

In the Matter of the Arbitration)
)
 between)
)
 WASHINGTON FEDERATION OF)
 STATE EMPLOYEES)
)
 (Union))
)
 And)
)
 THE EVERGREEN STATE)
 COLLEGE)
)
 (College))

OPINION AND AWARD

ADA BEEBE GRIEVANCE
AAA No. 75-390-00120-09

BEFORE:

Kathryn T. Whalen, Arbitrator

APPEARANCES:

For the Union

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HEARING:

October 26 and December 18, 2009

RECORD CLOSED:

January 29, 2010

AWARD ISSUED:

March 9, 2010

I. INTRODUCTION

The Evergreen State College (College) suspended Ada Beebe (Grievant or Beebe) for six days in October of 2008. The suspension was based on claims that she had been untruthful during a workplace investigation, had made an inappropriate statement to a co-worker, and was untruthful when questioned about it. On October 21, 2008, the Washington Federation of State Employees (WFSE or Union) filed a grievance under the parties' contract, asserting that the suspension was without just cause.

The parties did not resolve the grievance and selected the Arbitrator according to American Arbitration Association procedures. A hearing was held on October 26, 2009 and December 18, 2009 in Tumwater, Washington. The parties were accorded the full opportunity to present evidence and argument in support of their positions. The hearing was transcribed by CSR Terri Averill. The parties elected to file written post-hearing briefs. The Arbitrator officially closed the record on receipt of their briefs.

II. ISSUES

The parties agreed that the issues are:

Did the College have just cause pursuant to the Collective Bargaining Agreement to discipline Ms. Beebe, and the discipline was a six day suspension? And if not, what is the appropriate remedy or remedies? Tr. 4-5.

The parties further agreed that should the Arbitrator award a remedy, she could retain jurisdiction for a period of 90 days to resolve issues, if any, concerning the remedy awarded. Tr. 5.

III. CONTRACT PROVISIONS

ARTICLE 27
DISCIPLINE

27.1 The Employer will not discipline any permanent employee without just cause.

Employer Exhibit 1 (E-1).

ARTICLE 2
NON-DISCRIMINATION

2.1 Under this Agreement, neither party will discriminate against employees on the basis of religion, age, sex, marital status, race, color, creed, national origin, political affiliation, military status, status as an honorably discharged veteran, a disabled veteran or Vietnam era veteran, sexual orientation, any real or perceived sensory, mental or physical disability, or because of the participation or lack of participation in union activities. Bona fide occupational qualifications based on the above traits do not violate this Section.

* * * * *

2.5 Both parties agree that nothing in this Agreement will prevent an employee from filing a complaint with the Washington State Human Rights Commission, Office of Civil Rights, or the Equal Employment Opportunities Commission.

IV. POLICY PROVISIONS

Non-Discrimination Policies and Procedures

F. Sanctions Against Knowingly Filing False Complaints

The college considers the intentional filing of a false complaint to be serious misconduct. It is a violation of college policy and of state and federal civil rights laws. Sanctions for such an offense may be as severe as dismissal from the college or termination of employment.

A finding that the Non-Discrimination Policy was not violated will not in itself be the basis for a charge of a false accusation. This section should not be construed as a warning against the raising of a complaint.

E-2, Att.17.

Workplace Violence

Deliberately filing false or misleading report of violence or threatened violence will be handled as incidents of unacceptable personal conduct and any employee or student making false or intentionally inaccurate reports will be subject to disciplinary action, up to and including termination or suspension or expulsion.

E-2, Att. 18.

Evergreen's Social Contract

As members of the Evergreen community, we acknowledge our mutual responsibility for maintaining conditions under which learning can flourish—conditions characterized by openness, honesty, civility and fairness. These conditions carry with them certain rights and responsibilities that apply to us both as groups and as individuals.

E-2. Att.19.

V. FACTUAL SUMMARY

A. Overview

Grievant has worked as a custodian at the College for about 15 years. From at least 2004 through July 2007, her work location was the Seminar 1 building.

During that period, the College assigned another custodian to assist her with heavy lifting tasks for some part of her shift. This was an accommodation related to an on-the-job injury Grievant had suffered. Custodian Chris Furtado, who was in a floater position, was the person assigned to assist Grievant.

In November 2007 Beebe filed a discrimination complaint against the College with the Washington Human Rights Commission (WAHRC). Grievant claimed that the College failed to provide reasonable accommodations for her medical condition; and retaliated against her when she complained about that and about race discrimination.

College Civil Rights Officer Nicole Ack investigated the complaint to prepare the College's response to the WAHRC. In the course of her investigation, she interviewed Grievant with Labor Center employee Juan Bocanegra and Union Shop Steward Doug Shanafelt. Ack also interviewed Grievant's immediate supervisor Long Tran, the other custodial supervisor Tracy Sorrell, several custodians including Abdul Asmath and Furtado, Building Services Manager Gaylon Finley, Facilities Director Paul Smith, Vice-President for Finance and Administration John Hurley, Associate Vice-President for HR Laurel Uznanski, and Environmental Health and Safety Coordinator Robyn Herring. Ack further reviewed numerous documents.

On January 24, 2008, Ack submitted the College's response asserting that the evidence did not support Grievant's allegations. In addition to Ack's conclusion that the evidence did not support Grievant's discrimination complaint, her response to the WAHRC included a finding that Beebe had willfully mischaracterized certain facts. Tr. 44; Ex. E-2, Att. 5.

On April 28, 2008, the WAHRC issued a finding of "no reasonable cause." The conclusion was that "[t]he preponderance of the evidence does not support a finding that [the College] discriminated against [Grievant] in her employment because of her race, disability, or retaliated against her for opposing a discriminatory practice." Ex. E-3.¹

Hurley decided to discipline Grievant as a result of Ack's findings and information she collected during her investigation and information submitted by

¹ Because of a typographical error, an Amended Notice of Commission Action was sent on May 29, 2008. Ex. E-2, Att. 6.

Grievant in the WAHRC proceedings. By letter dated August 7, 2008, he notified Grievant that the College was considering disciplinary action "up to and including dismissal." The notice set out the charges as follows:

- 1) Your deliberate untruthfulness regarding the facts related to your complaint filed on November 21, 2007 with the Washington State Human Rights Commission (WAHRC). Specifically, for your admitted dishonesty regarding an interaction you had with Paul Smith, Director of Facilities, on May 15, 2006, in which you claimed that Smith struck you in the face; and for your deliberately false accusation that Gaylon Finley, Building Services Manager, directed your supervisor, Long Tran, Custodian 3, to withhold floater custodian assistance from you during the summer of 2007.
- 2) Your inappropriate statements made to Abdul Asmath, Custodian 1, on February 5, 2008, and your deliberate untruthfulness regarding your discussion with Asmath.

