IN THE MATTER OF ARBITRATION

BETWEEN

THE STATE OF OHIO

AND

STATE COUNCIL OF PROFESSIONAL EDUCATORS
OEA/NEA

Before: Robert G. Stein
CASE# 35-03-20110721-0022-06-10

Grievant: Jennette Wilch

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INTRODUCTION

This matter came before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Ex. 1) between The State of Ohio ("Employer") and the State Council of Professional Educators, OEA/NEA ("Union" or "SCOPE'). (Joint Ex. 1) The Agreement in control when this controversy arose was effective for calendar years 2009-2012.

Robert G. Stein was mutually selected to impartially arbitrate this matter pursuant to Article 6, Section 6.01 of the Agreement as a member of a recognized six-member panel. A hearing was conducted on August 14, 2013; October 28, 2013; and January 9, 2014 at the Cuyahoga Hills Juvenile Correctional Facility ("CHJCF"), located at 4321 Green Road, Highland Hills, Ohio. The parties mutually agreed to those hearing dates and that location, and they were each given a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing was recorded via a fully-written transcript and was subsequently closed upon the parties' individual submissions of post-hearing briefs on March 10, 2014.

The parties have stipulated both that the matter is properly before the arbitrator for a determination on the merits and also to the identified issue to be resolved. (A total of nine joint stipulations were submitted into the record) The parties have also agreed to the submission of six (6) joint exhibits.

ISSUE

Did the State have just cause to remove the Grievant? If not, what shall the remedy be?

RELEVANT AGREEMENT PROVISIONS

Article 5—Grievance Procedure
Article 6—Arbitration
Article 13—Progressive Discipline

BACKGROUND

Jennette Wilch ("Wilch" or "Grievant"), following three (3) weeks of pre-service training, began her actual work assignment with The Ohio Department of Youth Services ("DYS") in March 2009, serving as a personal development or family consumer science instructor at the CHJCF. The CHJCF is one (1) of four (4) Ohio high schools, which are chartered by the Buckeye United School District to house and serve the educational and vocational needs of youths from ages ten (10) through twenty-one (21) who have been convicted of committing felonies by the Ohio juvenile court system.

Wilch's personal development curriculum at CHJCF included instruction/experiences in the following skill areas: nutrition and wellness, parenting, child development, life management, and life planning. (Tr. p. 588) Beginning in October 2010, Wilch also served as a counselor for two (2) periods each school day. In February 2011 Wilch was alternatively assigned to fill a full-time guidance department counselor position subsequent to a colleague's retirement after her own return from her medical

leave because she had the appropriate existing guidance certification or licensure. (Tr. p. 593-94)

> [Specifically regarding her initial DYS classroom assignment], [t]he personal development course taught by Ms. Wilch included food preparation labs, which meant that new students, al times two or three per week, had to complete a self-study program before joining in the classroom activities. (Tr. pp. 590-91) Ms. Wilch needed a classroom aide to help manage the new students coming in while she was busy with the classroom work. (Tr. p. 591) Ms. Wilch first was assigned a classroom aide in August 2009. (Tr. pp. 591-92)

(Union brief p. 5) Based on the food preparation needs in Wilch's classroom, she selected Youth A ("Youth A") as the second of two (2) aides who had already met the CHJCF graduation requirements and were able to work in-house to earn a small hourly income. Youth A served as Wilch's aide for most of the year 2010 until Wilch's medical leave began in December 2010. Youth A's role as Wilch's classroom aide included his assisting new students through the five-day safety and sanitation unit, keeping the classroom area clean, assisting with connecting smart boards and other technology, and working with the students who were being exposed to the proper handling of "reality babies." His work as an aide from 7:30 a.m. to 11:30 a.m. each school day also included completing prep work before the students entered the classroom, such as putting various supplies on trays for the various student cooking groups.

The incidents ultimately leading to the Union's now-challenged termination of Wilch included the following:

- On March 11, 2010, a CHJCF teacher made a complaint that Youth A made a sexual gesture toward Wilch while the latter was in the guidance office and Youth A was in the hallway outside that office. A CHJCF administrator subsequently reviewed the hallway videotape, and the purported behavior by Youth A was not evidenced in the videotape. (Tr. pp. 17-18) However, a Youth Behavior Incident Report (YBIR) was completed regarding that incident. (Employer Exs. 8, 13)

- Wilch was placed on administrative leave on March 14. 2011. (Tr. p. 72)

- An Ohio State Highway Patrol trooper began a review of the video tapes from Wilch's classroom for several months' classroom time, including especially dates in November 2010. DYS also began an investigation with Nina Belli ("Belli") in charge. (Tr. p. 18) On May 5, 2011, the trooper informed Belli that misdemeanor 2 criminal charges would be filed against Wilch for dereliction of duty, which are misdemeanor 2 criminal charges. (Tr. p. 19)

- Belli conducted an investigatory interview with Wilch on May 10, 2011. When Wilch's request for Garrity rights was denied by Belli, Wilch did not answer the questions posed to her.

