments about Ms. Zavala's: (1) sex life with her husband, (2)her breasts, (3) breast-feeding her infant, and (3) her attire–how nice she looked would reasonably offend any reasonable woman under the same or similar circumstances as Ms. Zavala. Furthermore, the Grievant's conduct satisfies this subjective standard, as evidenced by Ms. Zavala's decision to leave her employment in considerable part because of the Grievant's sexual conduct and comments toward her. The sexual harassment had already set the stage for her resignation before the ice tea incident.

Similarly, the Grievant's sexual conduct and comments toward Ms. Zavala also sufficiently interfered with her ability to perform her job duties, again as evidence by her willingness to quit a job that she presumably needed. In fact, the Grievant's established sexual behavior toward Ms. Zavala was part of the

force–along with the ice tea incident–that constructively discharged her. Based on the foregoing discussion, the Arbitrator hereby finds that the Grievant's conduct was unwelcome, offensive, adversely affected Ms. Zavala's job performance, and ultimately was a major factor in constructively discharging her.

VII. The Penalty Decision

Because the Agency has clearly and convincingly established that the Grievant engaged in misconduct that constituted hostile environment sexual harassment, which qualifies as failure of good behavior, some measure of discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation of the mitigative and aggravative factors as well as an ultimate determination of whether the penalty imposed, removal, is unreasonable, arbitrary, or capricious under the circumstances of this case.

A. Aggravative Factors

The two aggravative factors that weigh most heavily against the Grievant are the serious nature of his misconduct in this dispute and his resistance to rehabilitation despite having had training in sexual harassment pursuant to an earlier violation. That violation in of itself is not an aggravative factor in this disciplinary assessment. However, the training that the Grievant had together with his continued engagement in the same or similar sexual misconduct strongly indicates his lack of capacity for rehabilitation. And given the potential liability for the Agency in this situation, reinstatement is not a workable situation.

B. Mitigative Factors

The Grievant's thirteen years of tenure and his satisfactory performance record are mitigative factors, but as suggested above, the aggravative factors and demonstrated recidivism outweigh any mitigative factors the Grievant has to offer in this dispute.

C. Propriety of the Penalty

For the reasons set forth above, the Arbitrator holds that removal of the Grievant for the demonstrated misconduct in this dispute is for just cause and is neither arbitrary capricious or unreasonable.

VIII. The Award

For all the reasons set forth in this opinion, the grievance is hereby **DENIED**.

Robert Brookins

Robert Brookins, Labor Arbitrator, J.D. Ph.D.