The letter also identified the policies alleged to have been violated, and advised Beebe of a pre-disciplinary meeting set for August 21, 2008. There were 12 exhibits attached, including the policies at issue and correspondence regarding Grievant's discrimination complaint. Ex. E-2, Att. 1.

The incidents listed in the pre-discipline notice, information from Ack's investigation, information provided by Grievant in response, and information related to the discipline, are set forth in more detail below.

B. Smith Incident Charge

Grievant submitted a letter dated October 21, 2007, with her discrimination complaint. The letter was prepared by Jennyfer Weiks, a family friend of Beebe's. Weiks drafted the letter based on Grievant's oral statement.

In the letter, Beebe said she felt that the College was retaliating against her because of her ongoing disagreements with Smith. As an example, the letter stated that Smith "on May 15, 2006 at 11 a.m. struck me in my face when he

angrily threw some papers and yelled at me in front of my manager Gaylon Finley and co-workers after which I reported this to the Vice-President of the school." E-2, Att. 8.

The purpose of that May 15, 2006 meeting had been to discuss Custodian Rosa Pantoja's concerns about the amount of work Sorrell was assigning to her. Pantoja was accompanied by Grievant and Custodian Frank Maldonado; Finley was also present.

As Grievant remembers the meeting, she thought that Smith was not paying attention to what she was saying, and that the reason was because Smith had already talked to Sorrell. She recalls that it was when she mentioned this to Smith that he got angry, started asking her how she knew that, stood up with Pantoja's papers in his hand, stood in front of her, shook the papers, and slapped them in front of her face. Tr. 222-223.

Pantoja remembers taking some paperwork about her complaint to the meeting. She recalls that at one point Smith got upset, stood up, picked up the paperwork, walked over in front of where Grievant was sitting, and threw the paperwork down in front of Beebe. Tr. 210, 212. Maldonado's description of what happened is consistent with Pantoja's: that Smith was standing in front of the table where Grievant was sitting and threw the papers down. Tr. 275.

Smith's recollection of the incident is different. He admits that at one point, he raised his voice to Grievant and told her to be quiet so Maldonado could translate. He denies standing up or throwing a stack of papers or striking Beebe; he says he only had a single piece of paper that indicated who was there and the

purpose of the meeting. Tr. 89. He does not recall that the meeting became heated after he asked Grievant how she knew he had talked to Sorrell. Tr. 93-94.

Finley recalls Smith getting frustrated and raising his voice, but disputes that Smith struck Grievant or threw a stack of papers at her. He believes Smith was frustrated because he was not getting the information he needed to respond to Pantoja's issue. Tr. 160.

Finley has had disagreements with Smith and reported that Smith has gotten frustrated with him. He once wrote an email to a friend that said Smith yelled and screamed at him in front of others; Finley was upset when he wrote the email. Tr. 162-163.

Grievant previously described the May 15 incident in an October 2, 2006 memorandum to Hurley. In that memo, she said that Smith "blew up at me and stood up at his desk and bent over his desk and started screaming at me." E-2, Att. 9. There was no reference to Smith throwing papers and hitting her or almost hitting her.

In early October of 2006, Pantoja and Maldonado also had written statements about the May 15 incident. U-2 and U-13. Those statements are consistent with the account in Grievant's October 2, 2006 memo, except that both described Smith throwing paperwork that almost hit Grievant. Maldonado and Grievant discussed what occurred before Maldonado wrote his statement. Tr. 277. He cannot recall why there was a five month delay between the incident and his statement. Tr. 276. At some point after the May meeting, Maldonado told Ack what had happened, but he does not remember when. Tr. 279.

On an unspecified date, Grievant and Hurley met to discuss the May 15, 2006 incident. Hurley does not recall Beebe making any allegation that Smith had hit her when throwing papers. Following his meeting with Grievant, Hurley discussed the matter with Smith, and concluded that Smith may have raised his voice, but had not screamed at Beebe.

C. Refusal to Provide Assistance Charge

For the five year period that Finley has been the building services manager, Grievant worked a 1 p.m. to 9:30 p.m. shift that overlaps the day and swing shift. She was supervised for part of the shift by day shift supervisor Sorrell, and part of the time by swing shift supervisor Tran; from 3 p.m. to 4:30 p.m., there is no lead custodian working, so Finley supervised her directly during that time.

In her WAHRC complaint, Grievant claimed that Smith told Finley and Tran not to provide assistance to her as retaliation.² In her October 21 letter, Grievant alleged that she was not provided any assistance for about three weeks in August of 2007. She claimed that she talked to Tran and he told her that he had received emails from Finley telling him not to provide assistance to her. She also claimed that she talked to Finley and that he said that what Tran had told her was not true; that the decision not to provide her with assistance came from Smith and HR. Ex. E-2, Att. 8.

From at least 2004 until December of 2007, Grievant needed accommodations for her medical issues. Initially, Finley arranged to have Furtado assist her for an hour a day. As time passed, the amount of assistance Beebe

² This element of the complaint was read into the record by Ack during her testimony. Tr. 45.

needed increased. This caused problems for the other custodians and Tran, because it meant Furtado often was not available to do set-ups. As early as February of 2005, Finley talked to Herring about these issues and alternatives. Ex. E-6.

Tran supervised Grievant for the past eight years. He was aware of her medical problems and need for assistance with heavy lifting or moving. He recalls that the initial arrangement was for Grievant to get one hour of assistance a day with such tasks, but that Grievant needed more help than that so he started sending someone for between two and four hours a day. Tr. 111. He assigned Furtado to help her, and Furtado worked with her daily for more than two years. Other custodians complained to Tran about the arrangement because they felt that Grievant was getting special treatment; he advised them to talk to HR.

In the summer of 2007, Finley took two related actions that involved Grievant. First, he reassigned her from the Seminar 1 building to the Communications (COM) building. His reasons were that the COM building would be easier for Grievant to clean and that the Library remodel project would increase the workload in the Seminar building as more employees would be moved there. Second, he decided that rather than Furtado, he would have Maldonado, a maintenance worker who reported directly to him; provide the one hour of daily assistance to Grievant. Tr. 138; E-10. Finley advised Herring of his plans, and told her he expected a grievance from Beebe, because she preferred working with Furtado. Tr. 141.

Grievant's reassignment was to go into effect near the end of July. Furtado was on leave from early in July until around August 23. Finley recalls asking Maldonado to assist Grievant at the time of the reassignment. He also told Tran to assign someone from the swing shift if Grievant needed assistance after Maldonado's shift was over. Tr. 167.

According to Maldonado, Finley did not ask him to assist Grievant at the time she was moved to the COM building or during the period that Furtado was on leave in August of 2007. He recalls that Finley had asked him to assist Beebe several months before the move, when she was still working in the Seminar building. Maldonado's shift overlapped Grievant's by about two hours, and he reported that he did not know whether she received any assistance after his shift was over.