- On May 25, 2011, a pre-disciplinary notice was issued to Wilch by DYS. (Joint Ex. 2A) It cited to several purported policy/work rule violations and made the following claims regarding Wilch's alleged conduct: "On various dates and while working in your assigned classroom, you did permit and/or engage in inappropriate and or prohibited physical contact with [Youth A] when you tolerated said youth touching your face, other areas of your body, and caressing you in various ways . . . Also, during the same time period you utilized your Internet access for unauthorized uses." (Joint Ex. 2A, p. 1)

- Subsequent to a pre-disciplinary hearing conducted on June 8, 2011, the hearing officer determined that there was just cause for discipline based on his conclusions that: "In viewing the video clips [from Wilch's classroom], it appears youth Youth A is in Ms. Wilch's personal space in various clips. It appears that youth Youth A and Ms. Wilch have leaned into each other with their heads touching, youth Youth A has leaned his head upon Ms. Wilch's shoulder, youth Youth A has stood behind Ms. Wilch, and leaned over her while she is using the PC. It also appears that youth Youth A appears to have kissed Ms. Wilch." (Joint Ex. 2B, p.6)

- DYS Director Harvey J. Reed issued an Order of Removal to Wilch, effective July 6, 2011. That order specifically noted: "On various dates during the month of November 2010 you did permit and/or engage in inappropriate and/or prohibited physical contact with a youth while working in you assigned classroom. It was further determined through an administrative investigation that you utilized your state computer and Internet access for unauthorized purposes." (Joint Ex. 2C, p. 17)

  Wilch was ultimately charged with violating the following individual rules included in Policy 103.17:

  Rule 5.01P Failure to follow policies and procedures
  (Specifically: OSYS SOP 106.06.01—Internet, E-mail and other on-line applications and services)

Rule 5.28P Failure to follow work assignment or the exercise of poor judgment in carrying out an assignment
Failure to perform assigned duties in a specified amount of time or failure to adequately perform the duties of the position or the exercise of poor judgment in carrying out an assignment.

Rule 7.05P Showing partiality toward or becoming physically, emotionally or financially involved with a youth
Includes but is not limited to inappropriate physical touching, sending letters with sexual content, providing personal photographs, engaging in sexual contact/activity with a youth in DYS custody or supervision or allowing the youth to engage in sexual contact/activity with another staff or youth.

Committing any sexual act or contact with any individual under the supervision of the Department.

- A grievance was filed on the Grievant's behalf on July 15, 2011, citing the Employer's purported violation of Sections 13.01 and 13.04 of the Agreement. (Joint Ex. 3A)

- A Step-2 grievance meeting occurred on August 10, 2011, which resulted in a denial of SCOPE's grievance based on the Meeting Officer's determination that: The video evidence clearly shows the Grievant and the youth having physical contact, some of which is personally intimate. This inappropriate relationship was not limited to a single occurrence, but continued to happen over an extended period of several days. The Meeting Officer is convinced that the Grievant welcomed and encouraged this close relationship with the youth. Otherwise she would have reported the youth's impropriety to her supervisor as required by DYS policy. The Grievant listened to Internet music with the youth, and the youth is seen at the Grievant's computer while she was not at her desk. Such Internet use is prohibited by DYS policy , , ," (Joint Ex. 3B, p. 4)

- On May 3, 2012, a SCOPE representative submitted to this arbitrator a motion to continue the arbitration hearing originally scheduled for May 6, 2012 "because criminal charges against the Grievant had been resubmitted . . . [SCOPE requested that the arbitration be postponed or continued] . . . until the criminal charges were answered and the charges have been addressed." (Joint Ex. 3D)

- This arbitrator granted the continuation request. The arbitrator's e-mail response indicated that the arbitration on the instant matter would be rescheduled at a later date by mutual agreement of the parties, and also noted that **all make-whole remedies related to the case shall be tolled as of May 16, 2012.** (emphasis added) (Joint Ex. 3E, p. 9)

- Upon motion of the prosecutor, all charges of dereliction of duty which had been made against Wilch were officially dismissed with prejudice by the municipal court judge before any actual trial had occurred. (Union Ex. G)

Based upon the culmination of any potential court proceedings, the matter was then made exclusively subject to the arbitrator's jurisdiction for final and binding resolution in accordance with Article 6, Section 6.08 of the Agreement.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer insists that it has provided clear and convincing evidence that Wilch was terminated for "just cause" based on her violation of work rule 7.05 on multiple occasions and that "her removal for these violations alone was progressive and commensurate with the offenses." (Employer brief p. 2) The Employer also claims that it has also proven Wilch's violations of work rules 5.01P and 5.28P "with aggravating circumstances that justify her removal, and these violations serve to augment the 'just cause' basis for termination when considered with the automatic removal penalty inherent with Rule 7.05P." (Employer brief p. 2) The Employer emphasizes that any violation of a Level 7 work rule by a DYS staff member may result in that employee's termination, absence of active previous discipline notwithstanding. (Joint Ex. 4)

The Employer denies any claim or assertion by the Union that work rule 7.05P contemplates only sexual contact/activity with a youth in DYS custody. The Employer asserts: . . . "[I]nappropriate physical touching need not involve overt sexual contact . . . Rule 7.05P specifies the following prohibited actions: showing partiality toward <u>or</u> becoming physically, emotionally <u>or</u> financially involved with youth." (Employer brief p. 3)

> The clarification paragraph following the 7.05P work rule elaborates the following prohibitions involving physical involvement with a DYS youth:

- inappropriate physical touching
- engaging in sexual contact/activity
- committing any sexual act or contact with any individual under the supervision of the Department

> These are all separate offenses . . . This distinction is made manifest by the commas inserted between each of these offenses.
>
> The removal order (Joint Ex. 2C) specifies that the Grievant "did permit and/or engage in **inappropriate** and/or prohibited **physical contact** with a youth." Nowhere in the removal order, the pre-disciplinary meeting notice (Joint Ex. 2A) or the pre-disciplinary meeting report (Joint Ex. 2B) is there any mention of a sexual act, sexual contact, or sexual activity.

