OPINION AND AWARD

In the Matter of the Arbitration Between
Ohio Civil Service Employees Association (OCSEA)
-AND-
Ohio Department Rehabilitation and Correction (Lorain Correctional Institution (LCI)

Appearances

For LCI

Kimberly Conn, Registered Nurse
Brande Harris, Correction Warden Assistant 2
Bethany M. Hill, Administrative Professional 1
Marc C. Houk, Parole Board Member
Kathryn Khan, Licensed Practical Nurse
James W. Miller, OCB Manager
Tracie Myers, Registered Nurse
Richard B. Shutek, Labor Relations Officer 2
Kim Vandrasik, Registered Nurse

For OCSEA

David Harper, Correctional Officer Chapter President
Laura Hensley, Registered Nurse
Lynn Kemp, OCSEA Staff Representative
Daniel D. Sablack, Corrections Officer Chief Steward
Kirk Saxon, Grievant
Sharon Sturgell, Licensed Practical Nurse
Robert Williams, 1199 Union Representative
Robin Williams, Licensed Practical Nurse

Case-Specific Data

Hearing Held
September 27, 2012

Grievance Number
27-14-20120201-0017-01-03

Last Brief Received
December 27, 2012

Case Decided
March 3, 2013

Subject: Sexual Comments, Gestures/Conduct

Decision
Grievance: **SUSTAINED IN PART AND DENIED IN PART**

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I. The Facts

A. Introduction

The parties to this contractual dispute are the Ohio Department of Rehabilitation and Correction, Lorain Correctional Institution ("Agency" or "Management") and the Ohio Civil Service Employees Association ("Union" or "OCSEA"), representing Mr. Kirk Saxon ("Grievant"), a Correctional Officer with approximately fifteen years of service.[1]

The Grievant joined the Lorain Correctional Institution (LORCI) as a Corrections Officer on September 15, 1997. The Grievant's last five performance evaluations either met or exceeded all job requirements, and all of his earlier performance evaluations were good and portrayed him as an asset to the Agency.[2]

On or about October 5, 2011, Mr. Ronald Foster, Assistant Health Care Administrator, submitted an incident report,[3] claiming that, on September 29, 2011, Kathryn Khan, LPN, told him that Robin Williams, LPN, said that the Grievant had grabbed her buttocks. Ms. Khan found this allegation credible because the Grievant had once grabbed her buttocks. According to Ms. Khan, employees in the Medical Department had not reported the Grievant's conduct because they believed that Management would not correct it.[4] On October 6, 2011, the Agency assigned Ms. Brande Harris, Correctional Warden Assistant 2 ("Assistant Warden Harris") to investigate the matter.

On October 8, 2011, the Agency transferred the Grievant from his post in the infirmary to avoid the possibility of similar incidents. However, the Grievant continued to work within the Agency, interacting with female employees until December 13, 2011 when the Agency placed him on paid administrative leave.[5]

On October 14, 2011, Assistant Warden Harris received an anonymous call, suggesting that she interview all females in the Medical Department where the Grievant allegedly discussed sex throughout the day and referred to himself as "Uncle Perv" and "Sexy Saxon."[6] Ms. Harris interviewed approximately sixteen females in the

[1] Hereinafter referenced as "The Parties." Union's opening statement.
[2] Joint Exhibit 6.
[3] Joint Exhibit 4, at 20.
[4] *Id. See also*, Testimony of Assistant Warden Harris.
[5] Union Exhibit 1.
[6] Joint Exhibit 4, at 12.

Medical Department and submitted her Investigative Report on December 9, 2011.[7] The Investigative Report found that the Grievant had violated Work Rules12A,[8] 13,[9] and 49.[10] Based on that Report, the Agency held a pre-disciplinary meeting on December 28, 2011 and found just cause for disciplining the Grievant,[11] and terminated him effective January 27, 2012 for violating the foregoing work rules.[12]

The Union challenged that disciplinary decision in Grievance No. 27-14-20120201-0017-01-03 ("Grievance") on February 1, 2012, claiming that the Agency's removal of the Grievant was not for just cause, i.e., "justified under the Department's Standards of Employee Conduct." The Parties first entertained the Grievance in a Step-3 meeting on March 13, 2012, after which the Agency denied the Grievance.[13] The Union opted to arbitrate the Grievant's removal, and the Parties selected the Undersigned to hear this dispute.

The Undersigned held an arbitral hearing on September 27, 2012. At the outset of that hearing, the Parties agreed that the instant dispute was properly before the Undersigned. During the arbitral hearing, the Parties' advocates made opening statements and introduced documentary and testimonial evidence to support their positions in this dispute. All documentary evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings. At the close of the hearing, the Parties agreed to submit post-hearing Briefs. Due to an email discrepancy, the Undersigned did not receive the Briefs until December 27, 2012. Upon receipt of those Briefs, the Undersigned closed the record.

II. Issue

Whether Management had just cause to remove the Grievant? If not, what shall the remedy be?

III. Summaries of the Parties' Arguments

A. Summary of the Agency's Arguments

1. **Grievant Guilty**—The Grievant willingly and knowingly engaged in sexual harassment, sexual

[7] Joint Exhibit 4, at 12-19.
[8] Making obscene gestures or statements, or false, abusive, or inappropriate statements.
[9] Improper Conduct - Acts of discrimination or harassment on the basis of race, color, sex, age, religion, national origin, disability, sexual orientation, gender identity or military status.
[10] Sexual conduct or contact, while on state time, with a person not under the supervision of the Department, regardless of consent.
[11] Joint Exhibit 4, at 4-5.
[12] Joint Exhibit 5.
[13] Joint Exhibit 3, at 3.

misconduct, and sexual solicitation targeting the female co-workers in the Medical Department at the Lorain Correctional Institution.