Tran recalls that when Grievant was first assigned to the COM building, Furtado continued to assist her, but that Finley wanted Furtado to return to his regular floater duties. Finley told him to assign someone else to assist Beebe, but she was not happy about the change. Tr. 114. Tran sent Asmath to assist Grievant, but she refused his help. He also sent a female custodian once, and Beebe said she did not need help. Tr. 120. He believes that Maldonado assisted her. After a few days, Tran reassigned Furtado to assist Grievant. Tr. 114.

Tran also recalls that Finley told him he did not need to assign anyone to assist Grievant for the first two days of the COM building assignment because someone from day shift would assist her. Tr. 119. Tran did not recall that Furtado was on leave from about July 26 to August 23, 2007. Tr. 123.

Smith does not recall talking to Grievant about these changes or about her concerns that she was not getting assistance. He also was not aware that Grievant was trying to discuss the issue with Finley and that Finley was referring her back to Tran. Tr. 93. He denies telling Finley not to provide assistance to Grievant. Tr. 92.

Grievant was upset by the reassignment and the decision that Furtado was not to assist her. She remembers not receiving any assistance during the first four or five days she was in the COM building, and asking Tran why. She recalls that Tran told her that Finley said they were not going to give her any more assistance because she had been moved to an area with lighter work. She also recalls that she and Shanafelt talked to Finley about the issue, and that Finley told her that Smith had directed that no one could work in partnership anymore. According to Beebe, when Furtado returned from his leave, he started assisting her again, but he had to hide it. Tr. 225-226.

Around the time of the move, Grievant contacted Shanafelt about the lack of assistance. Shanafelt began keeping a log of his conversations with Beebe and Finley about the issue. Tr. 288; U-8. He called Uznanski to confirm that there was a reasonable accommodation in place for Grievant, and was told that there was. Tr. 289. He contacted Tran to ask why Grievant was no longer getting help, and remembers Tran saying he had received an email from Finley directing him not to provide help for Grievant. Tr. 289.

Shanafelt did not see the email. Tr. 290. Around August 8, 2007, he talked to Finley and told Finley what Tran had said about being directed not to provide

Grievant with assistance. He remembers Finley told him that was wrong and that she was supposed to get help. Tr. 290. As far as he knows, Grievant still did not get help. Tr. 291.

In early August, Finley changed Grievant's assignment from the first and second floors of the COM building to the third and fourth floors at the request of Grievant and the Union. On August 15, 2007, he sent Tran an email about meeting with Grievant. He also addressed providing her assistance:

Please make sure that Ada receives 1 hour of help each night from someone on your crew other than [sic] Chris [Furtado]. Chris has helped Ada for over 2 years and needs [sic] to return to his regular float position. Please do not give this responsibility to Michael McMillan. He needs to work on cleaning the CAB. E-23.

Finley does not recall Grievant or someone from the Union trying to meet with him during the first two weeks of August. Tr. 164. By mid-August, Finley had directed Tran to assign whoever was available from swing shift to assist Grievant. He had been told that Beebe had refused assistance from some of the people Tran had assigned. Tr. 145. He thought Grievant's complaint about not getting assistance was really a complaint that she was not getting assistance from Furtado. Tr. 146.

Tran believes that Finley sent the August 15 email to make sure that Tran was not providing assistance for more than one hour a day, as had been done in the past. Tr. 124. According to Finley, that was not what caused him to send the email. Tr. 167.

About a week later, Finley sent Tran a reminder to make sure that Grievant was getting the agreed-on hour of assistance each day. He told Tran

that he might need to rotate the responsibility among the employees so "it is fair and does not become a union issue." E-22.

Finley does not believe there was any misunderstanding between Tran and Grievant about who would provide assistance after her move to the COM building. He believes his discussions with, and emails to, Tran made it clear that Beebe was to get an hour of assistance daily even though she was moving to a new building. Tr. 168. He was not aware that Grievant claimed that the heavy summer work had not been completed in the COM building before she was moved there. Tr. 169.

Furtado recalls when he returned from leave in August of 2007, he was told that he could not assist Grievant. Tr. 282; E-17. He estimates that, before his leave, he was assisting Beebe about two hours a day; he also said that sometimes she helped him finish work when he was behind. Tr. 283. He would help Grievant at the start of his shift and then spend the rest of his shift on other duties. Tr. 284.

In September of 2007, Beebe complained to Herring about not receiving assistance for several weeks in August. Herring contacted Finley to find out what assistance he had ordered. Finley replied that he had directed that she continue to receive daily assistance, but that Furtado was no longer assigned to that duty. He stated that Tran was sending Asmath to assist her. He also reported that Grievant only wanted assistance from Furtado or McMillan, and had on several occasions refused the assistance from whoever was assigned to help her. E-11.

Grievant did not complain to Herring about the lack of assistance until after it was no longer an issue. Tr. 190.

Finley denies sending Tran any emails telling him not to provide assistance to Grievant. He also denies getting any emails from Smith directing him not to provide assistance to Beebe. Tr. 157. To his knowledge, there was never a period, including the time when Grievant was transferred to the COM building, that she did not receive assistance. Tr. 158.

Grievant suffered an injury at work in August, and was off work from the middle of September through early October at her doctor's orders. She was offered some light duty work on October 1, 2007, but her doctor rejected one of the assignments because it was outdoor work. She was released to work with no restrictions in late November or early December 2007.

D. Asmath Incident

On February 7, 2008, Asmath talked to Ack about a conversation he had with Grievant and Shanafelt.

Shanafelt was investigating whether Grievant had been given the required assistance in August of 2007. He had been told that Asmath had been directed to assist her, so he went to talk to Asmath. He recalls that Asmath told him that he did not assist Grievant but that Furtado did. Grievant joined their conversation and continued to talk to Asmath after Shanafelt moved away. He did not hear any of their discussion. Tr. 305.

As Asmath remembers it, he and Shanafelt had concluded their conversation and Shanafelt was leaving when Beebe started asking him

questions. Grievant was on the loading dock and he was on the ground; they were separated by a few feet. Tr. 103-104. He recalls hearing and understanding what she said. Tr. 105. He was uncomfortable talking to her because custodians had been told not to talk about issues related to the investigation of her discrimination complaint. He remembers she said something like "I know that you are a Christian man. You'll tell the truth." Tr. 98.

Asmath said that he had worked with Beebe on one or two occasions in the past without problems. He also recalled at least once when Tran sent him to help Grievant because Furtado was not at work and Beebe refused his assistance. Tr. 106.