(Employer brief p. 3)

The Employer further insists: "[O]ne's education, training, and common senses will determine what constitutes inappropriate touching between teacher and student in an educational setting, especially when the student is a convicted felon in the State's custody. [M]ost human beings believe that a teacher stroking, touching, kissing or being stroked, touched or kissed by a youth/student under his/her supervision is wrong regardless of whether a law or rule governs such conduct or where the conduct occurs. It is common sense." (Employer brief p. 5)

Of the twenty-two (22) video clips subject to the arbitrator's review both at hearing and subsequently on an independent basis, the Employer contends that video clips 3, 4, 7, 8, and 9 provide proof beyond a reasonable doubt that the Grievant touched Youth A inappropriately.

> While Youth Youth A was lying prone on a cafeteria table, the Grievant admits to flicking, touching, or applying pressure points to his person. Also, Bruce Koenig {"Koenig"], the Union's expert witness, found that the touching did occur in these 5 video clips. The Grievant had no reason to make physical contact with Youth Youth A in these clips. He might or might not have been sick on 11/5/10, but in any event the Grievant is not a nurse and she could have and should have sent him to the

> nurse clinic if she truly believed he was sick. She had no authority, reason or right to apply pressure points to his head or pick, flick or rub anything off of his person.
>
> . . . [T]he Grievant permitted Youth A to intrude into her personal space and to physically touch her inappropriately in violation of work rules 7.05P and 5.28P, and she further encouraged him to engage in such inappropriate touching by failing to subject him to any negative consequences for his behavior.

(Employer brief p. 17) The Employer contends that it has met its requisite burden of proof by providing clear and convincing video evidence that one or more of the video clips demonstrate(s) or document(s) that Wilch violated work rule 7.05P. The Employer notes specifically that "the standard of proof required to uphold most all administrative removals in the State of Ohio is 'clear and convincing evidence'." (Employer brief p. 19)

The Employer challenges the Grievant's claims that her conduct with Youth A was appropriate pursuant to a then recently-adopted new program called Strength Based Behavior Modification System ("SBBMS").

> [SBBMS] is a multi-level behavior motivation system built on the principles of effective intervention and follows best practice guidelines of reinforcing positive/desirable behavior and sanctioning negative/undesirable behavior.
>
> "This program stresses immediacy and consistency in providing reinforcements (incentives) for a youth's positive behaviors while sanctioning those youth behaviors that are unacceptable." (SOP 303.01.16, p. 1 of 9)
>
> It is well-documented here that the Grievant never sanctioned Youth Youth A in any official way.

(Employer brief p. 21)

The Employer also insists that the video evidence demonstrates that on at least three (3) occasions Youth A was seated at Wilch's desk and controlling her state-owned computer. The Employer notes that, although Youth A was the Grievant's classroom aide at that time, he was not a student, and there was no school-related educational necessity requiring his access. The Employer emphasizes that, on at least one occasion, Wilch briefly

left Youth A alone in her classroom on her computer, resulting in her violation of both work rule 5.01P and 5.28P as a result. The Employer contends that the evidence demonstrates that Wilch permitted Youth A to access her state-owned computer for purposes not related to state business without authorization to do so.

The Employer requests that the Union's grievance be denied in its entirety based on its assertion that rule 7.05P prohibits "inappropriate physical touching," which is distinct from overt sexual touching, and that the evidence clearly demonstrates that Wilch engaged in the prohibited conduct on multiple occasions with Youth A.

SUMMARY OF THE UNION'S POSITION

The Union contends that the Employer has failed to meet the "just cause" standard identified in both Sections 3.01 and 13.03 of the Agreement by purportedly failing to prove with clear and convincing evidence that Wilch did engage in inappropriate physical contact with Youth A and that she violated the DYS Internet policy. The Union further asserts: "Ms. Wilch had no notice that her conduct, involving non-sexual physical touching to show care, comfort, and concern could result in her discharge. The investigation by DYS did not comport with due process requirements." (Union brief p. 48) The Union insists that "[t]he State has not met its burden of proof to show, through clear and convincing evidence, that there was inappropriate physical touching between Ms. Wilch and Mr. Youth A . . . The State presented no evidence of sexual touching between Ms. Wilch and Mr. Youth A." (Union brief p. 54)

The Union emphasizes the limited evidentiary value of the video clips copied from the security-based camera located near Wilch's desk in her classroom. The Union asserts

that expert witness Koenig recognized that the videos need to be viewed with their innate limitations in mind.

> These limitations include a loss of resolution due to the recording process, the low frame rate that can lead to misleading results if the video is viewed as if it is a movie, the two-dimensional format that presents deceiving perceptions of the closeness of objects and people, and the image compression that causes the loss of fine details in the image.

(Union brief p. 55)

The Union also notes that expert witness Koenig concluded that physical touching was apparent in video clips 3, 4, 7, 8 and 9. The Union also recognizes that Wilch and Youth A both confirmed that there was non-sexual touching of Youth A demonstrated because Youth A was not feeling well, and "Wilch was attempting to provide some relief through pressure point touching. Ms. Wilch may have removed a stray eyelash from Mr. Youth A's face. None of the touching was sexual in nature." (Union brief p. 55) The Union further notes that another instance of recognized touching between Wilch and Youth A was the hug that Youth A generated in December 2010 before Wilch left for winter break, her surgery, and her upcoming medical leave. That event was witnessed by other DYS staff members and was not included in the order for Wilch's removal from her employment. Regarding the Employer's claim of inappropriate touching involving Wilch and Youth A, the Union counters that conclusion:

> DYS did not provide clear and convincing evidence that there was inappropriate touching between Ms. Wilch and Mr. Youth A. Rather, the evidence shows that the touching which did take place was not prohibited by any work rule and was consistent with the practice at the facility and the SBBMS training . . . The physical touching or caring or concern which is shown on the video . . . is not prohibited by any DYS work rule, is consistent with the practice at the facility, and comports with the training Ms. Wilch received . . . There is no work rule that prohibits all physical touching of youth . . . [Principal Gretchen] Derethik ["Derethik"], Ms. Wilch's direct supervisor, testified that Rule 7.05P does not prohibit hugging . . .