2. **Ms. Kahn More Credible**—A review of the testimonies of Ms. Robin Williams and Ms. Kathryn Khan reveals that Ms. Khan was more likely truthful as to whether the Grievant's grabbed Ms. Williams' and Ms. Kahn's buttocks. Ms. Kahn testified that the Grievant grabbed her buttocks after an in-service class. Ms. Williams risked nothing by sticking to her version of the facts. Ms. Kahn, on the other hand, had much to lose by lying. Therefore, she is much more likely to have been truthful. By adhering to her claim that the Grievant grabbed her buttocks, she risked her friendship with Ms. Williams. In addition, Ms. Khan could lose the room she rented from Ms. Williams by contradicting Ms. Williams's testimony.
3. **No Stacked Charges—**Contrary to the Union's accusations, the state did not stack charges against the Grievant.
4. **Grievant Violated Rules**—Testimony in the arbitral record establishes the Grievant's violations of the Agency's work rules.
   a. The Grievant admitted having made inappropriate comments and statements that violated Rule 12A.
   b. During cross-examination, the Grievant impliedly admitted that he had violated Rule 13, stating that he only made the foregoing statements to female employees and not to males.
   c. The Grievant violated Rule 49 because Ms. Kim Conn credibly testified that he "would grab his crotch and say '*suck on this'* and he would pat his lap and say 'sit here and let's see what pops up.'" That conduct violated Rule 49.
   d. The Grievant also violated Rule 49 when he told Ms. Meyers that he "likes to go down on women and he would like to taste her."
   e. Rules 12A, 13, and 49 are intended to sanction the type of conduct established in this dispute.
5. **Thorough Investigation**—Contrary to the Union's assertion, the Agency thoroughly investigated the events and circumstances surrounding this dispute. Ms. Harris testified that she conducted the investigation and questioned everybody that was noted or mentioned by an interviewee.
6. **No Disparate Treatment**—Disparate treatment is an affirmative defense that the Union must prove by establishing that the Agency treated similarly-situated employees differently, i.e., more favorably.[14]
7. **No Procedural Due Process Deprivation** —The Agency did not deprive the Grievant of any contractual due process rights. Although "removal" did not appear on the front page of the Pre-Disciplinary Conference Notice, "removal" did appear on the attached disciplinary grid. Mr. Harper admitted that the Union retains copies of employees' disciplinary files, including, presumably, the Grievant's files, which revealed active discipline when the instant dispute arose.
8. **No Shop Talk**—Nor did the Union establish that sexually harassing conduct such as the Grievant's was commonplace in the Agency. Neither of the Union's two witnesses could identify any specific instance where other employees embraced such conduct.
9. **The Grievant's Tenure is Aggravating Factor**—The Grievant's fifteen years of service with the Agency is an aggravating, rather than mitigating, factor. The Agency disciplined the Grievant, in November 2003, after which he attended a special EEO training session in 2004. In addition, the Grievant received fifteen years of annual in-service training, including EEO training on Sexual Harassment and Hostile Work Environments. Finally, the Grievant's testimony that "in his heart he didn't believe he sexually harassed anyone," reveals either his inability or unwillingness to comprehend and/or obey the Agency's EEO-Sexual Harassment/Hostile Work Environment Laws and Guidelines.

B. Summary of Union's Arguments

1. **Proper Measure of Persuasion**—The Agency must establish violation of Rules 12A, 13, and 49 by clear and convincing (rather than merely preponderant) evidence.

[14] Agency Post-hearing Brief, at 9-10, citing State of Ohio, 99 LA 1169, 1173 (Award N0. 499) (Arbitrator Rivera, at 13-4).

2. **Application of Penalty Table**—The Agency must follow its penalty table. Rule 12A provides for a written reprimand or two-day suspension for a first offense. Rule 13 provides for a two-day suspension upon a first offense. Rule 49 provides for either a five day suspension or removal upon a first offense.
3. **Inadequate Notification of Charges**—The Agency failed properly to notify the Grievant of the Rule 7 charge. The Grievant's Letter of termination is silent regarding his alleged violation of Rule 7—Failure to follow post orders, administrative regulations, policies, or written or verbal directives.[15] Instead of leveling the Rule 7 charge against the Grievant in the Letter of Termination thereby affording him a fair opportunity to refute that alleged misconduct, the Agency added the Rule 7 charge after it decided to fire the Grievant. Sexual comments and innuendo are part of the Agency's culture, and the Grievant's admitted misconduct falls under Rule 12A or Rule 13, calling for no more than a two-day suspension. Finally, the Agency was aware of the Agency's sexualized culture.[16]
4. **Failure to Define Charges**—Throughout the instant dispute, the Agency has failed to define "making comments, gestures, sexual harassment and sexual conduct or sexual contact."
5. **Definition of Charges**—Absent a definition of "sexual conduct," the Union was obliged to reference it in the Ohio Revised Code, which defines "sexual conduct" as follows:

> "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."[17]

6. **Disparate Treatment**—Other employees engaged in the same conduct as the Grievant but were neither charged with nor disciplined for sexual harassment.
7. **Victims Never Offended**—The Grievant did not violate Rule 49, which contemplates "Sexual Conduct or Contact at Work." Evidence in the arbitral record establishes neither the grabbing of butts nor kissing at work. Nor does the arbitral record establish that the alleged victims were offended. Indeed, they never filed incident reports or reported the Grievant's conduct pursuant to the Agency's Sexual Harassment policy.[18]
8. **Stacking of Charges**—The Agency blatantly stacked the charges against the Grievant by leveling three charges for one episode of misconduct. To support separate charges, conduct must be separate and distinct.
9. **Disproportionately Harsh Penalty**—Finally, since the Agency improperly charged the Grievant with having violated Rule 7, removal was too harsh. The maximum penalty for a Rule 13 violation is a two-day suspension, not termination.
10. **Zero Tolerance**—The Agency either lacks or ignores a Zero Tolerance Policy. The Agency disciplined the Grievant for color-based verbal harassment in October 2003[19] and required him to attend EEO Training.[20] One year later, on October 2004, the Grievant attended the mandated training. A year's delay between disciplinary imposition and mandated training is inconsistent with a Zero Tolerance Policy. Consequently, the Agency's argument that it properly notified the Grievant of its Zero Tolerance is unpersuasive. Furthermore, despite the purported seriousness of the Grievant's alleged misconduct, the Agency did not immediately remove him from his position. Instead, after removing the Grievant from his post on October

[15] Joint Exhibit 5, at 15.
[16] Joint Exhibit 4, at 73-78 (LORCI's Medical Staff Meeting Minutes dated July 13, 2011).
[17] Ohio Revised Code, 2907.01.
[18] Joint Exhibit 4, at 20–23.
[19] Agency Exhibit 2.
[20] Agency Exhibit 1.

8, 2011, the Agency allowed him to continue working at the institution, having daily contact with female employees, until December 13, 2011 when the Agency placed him on administrative leave.

11. **Burden of Persuasion**—Management must show with clear and convincing evidence that the employee was guilty of the alleged infractions.