Grievant has a different memory of the incident. She remembers overhearing Shanafelt ask Asmath questions about whether Asmath provided any assistance to Grievant. She recalls that Asmath admitted that he had not helped Grievant, after which Shanafelt thanked him and said that was all he needed to ask. Tr. 233-234. She remembers talking to Asmath briefly, thanking him and telling him that she appreciated him telling the truth. Tr. 235. After that, she remembers saying that was all, Asmath asking if that was all, and smiling as he walked away. Tr. 235. She denies making the "Christian man" statement or saying anything about religion. Tr. 235.

Asmath described that it felt like Beebe was attacking him by the "Christian man" statement. It made him angry and he did not want to talk to Grievant any more or have any trouble so he walked away. Afterwards, he talked

to Tran about what happened. Tran advised him to report it to Finley. Finley told him to talk to Ack. Tr. 99-100.

After Asmath told Finley what had occurred, Finley met with Grievant and Union Field Representative Elizabeth Turnbow. Finley reported that he asked Beebe whether she had talked to Asmath and made the "Christian man" statement, and that she denied approaching Asmath or making any statement about religion. E-2; E-2, Att. 1.

Ack sent Hurley an email about her conversation with Asmath and what he reported. E-2, Att. 16. Ack was concerned about Grievant and/or the Union conducting a "backdoor" investigation. She asked Hurley to direct Shanafelt and Beebe to stop interviewing witnesses in the investigation. E-2, Att. 16.

After Hurley got Ack's email, he met with Smith, Finley, and Union Steward Laura Carpenter. He told them it was not acceptable for Grievant to be interviewing witnesses, and that the College needed to investigate to find out what had happened. Tr. 24.

D. The College's Discrimination Complaint Investigation

Smith Issue. Ack investigated the allegation about Smith as part of her investigation of Grievant's discrimination complaint. On December 31, 2007, she met with Grievant, Shanafelt, and Bocanegra, who acted as an interpreter. According to Ack, when she told Beebe that there was no evidence to support the claim that Smith had struck her, Beebe "said something to the effect that maybe she exaggerated because she was mad and it felt like he might hit her,

and because English was her second language." Tr. 57; E-2, Att. 5. Ack says she wrote that comment verbatim. Tr. 320.

Ack said she was stunned that Grievant apparently thought it was okay to exaggerate such a serious allegation. Tr. 57. She described Grievant's body language during this exchange as "cocking her head, shrugging her shoulders" as if it were acceptable. She did not question Grievant about this, only made notes and moved on. She does not remember Grievant mentioning that anyone helped her write up her complaint. Ack denies that Grievant told her that it was typographical error. Tr. 58.

Grievant disputes she told Ack that she exaggerated. According to Beebe, the December 31 meeting was the first time she realized that her October 21 statement said that Smith had struck her in the face with the papers. She recalls that when Ack showed her the statement, she told Ack it was an error. Tr. 229. She also remembers that it was Ack who suggested that Beebe had exaggerated in anger, and that she replied that if she exaggerated, then the other witnesses must have exaggerated too because they saw what happened. Tr. 230.

Bocanegra remembers Ack being very aggressive in the meeting. He found it difficult to translate because Grievant has some command of English but misses things because she is not fluent. The conversation started with him translating, but as it got heated, Grievant started speaking English and he just listened. Tr. 271-272. His recollection is that Beebe said she was misunderstood.

Shanafelt recalls that Grievant did not admit exaggerating and that she insisted as soon as Ack showed her the October 21 statement that it was an

error. Tr. 294. To his recollection, Ack responded as though she did not accept what Grievant was saying and kept referring to what was in the October 21 statement. Tr. 295.

According to Ack, as the meeting broke up, Shanafelt asked to speak to her alone. She recalls that he told her that he did not think anyone discriminated against Grievant, but that he was concerned about Sorrell's conduct. Tr. 73.

Shanafelt wrote a statement disputing Ack's version of the December 31 conversation. In it, he denied saying that he did not believe Grievant had been discriminated against. He stated that he had questioned why the reasonable accommodations made for Beebe had been stopped, and also questioned why Sorrell's abusive conduct had not been addressed. E-2, Att. 4 (ex. 13).

After the December 31 meeting, Grievant contacted Weiks, who had prepared the October 21, 2007 document. Weiks remembers that they discussed the statement in question. She realized that Grievant had said that the papers had "almost" struck Beebe, not that they had struck her. Tr. 310. She prepared a corrected version of the document, and she also helped Grievant draft an email to WAHRC to explain the change. Tr. 310; U-3.

The day after the meeting, Grievant sent the revised version of the October 21, 2007 memorandum to WAHRC. U-3; Tr. 231. In the revised version, Beebe states that Smith "almost" struck her when he threw papers. E-2, Att. 10. She also provided the revised version to Ack.

Assistance Issue. As part of her investigation of Grievant's discrimination complaint, Ack also investigated the allegations that Grievant was not getting assistance.

Grievant's October 21, 2007 letter that accompanied her WAHRC complaint included descriptions of conversations in August with Finley and Tran about why she was not getting assistance. She also submitted supporting letters from Furtado and Shanafelt about that issue.

Furtado's statement described conversations he had with Finley and Tran on August 23, 2007. He stated that Finley told him that Smith and HR had instructed him to no longer provide any reasonable accommodation to Grievant. He also stated that when he saw Tran later that day, Tran told him the same thing, and showed him emails instructing Tran not to provide any help to Beebe. E-18.

In December, Ack got an email from Tran, in which Tran said that when Grievant was moved to the COM building, Sorrell directed Maldonado to help her, but that it did not work out. He also said that Beebe asked Finley to re-assign Furtado to help her, but Finley told Tran to rotate the duty among the rest of the swing shift crew. Tran further said that he kept sending Furtado because Grievant did not want anyone else to help her, but that Finley was not happy about it. Tr. 65.

After Ack questioned Furtado about his statement, he sent her a memo on January 1, 2008 in which he described the emails:

One containing instructs *[sic]* for Long Tran to not provide Ada Beebe with any type of help. The other with Gaylon Finley denying

the first email took place and to provide Ada with one hour of help each day but to not pair her up with Mike McMillan or myself. E-2, Att. 4 (Ex. 12); also E-26.

Ack questioned whether Furtado had written his statements himself. She also found that his oral statement was inconsistent with his written statements, because he claimed in one that Tran handed him hard copies of the emails and in the other that he saw them on Tran's computer. Tr. 68.

In her investigation, Ack reviewed several emails between Finley, Herring, Tran, and Sorrell. She also interviewed several people. Apart from the claims of Grievant and Furtado, Ack found no evidence to support the allegation that Grievant was denied assistance; instead she found all the evidence was to the contrary. Tr. 48.

Among the documents Ack reviewed were the August 15 and 22 emails from Finley to Tran directing him to provide assistance to Grievant. The College searched its email system for the emails from Finley to Tran referenced by Grievant, Furtado, and Shanafelt but found none. Tr. 27.