> The SBBMS training that DYS provided to Ms. Wilch [and other staff members] actually encouraged, rather than prohibited, appropriate touching that shows care and concern. The program was referred to by the nickname of "hug a thug." The "Expressing Affection" skill card encourages the expression of good feelings toward another person . . . [T]here was no training or boundaries provided.

(Union brief pp. 56-58)

SCOPE further contends that if, in fact, there was inappropriate touching or a relationship which violated a work rule, the penalty of discharge is too severe in light of the Agreement's recognition of progressive discipline in Article 13, Section 13.04 and also in light of Wilch's success during her two (2) years and four (4) months as a staff member serving as a mitigating factor. The Union notes that Wilch was an excellent employee at DYS, and she had received several commendations from Derethik, positive performance evaluations, and an employee-of-the-month award. Based on the absence of any prior disciplinary actions against Wilch and Wilch's excellence as an employee, SCOPE claims that discharge was too severe as the discipline imposed. SCOPE contends: "[P]rogressive discipline is required, and Ms. Wilch's excellence as an employee is a mitigating factor." (Union brief p. 60)

Regarding the second basis for Wilch's challenged discipline, SCOPE maintains that Wilch's use of the Internet on the state-owned computer in her classroom did not provide a 'just cause" basis for her termination.

> Ms. Wilch was not provided with any notice from DYS that it considered using a state computer to play Internet music inappropriate. In the Order of Removal, DYS claimed that Ms. Wilch "utilized [her] state computer and Internet access for unauthorized purposes" in violation of Rule 5.01P and ODYS SOP 106.06.01. (Joint Exh. 2C) The rules and standard operating procedure cited to by DYS, however, do not state that individuals may not use their computers to access Internet music providers such as Air One, Pandora, or YouTube. DYS's witness, Mr. Penrod, admitted that there is no rule that prohibits access to such sites. In fact, Websense is supposed to block access to sites that are deemed inappropriate by DYS.

(Union brief p. 62) SCOPE further insists that the training Wilch did receive at DYS regarding use of the Internet did not inform her that she should not access Internet radio sites. SCOPE refers to the testimony of DYS staff member Kathleen Hutson ("Hutson"), who acknowledged that other DYS teachers use Internet sites to play background music and to provide classroom rewards. SCOPE also avers that, even though Youth A operated Wilch's assigned computer, it did not happen without Wilch's supervision of him as her classroom aide and while he engaged in a specific project assigned and was supervised by Wilch.

In support of its claim that Wilch's due process rights were violated in the investigatory and grievance procedures, the Union notes the Employer's failure to provide Wilch with Garrity protections, leading to Wilch's failure to respond to questions during the pre-disciplinary hearing. Scope also insists that the Employer failed to provide or introduce evidence at that pre-disciplinary hearing which was later presented at the arbitration hearing, purportedly precluding Wilch's counsel from preparing and presenting all of its defenses most effectively. SCOPE claims: "Of the 22 video clips presented by the State at arbitration, only 8 were specifically identified in the DYS Investigation Report (video clips 10, 11, 16, 17, 18, 19, 20, 1n 21), and one clip (clip 22) was specifically identified before the Hearing Officer's decision was issued." (Union brief p. 66) The Union maintains that the Employer violated Section 13.03 of the Agreement by failing to provide Wilch with all of the documents used to support her termination, either prior to the pre-disciplinary hearing or before the issuance of a written decision. Section 13.03 of the Agreement specifically provides:

> [T]he employee shall be provided with all documents used to support the possible disciplinary action which are known of and available at that time. Documents which are not known or available at the time of the [pre-disciplinary]

hearing shall be provided to the Association for examination prior to the issuance of a written hearing.

In summary, the Union requests that Wilch be reinstated with full back pay, tolled as of May 16, 2012, based on the Employer's alleged failure to prove by clear and convincing evidence that Wilch did engage in inappropriate physical touching with Youth A and that she violated any established DYS policy related to Internet usage. SCOPE also requests that the arbitrator retain continuing jurisdiction regarding the final resolution of this matter.

DISCUSSION

In this employee termination matter, the arbitrator must determine whether the Employer has proved with clear and convincing evidence that the discharged employee has committed one or more acts warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.,* 102 LA 555 (Bergist 1994). Generally, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and DWQ, Local 2236*, 117 LA 589 (Dichler 2002).

> Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee. This is especially true in cases, like this one, where the parties have agreed that the collective bargaining agreement requires "just cause" for disciplinary actions, including discharge.

Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

In the instant matter, the parties have collectively bargained for the inclusion of a "just cause" provision in both Sections 3.01 and 13.01 of the Agreement. Even though the parties did not include a definition of the "just cause" standard in the language which they elected to include, commonly-accepted principles routinely used by arbitrators in disciplinary matters "are intended to ensure a higher level of fairness and due process for employees accused of wrongdoing. They are also intended to increase the probability of workplace justice." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, Oren Parker Local 8-171, Vancouver, Wash. and Petra Pac, Inc.,* 05-1 Lab. Arb. Awards (CCH)P 3078 (Nelson 2004).

> "Just cause" imposes on management the burden of establishing: (a) that the standard of conduct being imposed is reasonable and is a generally-accepted employment standard which has been properly communicated to the employee; (b) that the evidence proves that the employee engaged in the misconduct which did constitute a violation of that standard; and (c) that the discipline assessed is appropriate for the offense after considering any mitigating or extenuating circumstances.