IV. Relevant Contractual/Regulatory Provisions

Contractual Provisions

Rule 12A

Making obscene gestures or statements, or false, abusive, or inappropriate statements

Rule 13

Improper Conduct - 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 49

Sexual conduct or contact, while on state time, with a person not under the supervision of the Department, regardless of consent.

Article 24.05 (Pre-Discipline)

Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline.

Sexual Harassment Policy

* * * *

II. Purpose

It is the purpose of this policy to establish uniform guidelines in order to ensure a workplace free of sexual harassment.

* * * *

IV. Definitions

Sexual Harassment

Any *unwelcome or unwanted* sexual advances, requests for favors, and other verbal or physical conduct of a *sexual nature*.[21]

Hostile Work Environment Sexual Harassment

Severe and pervasive conduct that has the *purpose or effect* to interfere with an individual's work performance, or creates an *intimidating or hostile* environment.[22] Examples of behaviors that violate this policy include, but are not limited to: suggestive comments, sexual jokes, gestures, slurs or innuendos. . . Unwanted touching . . . Explicit descriptions of the harasser's own sexual experiences . . . Unsolicited or unwelcomed flirtations and advances or propositions.

* * * *

V. Policy

It is the policy of the Ohio Department of Rehabilitation and Correction to provide a workplace free of sexual harassment, in compliance with state and federal law. Sexual harassment is strictly prohibited.

[21] Joint Exhibit 4, at 21 (emphasis added).
[22] *Id.*

VI. Procedures

The prevention and elimination of sexual harassment in the workplace is everyone's responsibility. This includes the reporting of such incidents . . . and, when appropriate, discipline.

* * * *

B. Reporting

1. An employee who believes he or she has experienced sexual harassment must promptly notify his or her immediate supervisor of such acts.

* * * *

3. Any individual who receives a complaint of sexual harassment must immediately report the complaint to the appointing authority.

C. Sanctions and Discipline

1. Appropriate sanctions will be imposed on individuals found in violation of this policy. . . . Such discipline may include counseling, reprimands, suspensions, demotions, transfers, and/or removal.

Ohio Department of Rehabilitation and Correction Standards of Employee Conduct

*** * * ***

Progressive Discipline

The purpose of . . . Providing standardized penalties for offenses is to provide a measure of consistency in application and progression of disciplinary actions. This consistency, however, does not require that the Employer must administer the *exact same level of disciplinary action* specified in the Standards of Employee Conduct the same way in each and every instance. Each instance of a violation of the Standards of Employee Conduct *turns on its own facts and distinguishing variables* such as prior disciplinary history, length of time since the last discipline and mitigating aggravating circumstances.[23]

ARTICLE 24-DISCIPLINE

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 the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary actions shall include:

a. One (1) or more oral reprimand(s) (with appropriate notation in employee's file);
b. One (1) or more written reprimand(s);
c. One (1) or more working suspension(s). . . .

V. Evidentiary Preliminaries

Because this is a disciplinary dispute, the Agency has the burden of proof/persuasion and, hence, must establish its allegations against the Grievant by ***clear and convincing***[24] evidence in the arbitral record as a whole,

[23] Joint Exhibit 5, at 8-9.

[24] Although preponderant evidence is the standard measure of persuasion in arbitral hearings, the Undersigned usually grants a Union's request to impose the "clear and convincing" evidence standard in disputes involving highly stigmatizing

doubts about those allegations will be resolved against the Agency. Similarly, the Union has the burden of persuasion regarding its allegations and affirmative defenses, doubts about which will be resolved against the Union.

VI. Analysis and Discussion
A. Investigatory and Testimonial Evidence

This section of the opinion examines testimonial and investigatory evidence in this dispute. Following this evidentiary presentation is an assessment of whether the Agency has established that the Grievant violated Rule 12A, Rule 13, and/or Rule 49.

1. Testimony and Interview Statements[25]

Kimberly Conn

Interview Statements

Ms. Conn stated that if someone asked the Grievant "can I sit here?" He would say ***"why don't you sit on my face."*** He would grab his crotch and say ***"suck on this" or "sit here and we'll talk about what pops up.***" He says he would like to ***"bury his head between those two melons.***" As you walk past him it was not uncommon for him to ***touch you on your shoulder or hip and guide you as you passed***. He talks about his ***sex life*** all the time, either the activity of it or the lack of it. Ms. Conn also stated that the Grievant made some of the foregoing statements directly to her. She also stated that she has heard the Grievant refer to himself as ***"Uncle Perv"*** and ***"Sexy Saxon."*** Ms. Conn said that when working closely with the Grievant, "I just try to ignore him. I don't feel threatened by him. On occasion he makes me feel ***uncomfortable."***[26]

Testimony

Ms. Conn testified that the Grievant's comments made her ***uncomfortable*** "at times." She usually ***rolled her eyes and walked away***. She disapproved of his comments. She did not report the Grievant's comments because she had worked a long time with him and needed him to watch her back. She referred to the correctional officers as a "Wall of Gray." She needed them once to protect her. ***She never actually told the Grievant that she was uncomfortable*** but she did roll her eyes and walk away, which she admits was not the best response.

Laura Hensley

Testimony

At the arbitral hearing**,** Ms. Hensley testified that sexual comments made in the workplace were no more than "***shoptalk." Everyone makes them.*** Nor were such comments offensive because they were customary, and, indeed, are still being made. Despite the continual sexual comments, ***none were made to her***. The ***current work environment is more hostile than ever***. She notified management about the comments and the ***inappropriate hostile environment***. The Undersigned found no investigative statement from Ms. Hensley in the arbitral record.

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allegations against the Grievant. In the instant dispute, the Agency charged the Grievant with behavior that is indistinguishable from sexual harassment, even though the Rules alleged to have been violated do not specifically reference "sexual harassment." The potential stigma remains undiminished.

[25] Interview statements and testimony appear for witnesses who testified at the arbitral hearing and were interviewed. Where both were not available, the Arbitrator used the available one.

[26] Joint Exhibit 4, at 50-51.

Kathryn Khan

Interview Statements

She stated that approximately one year ago the ***Grievant grabbed her buttocks***, and she simply ignored it because it ***was not offensive***.[27]

Testimony

Ms. Khan testified to the same butt-grabbing incident, which this time ***she found inappropriate***. She did not report the incident for fear of being ***labeled a snitch*** and losing coworker support as well as help with the inmates.