Ack was unable to determine with certainty whether Grievant did or did not receive daily assistance during the first three weeks of August 2007 because of inadequate records and different recollections. Instead, she focused on the larger question of whether there was a deliberate scheme to retaliate against Grievant by not providing assistance. Tr. 81. She found no evidence to support that allegation. She so advised the WAHRC in her January 24, 2008 response on behalf of the College. She also concluded that Grievant had willfully

mischaracterized the Smith incident, in violation of the College's non-discrimination policy. E-2, Att. 5.

On February 1, 2008, WAHRC Investigator David Hamilton requested the College to provide a witness statement from Tran regarding his knowledge of Grievant's medical issues, the instructions he received about providing her assistance, and whether Smith or Finley directed him not to provide assistance. Tran's statement, dated February 5, 2008, indicates that he was aware of Beebe's health issues in the summer of 2007, that he assigned Furtado or another custodian to assist her on a daily basis, and that neither Smith nor Finley directed him not to provide assistance to Grievant. E-2, Att. 4 (ex. 8 and 9).

In early February of 2008, Grievant asked Maldonado to write a statement responding to Tran's claim that Maldonado had been directed to provide assistance to Grievant. In his statement, Maldonado says that neither Finley nor Sorrell ever directed him to assist Beebe after she was moved to the COM building. At hearing, Maldonado acknowledged that he got the information about what Tran told Ack from Beebe; he did not talk to Tran on this issue.

Maldonado also had heard Finley and Sorrell say that he had been in the COM building assisting Grievant, but he stated he was only there to make repairs or deliver equipment. U-11.

Hamilton recalls that the College advised him that during the three week period at issue, a floater was assigned to assist Grievant. He further recalls that Beebe's complaint was that the assistance was not being provided by the person she wanted, was not being provided in a timely or consistent way, and that the

immediate supervisor was directed by the department director to stop providing assistance. Tr. 251.

When Hamilton concluded his investigation, he notified Ack that he was recommending a finding of No Reasonable Cause. U-4. He based his conclusions that Grievant had not been denied assistance mainly on documents provided by the College. Those documents included Tran's witness statement and emails directing Tran to provide the assistance. Hamilton did not actually talk to any employee that provided assistance to Grievant. Tr. 264.

In the letter to Ack, Hamilton also expressed his concern about personnel and organizational issues that came up during the investigation. One of the issues he was concerned about was Smith's behavior in the May 2006 meeting. Tr. 254.

Hamilton found Ack's response for the College to be credible, particularly because she did not try to hide matters that were not favorable to the College. Tr. 257. Though he concluded that there was no reasonable cause, he did not make any findings that Grievant had deliberately falsified statements made to WAHRC. Tr. 255. He was not aware that Grievant was disciplined by the College for fabricating statements made in her WAHRC complaint.

Asmath Issue. Shanafelt prepared a statement, dated February 27, 2008, about the Asmath incident. In it, he stated that he asked Asmath when he provided assistance to Grievant and Asmath said he did not remember; Grievant joined the conversation and said he could not remember because it did not

happen; and Asmath then admitted that he had not helped Grievant but that Furtado had. U-8.

Grievant recalls that she got a call from Hamilton about the Asmath incident. She remembers Hamilton telling her to be cautious in what she said. Hamilton denies making such contact with Grievant. Tr. 259-260. He was not aware of the allegation that Grievant had made the "Christian man" comment. Tr. 262.

E. The Discipline

Hurley has been in his current position since May 2005. As part of his job, he has oversight over several College programs, including Facilities. Building Services, which includes custodians, is part of Facilities.

Hurley described the College's approach to discipline as one of shared responsibility. Departmental supervisors usually authorize oral and written reprimands. Vice-presidents are the authorities for actions such as suspensions or terminations. Tr. 18. In line with that authority, he made the decision to discipline Grievant.

Grievant appeared for the pre-disciplinary meeting in August of 2008. Union Senior Area Representative Dave Pardy was with her. Uznanski also was present. Grievant was not feeling well and left the meeting shortly after it started. She authorized Pardy to speak for her. Pardy presented Hurley a packet of materials in response to the allegations. E-2, Att. 4.

In her written response to the pre-discipline notice, Grievant stated that when Ack asked about the claim that Smith had struck Grievant, she told Ack

that she had not said that. Grievant also stated that when Ack showed her the October 21, 2007 memorandum, she told Ack that it was a typographical error and that maybe the person helping her write the letter misunderstood what she was saying because English is her second language. E-2, Att. 4.

Grievant also submitted a letter from Weiks and Timothy Nelson. In the letter, Weiks stated that it was a typographical error on her part. E-2, Att. 4.

Another document attached to Grievant's response was a memorandum to Hamilton dated January 6, 2008, and titled "Response to college findings". E-2; Att 12. It is three pages of bullet points regarding issues that had arisen in Ack's investigation.

Also attached to Grievant's response to the pre-discipline notice were the October 2, 2006 statements from Pantoja and Maldonado. It is not clear that Hurley or anyone else in College management had seen these statements before Beebe submitted her response in August of 2008.

Grievant's response to the pre-discipline notice included statements from co-workers about the assistance issue. Shanafelt's statement said that Tran had told him that Finley instructed him not to provide any assistance to Grievant for summer cleaning projects or heavy lifting. It also said that Shanafelt had discussed this with Finley, who told him that he had been given those instructions by Smith and Herring.

Maldonado's statement said that he had not received any direction from Tran, Sorrell, or Finley to assist Grievant after she was assigned to the COM building. It also said that he had only assisted her during the period she was in

the Seminar building and when Furtado was not available, and that he had never been instructed to do so by management.

Custodian Colleen Stevens' statement said around the time Grievant was moved to the COM building, she heard Finley say that Beebe was not going to get any more help, especially from Furtado.

Shanafelt's statement is dated January 19, 2008; Stevens' is dated February 2, 2008; Maldonado's is dated February 10, 2008. All are addressed "to whom it may concern." E-2, Att. 4 (ex. 10). It is unclear whether anyone from the College saw these statements before August of 2008.

In addition, Grievant included statements from Furtado and Shanafelt dated August 15, 2008. Furtado's statement said that in a May 2008 conversation, Tran said he told Ack that he had only sent Asmath one time to assist Grievant, and that Finley told him not to send anyone else because Sorrell was going to assign Maldonado to do it. It also said that Tran told Furtado that he had emails with these instructions but that Ack had told him not to give them to anyone. Shanafelt's statement said that Tran said he had told Ack that Finley had instructed him not to send Beebe any help. It also said that Tran told Shanafelt that he had emails to back this up and that Shanafelt should come and look at the emails. E-2, Att. 4 (ex. 15 and 17).