Phillips Chem. Co. and Pace, Local No, 4-227, AFL-CIO, 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor 2000).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause," but does not define what does constitute "just cause," it is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17,* 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

> "Just cause" is a contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, any mitigating factors, and

whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County, and Mun. Employees, AFSCME State Council 61, 01-2 Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001*).* The purpose of "just cause" is to protect employees from unexpected, unforeseen, or unwarranted disciplinary actions, while at the same time protecting management's rights to adopt and to enforce generally-accepted employment standards. *Phillips Chem. Co. and Pace, Local No. 4-227, AFL-CIO,* 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor 2000). The Employer here has retained specific management rights in Article 3 of the Agreement, including the right to discipline employees and "suspend, discharge and discipline employees for just cause" so long as its exercise of discretion in utilizing those specific rights is not unreasonable, arbitrary, capricious, or motivated by improper means. *Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264,* 115 LA 190 (Landau 2001).

One arbitrator defined "just cause" as "that cause which, given the totality of circumstances, enables an impartial observer to determine that the adverse action taken against an employee is, in all respects, a reasonable assertion of authority designed to meet legitimate management objectives." *Gallatin Homes*, 81 LA 919 (Cerone 1985). "'Just cause' is not a legal concept, but it embodies the principles of industrial justice.

Arbitrators do not lightly interfere with management's decisions in disciplinary and discharge matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable.

In this matter, the arbitrator finds that the evidence submitted and reviewed herein demonstrates that the Company did not meet its evidentiary burden to demonstrate that it did have "just cause" to terminate Wilch's employment.

Although the Employer did not actually address at the pre-disciplinary hearing all of the video clips presented at the arbitration hearing and subsequently reviewed several times by this arbitrator, I find that none of the captured video footage or individual testimony demonstrates the Grievant's violation of Rule 7.05P, primarily focuses on purported sexual involvement with a DYS resident. Although five (5) specifically identified video clips were identified by expert witness Koenig as including actual short-term physical touching of Youth A by the Grievant, those brief incidents all occurred within an approximate six-minute time period beginning at 7:22 a.m. on November 5, 2010, a day on which Youth A complained of having a headache. Koenig's visual review of those specific segments (Union Ex. C) indicated the following content in the respective video segments:

- Segment 3—The male [Youth A] is lying flat on his stomach upon a table and the woman, sitting in a chair next to his head, touches his face for approximately 1.1 seconds.

- Segment 4—The male is lying flat on his stomach upon a table and the woman, sitting in a chair near his head, strokes the hair on top of his head with what looks like her right index finger.

- Segment 7—The male is lying flat on his stomach upon a table and the woman, sitting in a chair near his head, moves her right hand and touches the male's head for approximately 1.6 seconds.

- Segment 8-- The male is lying flat on his stomach upon a table and the woman, sitting in a chair near his head, moves her right hand and strokes the hair on the top of his head.

- Segment 9-- The male is lying flat on his stomach upon a table and the woman, sitting in a chair near his head, moves her right hand and strokes the hair on the top of his head for approximately 1.1 seconds.

Wilch's own hearing testimony indicated that these movements initiated by her were the result of her efforts to apply "pressure points" to Youth A's forehead in an effort to alleviate his headache and were an indication of her "care and concern and not sexual by nature." (Tr. pp. 659-660) Koenig's own summary also identified the inherent limitations in identifying "inappropriate physical touching" in some of the other specific video clips:

- Segments 5, 6—It is not possible from this video clip to determine conclusively if her right hand touched the man's head.

- Segments 10, 11—It is not possible to tell from the video if the male's and woman's faces are touching.

- Segment 12—It is not possible from this approximately 1.1-second video clip to determine if his right hand touched the woman's face, since the view of his hand is blocked by her head.

- Segment 13—It is not possible, due to the poor quality and limited pixel resolution, to determine if the male embraced, or even touched the woman in any manner, but the woman clearly did not embrace the male.

- Segment 14—They do not embrace and there is not obvious physical contact between them, but it is not possible, due to the poor quality and limited pixel resolution, to determine if the male's left arm touched the woman's right arm.

- Segment 16—The male is behind the woman when he reaches out and grabs the right, dark arm rest of the chair and swirls it toward him; he does not touch the woman.

- Segment 17—The male is sitting behind the right of the woman and their heads are close together. Some of the images reflect the top of his head to the left side of her face, but it is not possible from the video angle to determine if their heads actually meet.

- Segment 19—The male is standing behind the woman when he reaches out his right arm to the left and beyond the woman's head while he looks at the computer screen; their faces to not touch.

- Segment 20—The male is standing behind the woman moving his left hand around. It is not possible to determine from this video clip if he is touching her back, or not, due to loss of depth perception in the video.

- Segment 21—It is not possible to determine from this video clip if he is touching her back, or not, due to his body blocking the view and lack of depth perception.

- Segment 22—It is not possible from the video angle to determine if their heads actually touch, or not.

(Union Ex. C) The evidentiary value of the video clips, in general, was also noted by Koenig as being limited by the following, among other factors:

> . . .
>
> 3. The video clips are in a two-dimensional format, whereas the original scene captured by the camera is in three dimensions. Therefore, accurate depth perception between objects and individuals, that is normally easily discernible at the scene, is often not possible in video clips and images, especially if the subjects are in the same line of sight or are distant from the camera.
>
> 4. The original information captured by the video camera was further degraded by the installed video surveillance system due to the high level of image compression, which removed finer details, such as facial features. The installed video surveillance system most likely can be set to a lower compression level, and therefore provide more detailed resolution.
>
> 5. Overall, the video clips are of poor quality, which makes identifying an individual's face problematic, due to the selected low quality settings on the installed video surveillance system. Also, due to the low frame rate, the video clips cannot accurately be viewed as movies.