Tracie Myers

Interview Statements

During her interview, Ms. Myers testified that she heard the Grievant make "***sexual comments*** to other female employees ***about what he could (and would like to) do***. He always used the ***F word*** and he always talked about what he ***could do for a woman***. It was inappropriate. He liked to talk about how he liked to ***'Eat a woman out***. . . .' He would make comments about ***'come and sit on my lap; I'll take care of your needs. . . .' He told me he would like to taste what I tasted like . . . 'I bet you taste good. He asked me do you shave? Do you have hair. . . . I like muff pie.*** Although Ms. Myers found the Grievant's conduct "inappropriate," she stated that she was ***"comfortable around him***."[28] Ms. Meyers said that she asked the Grievant not to speak to her in that manner. He apologized and never again uttered such comments to her.

Testimony

Ms. Myers testified that she found the Grievant's conduct ***unacceptable*** and that she did not report the Grievant's conduct because she **was used to it,** and he apologized to her. Ms. Myers reasons for not reporting the conduct were different in her testimony relative to her interview statement.

Ms. Sharon Sturgell

Interview Statements

Ms. Sturgell said she heard the Grievant make ***inappropriate comments*** to others but those statements were ***"no more than [those made by] anybody else that works in this place, so no."*** "Just no more than what others would talk about, ***they may use the F word or call someone a bitch*** but never directed to anyone in particular. ***It's talk that you hear around a place like this***. Ms. Sturgell said that the Grievant made no inappropriate comments to her, at least, ***"None that I've taken offense to***. . . ." When asked how she felt about working closely with the Grievant, she said, ***"I trust [the Grievant], I know if need be he will be there, I do not feel uncomfortable with him. I don't mind working closely with him.*** She said she was ***never offended by any of the Grievant's inappropriate comments***.[29]

Testimony

Ms. Sturgell testified that ***she still hears sexual comments in the Medical Department***. She said she'd heard the Grievant refer to himself as "Uncle Perv."

Ms. Kimberly Vandrasik

Interview Statements

During her investigatory interview, Ms. Vandrasik stated that she had heard the Grievant make statements ***"mostly sexual in nature."***[30] Then she recounted a specific example where ***she said to the Grievant "you just want me to sit on your lap," and the Grievant responded "I'd rather have you on your knees."***[31] Ms.

[27] *Id.*, at 24-25
[28] Joint Exhibit 4, at 70-71.
[29] Joint Exhibit 4, at 61-62.
[30] Joint Exhibit 4, at 67-68.
[31] *Id.*

Vandrasik also recalled hearing the ***Grievant say that "him and his ex-wife had a high bed so he could stand to have sex because he has bad knees."***[32] She also said that the Grievant ***made jokes "about being on your knees and performing oral sex."*** Finally, Ms. Vandrasik said, ***"It was just common place; it was accepted behavior between him and the nurses. I can't think of one nurse that didn't give it back to him. Every nurse has gave it back to him."***[33]

Testimony

Ms. Vandrasik testified that the ***Grievant's conduct made her "uncomfortable."*** She also stated that she never reported the Grievant's conduct because "***blowing the whistle could cause repercussions such as the Grievant's not responding to her call."***

Ms. Robin Williams

Interview Statement

Ms. Williams stated that she had heard the Grievant make ***sexually suggestive comments*** to other staff, but that he had never made any such statements to her. She said the ***Grievant once touched her buttocks, "I went to sit down on the desk and [the Grievant] was reaching the paper towels and I sat on his hand. The Grievant laughed."*** She stated that she did not report the incident because***, "It did not make me uncomfortable. I didn't feel it was intentional*** and it didn't really register." When asked how she felt about **working closely with the Grievant**, Mr. Robbins said, "***Fine, no problems***."[34]

Testimony

Ms. Williams' testimony essentially tracked her interview statements.

The Grievant

Interview Statement

The Undersigned found no record of the ***direct comments*** that the Grievant made during his interview with Assistant Warden Harris. Instead, the Assistant Warden merely ***summarized*** her interview with the Grievant. The difficulty here is that such summaries lack the Grievant's unvarnished statements and, therefore, lack analytical utility in a factually intensive inquiry like this.[35] Credibility, and, hence, language, is absolutely critical in "he-said-she-said" sexual harassment disputes. Exact language is critical to fathoming the "color" of allegedly harassing statements and/or conduct. Summaries are merely someone else's recount of what allegedly culpable conduct. Finally, it is indeed puzzling why a firsthand account of the Grievant's interview statements was excluded from the arbitral record, since such statements can afford a useful platform for credibility assessments.

Testimony

During his arbitral testimony, the Grievant admitted making inappropriate sexual comments to females in the Medical Department. He testified, for example, that he bantered with everyone, making comments about his ***ex-wife and sex life with her***. As a defense or justification, he insisted that such comments were ***commonplace ("shoptalk")*** in the Medical Department, no better or worse than other employees' statements. Furthermore, no one told him to stop.[36] He testified that he just spoke his mind and viewed "Perv" as a term of endearment. The Grievant ***denied grabbing Ms. Khan's buttocks*** but admits having ***touched Ms. Williams' buttocks***. According to the Grievant, neither Ms. Williams nor Ms. Khan objected to his conduct as being offensive. Finally, the Grievant

[32] *Id.*
[33] Joint Exhibit 4, at 68.
[34] Joint Exhibit 4, at 40-42.
[35] Consequently, the Assistant Warden's summary of the Grievant's statements are not included in this opinion.
[36] Recall, however, that Ms. Meyers credibly testified that she asked the Grievant not to make sexual comments to her, after which he complied and apologized.

testified that he could not recall Ms. Kisner rolling her eyes at his statements or his having made sexual statements to Ms. Conn.

B Assessment of the Grievant's Behavior[37]

Before the Undersigned assesses the Grievant's conduct under the foregoing testimonies, investigative statements and applicable Work Rules, some commentary about the nature of the charges against the Grievant is indicated. Numerous statements throughout the dispute reference "hostile environment" and whether the Grievant's statements and conduct either created a "hostile environment," made alleged victims uncomfortable, or offended them. However, neither Work Rules 12A, 13, nor 49 requires any of those factors. Instead, those Rules explicitly reference only the ***conduct*** that they prohibit and not the ***consequences*** thereof. Consequently, those Work Rules may be violated by the prohibited conduct, irrespective of whether it creates a hostile environment or otherwise offends victims or makes them uncomfortable.[38]

1. Whether the Grievant Violated Rule 12A

Rule 12A prohibits "[O]bscene gestures or statements or . . . inappropriate statements." During his arbitral testimony, the Grievant admitted that he made "inappropriate sexual comments," including comments about his sex life with his ex-wife. Beyond that, however, he denied either making sexual comments or otherwise embracing sexual conduct.