Finally, in Grievant's response, she denied telling Finley that she had not approached Asmath. She acknowledged that she asked Asmath about the assistance Asmath had provided her. She also stated that Asmath did not appear upset or offended. E-2, Att. 4.

In support of that contention, Grievant also attached an August 12, 2008 statement from Shanafelt, in which Shanafelt stated that he had not heard Grievant say anything negative to Asmath about his religion, and that he saw no indication that either Asmath or Grievant were upset by the conversation. He also reiterated his earlier statement that Asmath said he had never been sent to help Beebe. E-2, Att. 4 (ex. 14).

Following the pre-discipline meeting and in light of Shanafelt's statement about what Tran told him, the College contacted Tran about the emails. Tran submitted a statement in response to Shanafelt's claim that Tran had showed him two emails. In part, Tran stated:

Both of these statements aren't true because I did not get any emails of the sort from Gaylon Finley. And other thing is I never brought Doug S over to my office to show him any of my emails. E-2, Att. 15.

On October 1, 2008, Hurley sent Grievant a letter suspending her for six days based on the three issues described above. There were 19 exhibits enclosed with the letter. In addition to the documents that were attached with the pre-discipline notice, there were other documents that Hurley relied on in reaching his decision.

Regarding the Smith incident, Hurley concluded that Grievant had falsely claimed that Smith struck her in the face, later told Ack that she had exaggerated that claim because she was angry when she made it, and still later said it was just a typographical error. Tr. 19.

Hurley investigated after learning that Grievant corrected the claim about Smith. He concluded that Smith raised his voice and forcefully put some

paperwork on the table, but that Smith had not yelled or screamed at Grievant. Tr. 39.

Hurley relied on Ack's response to WAHRC and other documents in reaching his conclusion that Grievant had been deliberately untruthful in describing the incident with Smith. For example, he accepted Ack's statement that Grievant admitted exaggerating because she was mad.

In Grievant's March 10, 2008 letter to WAHRC replying to the College's response, Beebe had stated that she "corrected that Paul Smith didn't actually hit me * * *." Hurley found that to be an admission by Beebe that she had lied about Smith hitting her.

Hurley was not aware when he imposed the discipline that Shanafelt and Bocanegra, who accompanied Grievant to the meeting with Ack, submitted statements disputing Ack's claim that Beebe admitted exaggerating about Smith. Tr. 37. He also did not interview Pantoja or Maldonado, who were present at the incident with Smith; he was aware that they signed statements that support Grievant's version of the event, but he questioned whether they wrote the statements. Tr. 39.

Hurley also assumed that if Grievant had told Ack or the WAHRC that the omission of "almost" in her description of the incident was a typographical error, that claim would have been investigated and reported; it was not. E-2, p. 3-4. Hurley found it troubling that Grievant waited until after the pre-discipline notice to submit the Weiks/Nelson letter. E-2, p. 5.

Regarding the January 6, 2008 document Grievant submitted, Hurley checked with Ack, who confirmed that she had not seen it before. Ack contacted WAHRC, and that agency confirmed that it had not received the document either. Hurley was troubled that although it purported to be in response to the College's investigation findings, it was dated almost three weeks before Ack's report.

Because neither Ack nor the WAHRC mentioned Beebe's typographical error claim, and because Grievant did not say the revision to her statement was a typographical error in her March 10, 2008 response to WAHRC, Hurley concluded:

As such, I can only conclude that in addition to lying about Smith hitting you during the May 15, 2006 meeting, you, in an attempt to avoid disciplinary action, are now willfully and intentionally lying about the October 2006 and October 2007 documents being different because of a "*simple typographical error*," and that the January 6, 2008 document * * *, for which Ack and the WAHRC verified that they have no record of receiving, was fabricated by you after both the TESC and WAHRC investigations were completed. It appears to me based on the record that the January 6, 2008 letter was created after the fact, and causes me to further doubt your truthfulness. (Emphasis in original.) E-2, p. 5.

Regarding the assistance issue, Hurley concluded based on Grievant's inability to produce the alleged emails from Finley to Tran and Tran's statements that he had not received such emails:

I continue to believe that Tran was instructed to provide you assistance and that you received sufficient help. Perhaps you did not receive your 'preferred' assistance (e.g., having floater custodian, Furtado, permanently assigned to you); however, that does not diminish the fact that there is extensive evidence, as indicated by the TESC investigation and the WAHRC report, to refute your blatant mischaracterization of the facts and false accusations that management did not provide you assistance.

Regarding the Asmath issue, Hurley concluded that Grievant had made the alleged remark:

I cannot find anything in your letter August 10, 2008 * * * denying that you made the reported statement to Asmath that, "*I know you're a Christian man and you'll tell the truth.*" Rather, you have remained silent about this issue and do not dispute his claim. E-2, p. 7.

Hurley did not remember Pardy denying that Grievant had made the alleged statement during the pre-discipline meeting, though he had indirect knowledge that Grievant denied it. Tr. 35.

After setting out the above conclusions relative to each charge, Hurley stated:

Based on the results of the investigations and the rebuttal evidence you provide in your August 10, 2008 response * * *, I continue to be convinced that you made deliberately untruthful statements and false accusations to Ack and the WAHRC regarding the facts of the November 21, 2007 WAHRC complaint, and your deliberately untruthful statements about the February 2008 interaction with Abdul Asmath. Your deliberately untruthful statements and false accusations constitute misconduct, and are violations of the Non-Discrimination Policy and Procedures, Workplace Violence Policy and the Evergreen Social Contract. E-2, p. 8.

Because there had been issues of Facilities employees not treating each other with respect, Hurley wanted to send a clear message that Beebe's identified conduct was not acceptable. Tr. 21. He was concerned that Grievant's allegations had impugned the reputations of Finley and Smith. At the time, Smith was a relatively new employee; had it been shown that he actually struck Grievant; the College would have terminated him. Tr. 29. He felt Finley's reputation was harmed because he was accused of failing to provide assistance when he had done the opposite. T. 30.

Hurley came up with the total of six days by figuring roughly two days for each charge. Tr. 20. He did not state in the letter that there were two days of suspension for each charge because he did not think it was appropriate or germane. Tr. 29. Hurley considered other suspensions within Facilities in deciding on the length. He also got advice from HR about the length of suspension based on other suspensions at the College. Tr. 30.

On October 21, 2008, the Union filed a grievance over the suspension.

The grievance states:

On October 1st Ada received a letter of discipline for being untruthful and dishonest in an investigation conducted by TESC and Human Rights Commission without Just Cause. Ada also believes that she was discriminated against for reporting actions by Paul Smith that occurred in a meeting on May 15, 2006.

The grievance cited Sections 27.1, 2.1, and 2.5 of the parties' contract. E-4.