(Union Ex. B)

Based on the limited and compromised quality of the video clips, the five (5) cited clips (3, 4, 7, 8, and 9) do not clearly demonstrate that Wilch engaged in "inappropriate physical touching" in the sexual sense or setting, as suggested by the context of Rule 7.05. However, her conduct does demonstrate her failure on multiple occasions to maintain the appropriate physical boundaries as a professional educator. As an experienced teacher and

trained school counselor, Wilch was made aware during her three-week pre-training of some of the innate hazards of working in the DYS system with students and residents having a history of criminal involvement. Especially in circumstances such as those, the Grievant had an on-going duty to maintain a professional, rather than personal, relationship with all of the DYS students/residents, including Youth A, as her former student and subsequent aide. As noted in Derethik's hearing testimony, an on-going need was identified in Wilch's pre-service training to maintain a **"safe distance"** from students in the classroom environment.

> **. . . Whenever talking about safety and security of a teacher in the classroom, the instruction is to make sure you have a safe distance between yourself and the youth. Make sure that the youth are not up around your desk, or behind you or on the side of you or block you in any possible way.**
>
> You always want to leave yourself room to get out, room to get to a phone, so that you yourself are protected . . .

(Tr. p. 392) In Wilch's classroom environment, Youth A had a desk located very near to the Grievant's, based on Wilch's identified need to rely on assistance from Youth A for resolving technical issues. (Tr. pp. 602-603, 647) Perhaps because of her counselor training, her role as the parent of three (3) young adult sons, and the fact that Youth A was not able to successfully communicate with his assigned social worker(s), Wilch admittedly assumed more of a counseling and quasi-parenting role in her relationship with Youth A. (Tr. pp. 607, 608, 609, 621, 715) While wearing this "parenting hat," Wilch attempted to counsel her student worker when his grandmother died, and she helped Youth A write personal letters to his two (2) younger half-sisters.

A significant mitigating factor in this case is the fact that as this teacher/student relationship advanced on a more personal basis, it was not only acknowledged, but

seemingly approved and encouraged, by Wilch's colleagues and supervisor Derethik. (Tr. pp. 533, 609) The latter was among those DYS staff members who admittedly referred to Wilch as Youth A's "mom" and he as her "son." (Tr. pp. 431, 490, 532, 610; Union Ex. T5) At least one (1) other staff member witnessed Youth A hug Wilch and wish her well before her upcoming surgery and recovery without any negative repercussions. (Tr. p. 635; Employer Ex. 9; Union Ex. R) Derethik also permitted Youth A to include his signature on a get-well card sent with flowers to Wilch at home while she recuperated from surgery. (Tr. pp. 429, 702; Union Exs. R, S) In mid-January 2011, Youth A shared in at least some of the phone conversation generated by Derethik from work to Wilch's home while the Grievant was still on medical leave. (Tr. pp. 491-492; 704) It is clear that DYS staff members played an enabling role in promoting the supervisor/graduate worker personal relationship and encouraging the encroachment or elimination of professional boundaries necessary to be maintained, especially in the DYS environment.

Although Wilch's conduct exceeded the normal boundaries prescribed to be maintained between teacher and student/aide, there is no evidence to establish conclusively that anything beyond an authentic therapeutic or counseling relationship was reciprocally operative. There is an absence of clear and convincing evidence that Wilch's conduct was of a sexual nature or that it encouraged such conduct by Youth A. Charges by the Employer that Wilch's alleged violations rose to Level 7.05P are based on significant speculation and unsupported by the video clips and other exhibits and testimony submitted. If Work Rule 7.05P does not prohibit any or all touching whatsoever involving staff and students at CHJCF, it was the Employer's responsibility or duty to clearly communicate with Wilch and all staff members with notice or training regarding what non-

sexual touching is actually intended to be prohibited by that rule. And, it was certainly their responsibility to immediately correct conduct that violated or bordered on violation of this rule. Local supervisions' enabling behavior or lack of response to what was condoned or tacitly condoned as a "Mom-son" relationship added confusion and not clarity to the meaning of Rule 7.05P for this employee who was new to teaching in an institutional setting.

"Teachers and other school employees often are held to a 'heightened scrutiny' of their conduct because of the important role they fill as educators of students. They occupy a position of 'public trust'." *Phenix City Bd. of Educ. and Ala. Educ. Ass'n*, 09-1 Lab. Arb. Awards (CCH) P 4461 (Baroni 2009).

> Where public employment is involved, particularly in the area of education, the question involves a balancing of the employer's right to expect the teacher to be a role model to students with the teacher's right to lead a reasonably normal life despite being held to a higher standard than almost any other type of employee.

Allied Supermarkets, Inc., 41 LA 713, 714-715 (Mittenthal 1963). Regarding a "just cause" determination in a teacher disciplinary matter, it should include any causes which "bear a reasonable relation to the teacher's 'fitness and capacity' to discharge the duties of his (her) position. *Phenix City Bd. of Educ*. In a disciplinary matter challenged in the California courts, the Supreme Court of California focused on the teacher's continuing "fitness to teach" and applied the following factors: (1) the likelihood that the conduct did or may adversely affect students or other teachers; (2) the degree of such adversity resulting or anticipated; and (3) the likelihood of the recurrence of the questioned conduct. *Morrison v. Bd. of Educ*., 1 Cal.3d 214, 461 P.2d 375 (1968).