Nevertheless, the interview statements and ***credible*** arbitral testimonies of Ms. Conn, Ms. Myers, and Ms. Vandrasik persuade the Undersigned that the ***Grievant violated Rule 12A***.[39] As discussed below, those statements and testimonies demonstrate that the Grievant's behavior exceeded his acknowledged infractions to include other statements and gestures/conduct of a sexual nature.

Ms. Conn credibly stated that the Grievant: (1) Invited her to "sit on my face," (2) grabbed his crotch and said "suck on this," (3) said "Sit here and we'll talk about what pops up," (4) expressed a desire to "bury his head

[37] When used in the analysis of this dispute, "Behavior" is intended to encompass both speech and physical conduct.

[38] Of course proof of a hostile environment and offended victims are part of the federal claim of sexual harassment under Title VII of the Civil Rights Act of 1964 (Title VII) as amended. In this dispute, however, the Parties did not indicate an intent to charge the Grievant under the federal standards of sexual harassment. Consequently, the Undersigned makes no attempt to apply federal standards in this dispute. Instead the issue is one of "just cause" rather than sexual harassment under the standards of Title VII.

[39] Interview statements of employees who ***did not testify*** at the arbitral hearing constitute uncorroborated hearsay, inherently lacking in probative value, unless corroborated by independent probative evidence in the arbitral record.

between those two melons." Even without other female employees' statements, Ms. Conn's accounts would establish Rule 12A violations.

There is more, however. Ms. Tracie Myers stated that she heard the Grievant make sexual comments to other female employees about what he could (and would like to) do. According to Ms. Myers, the Grievant always used the "F" word and talked about what he could do (sexually) for a woman. He talked about how he could "Eat a woman out." He would invite female employees to "come and sit on my lap; I'll take care of your needs." He told Ms. Myers that "he would like to taste what [she] tasted like, and [he] bet [Ms. Myers] taste good." He asked Ms. Myers "do you shave" and stated "I like muff pie." During her arbitral testimony, Ms. Myers confirmed the foregoing interview statements.

The Union challenges Ms. Myers' credibility because her testimonial reason(s) for not reporting the Grievant's conduct differed from the reason(s) offered during her investigatory interview. During her investigatory interview, Ms. Myers said she did not report the Grievant's conduct because "I didn't know I should of. I thought when I said, I don't want this he stopped so I didn't think to report how he was talking to everyone else."[40] When testifying at the arbitral hearing, however, Miss Myers stated that she did not report the Grievant's conduct because she "was used to it," and he "apologized to her."

Clearly, this discrepancy warrants consideration as a credibility impediment. However, closer scrutiny reveals at least two reasons that this discrepancy does not undermine Miss Myers' credibility. First, the arbitral record reveals that the statements of other witnesses, as well as the Grievant's own admissions corroborate his sexual behavior. Second, the inconsistency is reasonably reconcilable. Ms. Myers's arbitral testimony states that she never reported the Grievant's behavior because "[She] was used to it" and because he apologized to her.[41] During her investigatory interview, Ms. Meyers said she never reported the behavior because: "I didn't know I should of. I thought when I said I don't want this he stopped so I didn't think to report how he was talking to everyone else."[42] Thus, the specific discrepancy is that Ms. Myers' testimony omitted the latter reason. A reasonable interpretation of Ms. Myers' claim that she never reported the Grievant's behavior because "she was

[40] Joint Exhibit 4, at 71.
[41] Joint Exhibit 4, at 71.
[42] *Id.*

used to it," is that she had acclimated to the Grievant's sexual comments and conduct towards other employees. From this perspective, the statement that "she was used to it" does not necessarily fly in the face of the investigative declaration that she did not think she should have reported the Grievant's continuing sexual behavior toward other employees.

During her investigatory interview, Ms. Vandrasik stated that she had heard the Grievant make statements ***"mostly sexual in nature."***[43] On one occasion, she heard another nurse say to the Grievant "you just want me to sit on your lap," and the Grievant responded ***"I'd rather have you on your knees."***[44] That the Grievant responded to a nurses comment does not somehow excuse his sexual statement under Rule 13. Ms. Vandrasik also recalled hearing the ***Grievant say that "he and his ex-wife had a high bed so he could stand to have sex because he has bad knees."***[45] And he Grievant ***made jokes "about being on your knees in performing oral sex."*** Finally, Ms. Vandrasik opined that the Grievant's behavior, ***"was just common place; it was accepted behavior between him and the nurses. I can't think of one nurse that didn't give it back to him. Every nurse has gave it back to him."***[46] Ms. Vandrasik also stated that she did not report the Grievant because "***blowing the whistle could cause repercussions such as the Grievant's not responding to her call."*** The foregoing testimonies and investigative statements afford ***clear and convincing evidence*** that the Grievant violated Rule 12A.

2. Whether the Grievant Violated Rule 13

The issue here is whether the Grievant violated Rule 13, which prohibits: "Improper Conduct - Acts of discrimination or harassment on the basis of race, color, ***sex***, age, religion, national origin, disability, sexual orientation, ***gender identity*** or military status."[47] The Employer argues that the Grievant violated Rule 13 because he discriminated on the basis of gender by subjecting ***only females*** to his sexual comments. Because the Grievant addressed his sexual comments only to female employees, he discriminated on the basis of "sex" and/or "gender identity." Moreover, the sex or gender-based discrimination constitutes "conduct" and/or "acts." Consequently, the Arbitrator holds that the Grievant ***clearly and convincingly*** violated Rule 13.

[43] Joint Exhibit 4, at 67.
[44] Joint Exhibit 4, at 67.
[45] *Id.*
[46] Joint Exhibit 4, at 68.
[47] Emphasis added.

Also, but for the staleness of the event, the Grievant's having grabbed Ms. Khan's buttocks also would have violated Rule 13. However, as Ms. Khan testified, the buttocks-grabbing incident occurred approximately one year earlier. As a result, that otherwise credible claim is now stale and, hence, inadmissible. For the Undersigned to permit a year-old claim to be asserted against the Grievant would risk undermining his ability to defend himself against it. Consequently, the Undersigned dismisses this untimely allegation/charge against the Grievant.