After the discipline was imposed, Beebe got statements from Shanafelt and Bocanegra. Both statements support Grievant's version of the December 31, 2007 conversation. Both stated that it was Ack who suggested that Beebe had exaggerated, and both asserted that Grievant never admitted exaggerating. U-1 and Ex. U-10.

Bocanegra recalls that he made some notes about the meeting shortly afterwards, but that it was not typed until some months later. He does not recall whether he typed it himself or had someone else type it. He discussed the statement with Shanafelt because he could not remember all the details of the meeting. Tr. 270.

Shanafelt remembers writing up what happened at the December 31 meeting to document it. He had someone else type it because his handwriting is not good. He knew Grievant was being investigated for lying in her WAHRC complaint, and he drafted his statements to support her. Tr. 301.

It is not clear whether Beebe submitted these statements to anyone at the College. Hurley had not seen Bocanegra's statement. Ack did not recall either Bocanegra or Shanafelt taking notes at the meeting, and was surprised by their statements.

VI. OPINION

The College suspended Grievant Ada Beebe for six days in October of 2008 for three separate but related instances of alleged misconduct. The Arbitrator concludes that the College did not have just cause to suspend Grievant; but did have just cause issue a written reprimand for one incident. The following is my reasoning.

A. Preliminary Matters

At the outset, it is important to note what this case is—and is not—about. My role as Arbitrator is to examine all of the evidence and determine whether the College had just cause for the discipline it imposed. This proceeding is not, for example, to determine what actually happened during the May 15, 2006 meeting; instead, the relevant question is whether Grievant deliberately wrote a false statement about what occurred at that meeting.

The College argues that the appropriate formula for determining just cause is that used by the court in *Baldwin v. Sisters of Providence*, 769 P.2d 298

(1989). *Baldwin v. Sisters of Providence* was a wrongful termination case. It did not concern just cause under a collective bargaining agreement. There is no evidence that the parties intended to use in their collective bargaining agreement the formula explained by the court in *Sisters of Providence*. For that reason, I will apply traditional arbitral tests for determining just cause.

Under the just cause standard, discipline must be reasonable in light of all the circumstances. Elkouri & Elkouri, *How Arbitration Works*, 932 (6th Edition, 2003). In order to determine just cause, arbitrators consider whether the employer satisfied basic procedural requirements, whether the employer established the grievant's wrongdoing, and whether the penalty imposed was appropriate for any proven misconduct. I must be persuaded based upon the record as a whole that the College established that just cause existed for the discipline.

The Union argues that the College should be held to the higher evidentiary standard of "clear and convincing evidence" rather than a mere preponderance of evidence. The charges against Grievant are based in whole or in part on alleged dishonesty, including the claim that she was deliberately untruthful in statements she provided to WAHRC. Because of the nature of the charged misconduct, I agree that the College must establish Grievant's guilt by clear and convincing evidence. Elkouri & Elkouri at 950-951.

Much of the evidence in this case was disputed. Some of the conflicts are material to the outcome and must be addressed. Assessing credibility is seldom easy and an arbitrator is able to make few determinations with certainty. See

Elkouri & Elkouri at 416. Among factors that may be considered are: (1) the consistency of the witness's story; (2) the plausibility of the witness's story; (3) the extent of corroboration by other evidence in the record; (4) the withholding, without explanation, of available evidence that might substantiate controverted testimony; (5) demeanor at hearing or demeanor observed during the investigation; (6) conduct suggesting an innocent or guilty mental state; (7) the witness's capability to perceive what occurred; (8) the witness's clarity of recollection; (8) the witness's ability to communicate what occurred; and (9) the witness's motive—or lack thereof—to falsify. As appropriate here, I have considered the above factors in deciding credibility.

Finally, before discussing the merits, I turn to the Union's public policy argument. The Union contends that, as a matter of public policy, just cause for discipline should never exist based upon the contents of a complaint to the WAHRC. The thrust of this argument is that allowing the College to discipline Grievant for allegations included in her discrimination complaint would have a chilling effect on employees' right to complain about discriminatory practices.

The public policy argument is not sufficiently developed and supported to decide this grievance. I find it is not proper to determine this case on these grounds alone, without regard to the merits.

B. Procedural Requirements

The procedural requirements of just cause encompass several matters. These typically include certain notice requirements and an adequate investigation into the charges by the employer.

The College has rules which expressly prohibit employees from filing false complaints of discrimination or workplace violence. Those rules warn employees that there will be disciplinary consequences for violations. There is no claim or dispute that Grievant was unaware of these rules; nor does the Union dispute evidence that the College provided Grievant with notice of the charges and the opportunity to respond before discipline was imposed. The Union also does not challenge the adequacy of the College's investigation, except to the extent the investigation can be considered to bear upon the above public policy argument.

My decision in this case does not turn on procedural matters, but rather on proof of wrongdoing and the appropriateness of the College's disciplinary penalty.

C. Proof of Wrongdoing

The College charged Grievant with: (1) being deliberately untruthful in her WAHRC discrimination complaint by claiming that Smith had struck her during a May 15, 2006 meeting, (2) deliberately making a false accusation in her WAHRC discrimination complaint that Finley directed Tran to withhold assistance from her, and (3) making an inappropriate statement to Asmath and being deliberately untruthful about that statement. I find that the College failed to prove the first two charges; on the third charge, I find that Grievant made the inappropriate statement to Asmath.

Deliberately is defined as "willfully; with premeditation; intentionally; purposely." *Black's Law Dictionary*. In charging Grievant with being deliberately untruthful in describing the Smith incident, the College is claiming that Beebe

intentionally wrote in her October 21, 2007 letter that Smith struck her with some papers when she knew that he had not. The evidence on this charge is mixed.

Ack testified that when she questioned Grievant about the Smith claim, Beebe said that maybe she exaggerated because she was angry. Hurley found that Grievant's statement to Hamilton that she had corrected the claim to be an admission that she had lied. He also found that Grievant was lying based on his conclusion that she had not told either Ack or WAHRC that the Smith statement was a typographical error.

Grievant, on the other hand, has denied that she admitted to Ack that she exaggerated her statement about Smith. She has insisted that the word "almost" was inadvertently omitted, and that the error may have occurred because English is her second language. Her version of events is supported by the testimony and statement of Weiks, who typed the October 21 letter, and the testimony and statements of Shanafelt and Bocanegra, who were at the December 31 meeting with Ack.

There are several factors that support Grievant's version of what occurred. Almost immediately after the December 31 meeting with Ack, Grievant contacted Weiks and had a corrected version of the October 21 letter prepared and submitted to WAHRC. The corrected version sent to WAHRC was attached to an email to Hamilton in which Grievant acknowledged the error and pointed out that English is her second language, the same reason she reportedly offered to Ack.