Although Wilch's conduct in this matter merited some form of warning or discipline based on her failure to maintain requisite professional boundaries in her conduct with

Youth A, the Employer failed to impose discipline at an appropriate level. "The degree of penalty should be in keeping with the seriousness of the offense(s)." *Cent. Mich. Univ. and Cent. Mich. Univ. Faculty Ass'n*, 12-2 Lab. Arb. Awards (CCH) P 5730 (McDonald 2011). The parties here have agreed in Section 13.04 of the Agreement that "[d]isciplinary action shall be commensurate with the offense." The Disciplinary Grid, indicating the appropriate penalties based on the severity of the individual rule violations, also states: "Progressive discipline shall be based on the prior discipline received and the level of the current infraction(s). Where there is a choice of penalties, issues of mitigation or aggravation shall determine the penalty." (Joint Ex. 4)

> It is ordinarily the function of an arbitrator in interpreting a contact provision which requires [just cause] . . . not only to determine whether the employee involved is guilty of wrongdoing . . . but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what a reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee is defensible and the disciplinary penalty just.
>
> The concept of "just cause" requires reasonable proportionality between the offense and the penalty. The seriousness of the offense will vary depending on such factors as: the nature and consequences of the employee's offense (the magnitude of the actual or potential harm); the degree of knowledge the employee had about the rules and penalties (the clarity or absence of rules); the frequency of the offense; the impact of the degree of punishment on other employees; and the practices of the parties in similar cases. Furthermore, the discipline for all but the most serious offenses must be imposed in gradually increasing levels, i.e., progressive discipline**.** The primary objective is to correct rather than to punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge. Finally, the penalty should take into account any mitigating or aggravating factors, such as the employee's past employment record.

Stationary Eng'rs, Local 39 and County of Tehama, Cal., 0801 Lab. Arb. Awards (CCH) P 4129 (Reeves 2007).

> Inevitably, "just cause" depends on the [employment] setting and the special circumstances in which it appears. The bottom line is that "just cause" does not have a fixed and unalterable mathematical meaning and requires the application of good judgment and fairness to all of the facts in the record . . . [T]he employer's decision cannot and should not control in all situations when the test is an objective one such as "just cause."

Freightliners Corp. and Int'l Ass'n of Machinists and Aerospace Workers, Dist. Lodge No. 24, AFL-CIO, 90-2 Lab. Arb. Awards (CCH) P 8457 (Tilbury 1990).

If it is convincingly established that an employee has committed one or more rule or policy violations, "[i]t is well-established in arbitral authority and in practice that arbitrators expect employers to use progressive discipline in discipline and discharge cases." *ConocoPhillips and I.O.U.E., Local 351*, 13-2 Lab. Arb. Awards (CCH) P 6001 (Terrell 2013). "It is well-settled that progressive discipline is the preferable way to bring about change in an employee's work habits. In the instant matter, no such meaningful attempt was made." *AFSCME, Council 93, AFL-CIO and Town of Adams*, 09-1 Lab. Arb. Awards (CCH) P 4496 (Berry 2008). Because the Employer has a recognized contractual duty to utilize progressive discipline in response to Wilch's specific conduct, the discharge penalty utilized was not appropriate nor reasonable, given all of the circumstances. Instead of being corrective, it was unduly severe and punitive and demonstrated an abuse of the Employer's discretion in meting out appropriate discipline to the Grievant..

> [M]anagement's authority to use progressive discipline for governing the workforce is qualified; it does create a responsibility . . . The "just cause" requirement demands fair procedure as well as an adequate cause for discipline. Management is not at liberty to dismiss employees blindly. Termination of employment is too severe a penalty to be imposed on the basis of assumptions and predilections. Before an employer can discharge an employee for "just cause," it must perform two (2) rudimentary functions: (1) it must make every reasonable

attempt to ascertain the facts; and (2) it must judiciously consider mitigating factors including, but not limit to, the length and quality of the employee's service.

Myer Prods., 91 LA 690 (Dworkin 1988). "The concept of progressive discipline is one that anticipates that an employee who has been warned and notified of certain behavior will modify that behavior and become compliant with the employer's rules and regulations. The idea is that employees simply need to be instructed concerning problems, and the employee will learn from that and correct the problem." *Shuttleport Cal., L.L.C. and Serv. Employees Int'l Union Local 1877*, 08-2 Lab. Arb. Awards (CCH) P 4378 (McKay 208).

> [Progressive discipline is required] except in cases involving the most extreme breaches of the fundamental understanding. In particular, discharge may be imposed only when less severe penalties will not protect legitimate management interests, for one of the following reasons: 1) the employee's past record shows that the unsatisfactory conduct will continue, 2) the most stringent form of discipline is needed to protect the system of work rules, or 3) continued employment would inevitably interfere with the successful operation of the business.

Fed'n of Pub. Health and Human Servs., Local No. 4573, MEA-MFT and Child and Family Servs. Div., Mont. Dept. of Pub. Health and Human Servs., 06-2 Lab. Arb. Awards (CCH) P. 3569 (Reeves 2006).

Principal Derethik specifically noted at hearing that "[Wilch] was very good in the classroom." (Tr. p. 385) The evidentiary record also includes:

- a letter of congratulations from CHJCF regarding Wilch's selection as Employee of the Month for January 2010 (Union Ex. Q);

- several personal messages from Derethik to Wilch on various cards with messages indicating "I am very impressed with your professionalism and all you do."; "You have done a fantastic job."; "You have done a super job."; and "You have a great sense of teaching—you understand teaching as an art—I believe that comes natural—it is instinct—you are terrific." (Union Ex. T);

- several classroom observation and evaluation forms completed by individual CHJCF administrators found the Grievant's teaching performance to be "above average" and included comments such as: "[Wilch] always attends to the youth individually,

> in a quiet, supportive manner."; [Wilch] is respectful and professional at all times"; "The rapport between the students and [Wilch] is excellent."; and "[Wilch] is committed to helping the youth succeed."