But for the circumstances, the Grievant also could have been found guilty of engaging in sexual conduct against Ms. Robin Williams. However, the Agency failed to establish that the Grievant intentionally touched Ms. Williams' buttocks. In describing the incident, Ms. Williams stated that she ***accidentally*** sat on the Grievant's hand and that he did not intentionally place his hand in that position so that she would sit on it. Therefore, the Arbitrator holds that this incident did not violate Rule 13.

3. Whether the Grievant Violated Rule 49

Rule 49 prohibits "***Sexual conduct or contact,*** while on state time, with a person not under the supervision of the Department, regardless of consent." Here, again, Rule 49 focuses on "Conduct or contact." As noted above, evidence in the arbitral record does not establish that the Grievant engaged in any ***actionable sexual*** **"**Conduct**."** Nor is there evidence in the arbitral record of any ***actionable sexual contac***t by the Grievant.[48] Finally, although there were allegations that the Grievant and Ms. Diane Bohl were kissing on the job ("peck" on the lips"), both the Grievant and Ms. Bohl denied that accusation. A accordingly, the Undersigned finds no basis in the arbitral record to support the allegation that the Grievant violated Rule 49.

C. Union Defenses

1. Inadequate Investigation

The Union contends that the Agency inadequately investigated the facts and circumstances surrounding the instant dispute and offers two facts in support of this assertion. First, the Union stresses that the Agency did not interview every employee who either directly or indirectly experienced the Grievant's behavior. Second, the

[48] Of course, this holding neither obviates nor mitigates the fact that the Grievant engaged in sexual gestures (holding his crotch), which constitute specific types of conduct that violated Rule 12A.

Union notes that the investigatory report omitted relevant facts. Specifically, the Agency failed to interview Ms. Williams, Ms. Bohl, and other nurses who either directly or indirectly experienced the Grievant's behavior. In contrast, the Agency insists that its investigation was complete. In support of this position, the Agency asserts that Assistant Warden Harris interviewed every person mentioned by either interviewees or others. Second, the Agency stresses that the Grievant admitted having made sexual comments, thereby, presumably, contraindicating an exhaustive investigation.

The Agency prevails on this particular issue. First, the number of witnesses an employer should interview in any given dispute must be determined on a case-by-case basis. A thorough investigation does not necessarily entail interviewing every possible witness that observed a given episode of alleged misconduct. If, as the agency asserts, witnesses began to recount the same set of facts and circumstances, terminating the investigation may fall within the realm of reason. Thoroughness is not solely determined by the number of witnesses interviewed.

Second, whether the Grievant's behavior offended either Ms. Williams or Ms. Bohl, that is not a factor in this dispute because ***offensiveness*** is not an ***element*** of either Rules 12A, 13, or 49. Those Rules focus on the existence/nonexistence of prohibited statements, gestures, and/or conduct, irrespective of any concomitant offensiveness or discomfort. Consequently, to establish a violation of Rules 12A, 13, or 49, one need not prove that the alleged victim was also offended or otherwise discomforted. It is enough that the prohibited behavior occurred. Based on the foregoing discussion, the Arbitrator holds that preponderant evidence in the record does not establish that the Agency conducted an inadequate investigation.

2. Stacking Charges

The Union alleges that the Agency stacked charges against the Grievant in order to justify his termination. Specifically, the Union contends that the Agency may not level three rule violations against the Grievant for only one episode of misconduct, i.e., sexual comments/gestures. The Agency responds that it properly charged the Grievant with having violated Rules 12A, 13, and 49, each of which covers different aspects of the same behavioral episodes, and each of which the Grievant violated.

Before the Undersigned assesses the persuasive force of these arguments, some discussion of what constitutes "stacking charges" is indicated. As a general proposition, Management is entitled to assert all

applicable charges for each episode of alleged misconduct. "Stacking charges" generally entails asserting the ***same*** (rather than ***different*** or ***independent***) charges against an employee for a ***single*** episode of alleged misconduct. Restated, the vice in "stacking charges" entails ***duplicating*** either applicable or inapplicable (false) charges for the same behavioral episode. Management is free to assert ***multiple independent*** charges that address different ***aspects or components*** of a single behavioral episode. In other words, when an employee embraces a single episode of misconduct, Management may level ***all applicable***, ***independent*** charges against that employee.

In the light of this discussion, the Undersigned holds that there is no "stacking of charges" in the instant dispute. Rule 12A addresses "obscene gestures or statements . . . Or inappropriate statements." Rule 13 addresses "Improper conduct," defined as "acts of discrimination or harassment on the basis of . . . Sex . . . Sexual orientation, gender identity. . . ." Rule 49 contemplates "Sexual conduct or contact."

Although Rules 12A, 13, and 49 overlap to some extent, they also address different aspects of sexual behavior, and, hence have different scopes. First, all three rules address some form of physical "conduct" as distinguished from verbiage such as "statements" or speech.[49] Specifically, Rule 12A prohibits "obscene ***gestures (a form of physical conduct)***." Rule 13 prohibits "Improper ***conduct***." Rule 49 prohibits "sexual ***conduct*** or ***contac***t."[50] Thus, the rules overlap and are identical in so far as each one addresses some dimension of physical conduct.

The commonality ends there, however. Rule 12A addresses ***obscene*** gestures. Rule 13 prohibits conduct that entails "discrimination or harassment" linked to "sex" "sexual orientation," or "gender identity." Clearly, Rule 12 A is broader in scope because "obscene gestures" may involve "sex," "sexual orientation," or "gender identity." Under the facts of this case, it is reasonable to charge the Grievant under Rule 12A where he allegedly grabbed his crotch—a "gesture"—and uttered "obscene statements." Similarly, the Agency reasonably charged the Grievant under Rule 13 because his conduct was arguably discriminatory, aimed only at females. That same

[49] For analytical and functional purposes, the Undersigned distinguishes "speech" from "conduct." "Speech" entails mere verbal utterances as distinguished from physical conduct, which entails physical acts or movement. Furthermore, the Undersigned resumes that the Agency intended such a distinction between "speech" on the one hand and "conduct" "acts," on the other.

[50] "Contact" is a form, type, or subset of "conduct" because one cannot establish contact without engaging in some form of physical "conduct."

conduct also was arguably harassing on the basis of "sex." Based upon this comparison, it is clear that Rule 12A and Rule 13 are not identical in scope/focus because they cover different aspects of sexual behavior. Consequently, accusing the Grievant of violating both Rules does not constitute "stacking charges."

On the other hand, Rule 49 is duplicative and, hence, stacked because it addresses only "sexual conduct or contact," which is functionally and semantically indistinguishable from "improper ***conduct***," involving "discrimination or harassment on the basis of . . . ***sex***" under Rule 13 and obscene gestures under Rule 12A. Ultimately, then, charging the Grievant with violating Rules 12A and 13, as well as Rule 49 constitutes "stacking charges." Sexual conduct was the ***actionable conduct*** that triggered the charges under those three Rules. Rule 49 covers no aspect of the Grievant's allegedly sexual behavior that Rules 12A and 13 do not cover. In light of the foregoing analysis, the Undersigned holds that the Agency stacked charges against the Grievant by adding Rule 49 to the list of Rules allegedly violated.[51]

3. Disparate Treatment

The Union also essentially alleges that the Grievant is a victim of disparate treatment because others in the Medical Department engaged in the same or similar conduct as the Grievant without suffering his disciplinary fate. The Agency responds with essentially three arguments. First, it correctly notes that the Union has the burden of persuasion with respect to its affirmative defenses, including disparate treatment. Second, the Agency argues that to satisfy its burden, the Union must establish that the favored employee(s) must have been similarly situated to the Grievant, an element which the Agency claims the Union failed to establish. Arguing in the alternative, the Agency asserts that even if the Union satisfied the "same or similar" standard, the Agency removed other employees who violated Rules 12A, 13, and/or 49.

The Agency prevails on the issue of disparate treatment. To establish this affirmative defense, the Union must identify ***specific*** employees who were similarly situated to the Grievant in all ***relevant*** respects and who were disciplined less harshly than the Grievant if at all. This same-or-similar element is absolutely pivotal to establishing a disparate treatment claim. It is not enough to establish a general environment, in which employees

[51] Stacking charges can become a procedural error of consequence where the superfluous charges are shown to interfere with an employee's ability to fashion a defense, a fact neither alleged nor established in the instant dispute.

commonly embraced sexual behavior. Specificity and similarity are the keys, and neither is sufficiently established in the instant dispute. Consequently, the Arbitrator holds that the Union has failed to establish the affirmative defense of disparate treatment.

4. Shoptalk/Culture of Sexual Behavior

A Spinoff of the disparate-treatment issue is that both the Union and arbitral testimony suggest that the Grievant's statements were mere "shoptalk," and, therefore, not a proper basis for discipline. The Agency broadly responds that those who engaged in the type of conduct of which the Grievant is accused in this dispute were also disciplined. Furthermore, the Agency notes that none of the witnesses who testified to the existence of shoptalk could recall a single individual who engaged in the type of sexual behavior alleged in the instant dispute.

The Union prevails on this point because preponderant testimonial evidence establishes that, more likely than not sexual comments, gestures, and innuendo were common in the Medical Department.

Set forth below is a list of witnesses and summaries of their statements that tend to support the contention that sexual comments and behavior were not uncommon in the Medical Department:

1. Ms. Laura Hensley— sexual comments made in the workplace were no more than "***shoptalk.***" ***Everyone makes them.*** Nor were such comments offensive because they were customary, and, indeed, are still being made.
2. Ms. Sharon Sturgell—heard the Grievant make ***inappropriate comments*** to others but those statements were ***"no more than [those made by] anybody else that works in this place . . . ."*** "Just no more than what others would talk about ***they may use the F word or call someone a bitch*** but never directed to anyone in particular. ***It's talk that you hear around a place like this***."
3. Ms. Kimberly Vandrasik—***"It was just common place; it was accepted behavior between him and the nurses. I can't think of one nurse that didn't give it back to him. Every nurse has gave it back to him."***[52]

Manifestly, the foregoing statements and testimonies reveal the general nature of the environment in the Medical Department. Furthermore, the Arbitrator is unpersuaded by the observation that none of the foregoing witnesses could identify a specific employee who contributed to the sexual environment. Throughout this dispute, witnesses have voiced a fear of retaliation from blowing the whistle on corrections officers. Indeed, the Agency, itself, has recognized this fear as a factor contributing to, if not solely causing nurses in the Medical Department to silently endure sexual abuse. Thus, one is hardly surprised that any nurses would specifically identify other employees (especially corrections officers) who engage in prohibited sexual behavior. These facts

[52] Joint Exhibit 4, at 68.

together with the foregoing testimonies persuade the Arbitrator that more likely than not (preponderant evidence) sexual behavior was not uncommon in the Medical Department,[53] and the Grievant was not the sole offender therein.[54]

5. Zero Tolerance

Although the Union argues that the Agency failed to demonstrate a zero-tolerance rule, the Arbitrator finds nothing in the arbitral record suggesting that the Agency claims to have either had or applied a zero-tolerance rule.

6. Due Process

Here, the Union alleges that the Agency committed several fatal procedural errors that warrant the Grievant's reinstatement. These alleged errors along with the Parties' arguments are set forth below.

7. Progressive Discipline

Here, the Union argues that the Agency violated Article 24.02 by failing to follow the principles of progressive discipline in the instant dispute. According to the Union, the Agency was obliged to follow its penalty table for violation of Rules 12A and 13, which call for either a written reprimand or a two-day suspension on first offenses.[55] In support of this position, the Union notes that the Grievant is a fifteen-year employee with no active discipline, and, therefore, the alleged misconduct in this dispute constitutes a first offense.

In response, the Agency stresses the aggravative factors as justification for the Grievant's termination. In this respect, the Agency stresses that during his fifteen-year tenure, he had numerous sessions of EEO training specifically about sexual harassment.[56] According to the Agency, the Grievant's refusal or inability to jettison sexual behavior at work betrays unmistakable incorrigibility or rehabilitative resistance. In addition, the Agency stresses the potential legal liability associated with the Grievant's undaunted sexual behavior.

[53] It is unclear whether the Agency intends to charge the Grievant with creating a hostile environment. In any event, evidence in the record as a whole does not clearly and convincingly establish that the Grievant created a hostile environment. Furthermore, and perhaps more important, if the Agency wishes to accuse the Grievant of creating a sexually hostile environment, then the Agency must rely on either work rules or federal law that define a hostile environment. In addition, the Agency should be able to establish that it afforded the Grievant proper notification of what constitutes a hostile environment.