(Union Ex. N) Such positive comments suggest that Wilch was generally a very successful employee who would have benefitted from some individual counseling with administrators regarding her questioned conduct before an official investigation was begun, which ultimately resulted in the most severe disciplinary option. There is a recognized responsibility on the part of management to investigate and discover the facts surrounding seemingly inappropriate or unprofessional conduct, to take reasonable explanations into account, to use progressive discipline, and to provide verbal and written warnings before imposing more onerous penalties. *Gardens Mun. Employees Ass'n, AFL-CIO and City of Gardena*, 04-1 Lab. Arb. Awards (CCH) P 3792 (Clokek 2004).

Given the proven facts in this grievance, this arbitrator finds that termination is not a "just" penalty for the Grievant's conduct. While Wilch was also charged with "the exercise of poor judgment," via Rule 5.28P and the "failure to follow policies and procedures" regarding Internet and computer usage, via Rule 5.10P, the latter alleged violation was again never proven by clear and convincing evidence to have demonstrated that Wilch did, in fact, violate the latter rule regarding computer usage in her classroom. The Union's post-hearing brief very adequately addressed Wilch's purported violation(s).

> In the morning before class when Mr. Youth A was with Ms. Wilch, Ms. Wilch would usually play background music on a Christian station, Air One, but on occasion she played music from YouTube. (Tr. pp. 451-452) They would also listen to music on Pandora, and if Ms. Wilch was in another area of the room working, Mr. Youth A would ask her if it was okay to listen to something else on Pandora or Air One, and then switch over to that. (Tr. pp. 697-698) On one occasion, Ms. Wilch asked Mr. Youth A to look up a recipe for hard candy. (Tr. p. 697) Ms. Wilch was always aware of what Mr. Youth A was doing on the computer. (Tr. p. 698) Mr. Youth A confirmed that although sometimes he would "push a button," Ms. Wilch was always supervising his use of the computer. (Tr. p. 452)

> The only training that Ms. Wilch received on Internet use is the self-study workbook that she completed. (Tr. p. 694-695; Union Ex. M) The training did not express any prohibitions on using the Internet for music through Pandora or Air One, and no one ever told Ms. Wilch that such things were prohibited. (Tr. p. 696)
>
> [Fellow teacher] Ms. Hutson testified that teachers play music on the computers from stations like Pandora and Christian stations, that the principal is aware of that activity, and that the principal has not said it is inappropriate. (Tr. pp. 545, 547) According to Ms. Hutson, sometimes teachers allow students to select the songs as a reward, or play it as background music. (Tr. p. 546) Ms. Hutson received Internet training during pre-service and has never been instructed that such activities were inappropriate. (Tr. p. 546) Ms. Hutson also testified that the teachers are encouraged to use YouTube and Internet resources as much as possible with the smart board technology. (Tr. pp. 547-548) Ms. Hutson understood that anything that was inappropriate would be blocked [by the DYS monitoring program Websense]. Tr. p. 548
>
> Roger Penrod, the Bureau Chief of the Bureau of Management Information Services, or Chief Information Officer, is responsible for all computing within State of Ohio, Ohio Department of Youth Services. (Tr. p. 38) Testifying for the State, Mr. Penrod explained that Websense captures and either permits or blocks certain activities on the Internet at DYS. (Tr. p. 40) Neither Pandora nor Air One was blocked by Websense. Although Mr. Penrod opined that accessing Pandora or Air One is not state business, he admitted that **there is no policy that prohibits listening to Internet music. (emphasis added). (Tr. pp. 48, 55-57).**
>
> Ms. Wilch was never told or trained that it was inappropriate for Mr. Youth A to be on her computer with her knowledge and approval. (Tr. pp. 698-699) . . . Ms. Derethik did not instruct Ms. Wilch that Mr. Youth A could not be on her computer, as her aide. (Tr. p. 42)

(Union brief pp.42-43) The above facts were not refuted or rebutted by the Employer.

Based on a review of all of the documentary evidence and testimony afforded at the hearing and in the parties' subsequent briefs in this matter, this arbitrator concludes that Wilch's discharge was too harsh a penalty in view of the lack of notice by the Employer to the Grievant regarding her alleged rule violations, the employer's failure to utilize progressive discipline in view of the Grievant's discipline-free record, and the apparent absence of consideration of Wilch's excellence as a teaching employee as a mitigating

factor. DYS failed to meet its contractual obligation to utilize progressive discipline and to issue discipline commensurate with the gravity of the Grievant's offense of failing to consistently maintain appropriate professional boundaries in dealing with Youth A.

AWARD

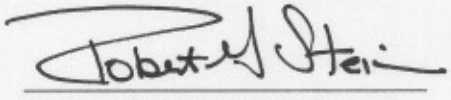
The Union's grievance is granted in part.

Safe practices are of upmost importance for employees working in institutional settings. In order to firmly emphasize the seriousness of using good judgment in maintaining a safe and secure professional boundary when dealing with youth in a DYS setting. Wilch's termination shall be vacated and replaced with an unpaid three (3) day suspension for the violation of Rule 5.28P only. The other two charges shall be removed from her personnel record. The Grievant, minus these three (3) days of suspension, shall be made whole, within two (2) full pay periods following the date of this Award, for back pay and benefits from the date of her termination until the mutually-agreed damage-freeze date of May 16, 2012.

Based on the provisions of Section 6.04 of the Agreement, the arbitrator's fees and expenses shall be borne equally by the parties.

This arbitrator shall maintain jurisdiction for 90 calendar days to assure proper compliance with this Award.

Respectfully submitted to the parties this 10th day of June 2014.



Robert G. Stein, Arbitrator