[54] Such an environment might mitigate, but hardly excuses, the Grievant's sexual behavior.
[55] Joint Exhibit 5, at 16.
[56] Management Exhibit 3, at 1.

The Arbitrator holds that progressive discipline is a cornerstone of labor-management relations, intended to rehabilitate rather than punish. Yet, progressive discipline is not without limits. In this respect, the Arbitrator agrees with the Agency that the established frequency, continuity, and blatancy of the Grievant's sexual conduct together with his frequent sensitivity training hardly suggest either rehabilitative capacity for the Grievant or rehabilitative efficacy for written reprimands or short suspensions.[57] In the instant dispute, the rehabilitative potential of progressive discipline is contraindicated given the nature and frequency of the Grievant's sexual behavior and his extensive sensitivity training. Consequently, the Arbitrator holds that the circumstances of this case do not support a reasonable expectation that progressive discipline will likely correct the Grievant's sexual behavior at work.

8. Pre-Disciplinary Notice

The Union argues that the Agency violated Article 24.05 by failing to include the following required data on the Grievant's pre-disciplinary notice: (1) measure of discipline to be imposed,[58] and (2) witness statements, and investigative documents. The Agency notes that although the measure of discipline did not appear on the first page of the pre-disciplinary notice, it appeared on the attached disciplinary grid.[59] The Agency did not address the Union's claim that the pre-disciplinary notice lacked witnesses' names and statements as well as investigative documents.

The Agency prevails, regarding ***notification of the measure of discipline*** on the pre-disciplinary notice. The Collective-bargaining Agreement addresses this issue as follows: "Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline."[60] Although the measure of discipline does not appear on the first page of the pre-disciplinary notice, the penalty table, containing the measure of discipline, was attached to the pre-disciplinary notice. The Agency's failure to place the measure of discipline on the first page of the pre-disciplinary notice constitutes a

[57] Not only is the Grievant persistent in his sexual behavior, he seems to take some pride in the labels associated with that conduct, i.e., "Uncle Perv" and "Sexy Saxon."
[58] Joint Exhibit 4, at 6.
[59] *Id.*, at 9.
[60] Joint Exhibit 1, at 96 (emphasis added).

procedural error, which was effectively cured by attaching the penalty table to the pre-disciplinary notice. Therefore, the Arbitrator dismisses this particular procedural error.

A different outcome obtains, however, with respect to the Agency's failure to attach witnesses' names, statements and other documents. Article 24.05 of the Collective-bargaining Agreement provides: "When the pre-disciplinary notice is sent, the Employer will provide a ***list of witnesses*** to the event or act known of at the time and ***documents*** known of at that time used to support the possible disciplinary action."[61] Failure to supply the foregoing information constitutes procedural error. Moreover, nothing in the arbitral record justifies excusing or mitigating that procedural error, which, therefore, shall factor into the remedial section of this dispute.

(a) Notice of Purpose of Investigatory Interview

Article 24.04 of the Collective-bargaining Agreement provides: "When employees have a right to and have requested a steward, stewards shall have the right to be informed of the purpose of the [investigatory] interview. . . ."[62] The Union alleges that the Agency committed procedural error by failing to notify the Grievant of the purpose of the investigatory interview with Assistant Warden Harris. The Agency offers no response to this alleged procedural error. Therefore, the Arbitrator holds that the Union has established this procedural error, which also shall factor into the remedial decision of this dispute.

VII. Penalty Decision.

Clear and convincing evidence in the arbitral record demonstrates that the Grievant continually made sexual comments and engaged in sexual behavior in violation of Rules 12A and 13. In addition, the Grievant apparently derived some sense of pride or pleasure from the nicknames, "Uncle Perv" and "Sexy Saxon." Because the Agency has established that the Grievant continually engaged in prohibited sexual behavior, the Undersigned holds that just cause warrants some measure of discipline.

Assessment of the proper disciplinary measure involves an evaluation and balancing of the mitigative and aggravative factors surrounding the Agency's disciplinary decision. The Arbitrator shall not modify that decision, unless it is unreasonable, arbitrary, capricious, discriminatory, in bad faith, or abusive of discretion.

[61] *Id.*, (emphasis added).
[62] Joint Exhibit 1, at 96.

A. Aggravative Factors

The major aggravative factors in this case are the Grievant's: (1) continual, blatant, lewd, sexual comments, gestures, and behavior; (2) repeated sensitivity training in sexual harassment throughout an over fifteen-year career with the Agency; (3) recalcitrant attitude, as evidenced by his apparent pride in the nicknames "Uncle Perv" and "Sexy Saxon"; and (4) position as a Correction Officer justifies holding him to a higher standard as a role model for inmates.

B. Mitigative Factors

The major mitigative factors are: (1) the Grievant's fifteen years of service; (2) his lack of active discipline; (3) the Agency's failure to establish a violation of Rule 49; (4) the procedural errors established in this dispute as set forth in this opinion, and (5) the prevalence of sexual behavior in the Medical Department.

C. Proper Measure of Discipline

The foregoing balancing of aggravative and mitigative factors warrants serious disciplinary measures, albeit short of termination, which is not justified in this particular dispute given the number and nature of mitigating factors. However, the Arbitrator finds unpersuasive the Union's argument that the Agency may not deviate from its penalty table, irrespective of the circumstances surrounding the particular type of misconduct at issue. The instant case typifies an occasion to replace progressive discipline with a sterner disciplinary measure, more likely to secure the Grievant's attention and precipitate his rehabilitation. A reasonable balance of the aggravative and mitigative factors in the instant case places the Grievant's sexual statements and conduct, including gestures far beyond the pale of any fathomable definition of tolerable behavior in any workplace.

Accordingly, the Arbitrator hereby reinstates the Grievant without backpay and without any employment benefits that he otherwise would have received but for his termination. Nevertheless, the Grievant's seniority is to remain intact as if the termination never occurred. Furthermore, the Agency shall reinstate the Grievant pursuant to a ***Last-Chance Agreement***, the ***central provision*** of which explicitly prohibits the Grievant from engaging in ***any kind of*** sexual behavior, including ***conduct, gestures, or statements*** that violate either the ***language or spirit*** of any ***applicable work rules*** that prohibit sexual and/or discriminatory behavior.

VIII. The Award

For all of the foregoing reasons, the Grievance is hereby **SUSTAINED IN PART and DENIED IN PART**.

Robert Brookins

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