Contrary to the discipline letter, there is no evidence that Grievant admitted lying about the Smith claim. The statement that Hurley relies on for his

conclusion is not a clear admission. Grievant was responding to Ack's characterization of what had been said during the December 31 meeting.

The discipline letter also inaccurately states that Grievant did not advise either Ack or WAHRC that the Smith claim was an error. Beebe reported the error to WAHRC the day after her meeting with Ack. She told Hamilton again in March that she had corrected the claim.

Hurley took Ack's description of what occurred at the December 31 meeting at face value. He ignored or discounted information that was contrary to Ack's description, and he did not independently investigate by questioning either Shanafelt or Bocanegra.

The most disinterested witness to the December 31 meeting was Bocanegra; he was employed in a different part of the College and had no connection to the incidents at issue. He testified that Grievant told Ack that the Smith claim was an error and that she was misunderstood. His testimony is consistent with Grievant's version.

These factors make Grievant's claim of honest error plausible. For just cause purposes, the College needed to clearly and convincingly establish that Grievant intentionally submitted a false statement to WAHRC. I conclude that it failed to prove that Beebe was deliberately dishonest in describing Smith's actions in the October 21 letter.

The College charged Grievant with falsely accusing Finley of telling Tran not to provide her with assistance. The evidence on this point is also mixed.

Grievant had been receiving an hour or more a day of assistance with heavy work since 2004 as an accommodation for medical issues. Around the end of July of 2007, Finley changed her building assignment and also decided that Furtado, who had provided most of the assistance to Beebe, would no longer be assigned that role.

The evidence established that the College did not intentionally fail to provide assistance to Grievant during the period at issue in August of 2007. At least twice, Finley reminded Tran in writing to make sure Beebe was getting help. Tran denied, at hearing and in statements, receiving any instructions from Finley to withhold assistance from Grievant. There is no conclusive evidence to the contrary.

Still, the fact that Finley directed Tran to provide Grievant assistance does not establish that Grievant's claim was a false accusation. The evidence does not clearly or convincingly prove that point.

What the evidence shows is, regardless of what the College intended, Grievant well may have not received assistance for some period in August of 2007. In addition, Furtado and Shanafelt said that Tran had told them he had been directed not to provide Beebe with any more assistance.

Ack concluded that it was not possible to determine whether Beebe got help during that August period. There is no evidence from anyone who acknowledged helping Grievant at that time. Maldonado, who Finley thought had been assigned, testified that he was not told to help Beebe. Asmath testified that on one occasion he offered to assist her and was turned down, but it is not

altogether clear when that happened. Tran thought Sorrell had assigned Maldonado; Maldonado testified that Sorrell did not assign him, and Sorrell did not testify. Tran referred to reassigning Furtado to that role, but Furtado was on leave for the first three weeks of that month.

The discipline letter inaccurately claims that the WAHRC report shows that Grievant received assistance. The WAHRC report relies entirely on information supplied by the College; Hamilton did not independently verify the accuracy of that information. More importantly, none of the information the College provided to Hamilton established that Grievant actually received assistance during the critical three week period; it only shows that Beebe was supposed to get assistance.

In viewing all the testimony and statements, a plausible explanation is that there was miscommunication between the various parties about Finley's instructions. In any event, the evidence is insufficient to prove that Grievant willfully or intentionally falsified what she wrote in support of her discrimination complaint.

The final charge was that Grievant made an inappropriate comment to Asmath and then was untruthful about it during the investigation. Unlike the other two charges which involve several people, Grievant and Asmath are the only two with direct knowledge of this incident. The alleged comment occurred during a conversation to which they were the only parties. Their testimony and statements about what was said are in direct contradiction on the critical point.

Asmath reported to Tran, Finley, and Ack that during a conversation with Grievant she made a comment that she knew he would tell the truth because he was a "Christian man." He testified that he reported the comment because he found it offensive—he is a Muslim, and the comment implies that anyone other than a Christian would not tell the truth.

Grievant denied that she made any comment referring to religion. She testified that she only thanked him for telling the truth.

The Union argues that Asmath's version is less credible because he claimed, contrary to Shanafelt and Grievant, that his conversation with Shanafelt did not concern the investigation into Grievant's issues. The Union also points out that Grievant and Asmath were on different levels of the loading dock, and that Asmath may have been predisposed to hear something negative from Grievant because he expected her to attack him about the investigation.

I credit Asmath's account. There is no basis in the record to support a conclusion that Asmath fabricated his claim. He had no issues with Beebe, and had only rarely worked with her. Shanafelt did not hear the conversation, and his observation that Asmath did not appear upset does not shed any light on what Grievant said or Asmath heard. Despite being on different levels of the loading dock, Asmath was certain about what he heard. Even if he anticipated Beebe grilling him about the investigation, there is no reason that he would have expected to hear her tie his veracity to his religion. In addition, Grievant did not expressly deny making the comment in her written response to the pre-discipline letter.

I conclude the College proved that Grievant made the inappropriate comment, and as a result, was not truthful in denying that she made it.

The College argues that it proved all three charges because Ack's investigation was complete and accurate, the results of her investigation were confirmed at hearing, and Ack was the more credible witness.

I do not doubt that Ack believed her findings and conclusions. Nevertheless, her investigation and results were for the purpose of preparing the College's response to Grievant's discrimination complaint. That context and purpose is significantly different from the Arbitrator's job of evaluating the totality of the evidence and circumstances in connection with just cause for disciplinary action.

The College also argues that Grievant's credibility was undermined by Hamilton, a Union witness, because Hamilton found that Grievant had excellent command of English, denied calling her about Asmath, and found Ack to be credible based on the investigation response.

Hamilton's testimony cuts both ways; that is, certain aspects were favorable to Grievant, other aspects were favorable to the College. As a general matter, Hamilton described that statements from both parties indicated an adversarial relationship between employees and management at the College—and it seemed very dysfunctional.

With respect to Grievant's command of English, I disagree with the College's characterization of Hamilton's testimony. Hamilton found that Grievant spoke English well and commented that her later, written submissions were very

well articulated. He did not think her submissions were falsified and he made no such finding; rather, he believed she had gotten some help in preparing her submissions. Tr. 255-256. Also, I note that Bocanegra, who translated for Grievant during the meeting with Ack, testified that Grievant has some command of English, but that she misses nuances because she is not fluent.

It is true there is a disagreement between Grievant and Hamilton about whether he called her in the aftermath of the Asmath incident to tell her to be careful about what she said. This testimonial difference, however, is insufficient influence or alter my prior findings with regard to proof of wrongdoing.

D. Reasonableness of Penalty

In determining if just cause exists for discipline, arbitrators take into account whether the discipline imposed is proportionate to the proven misconduct. Brand, *Discipline and Discharge in Arbitration*, 85 (BNA 1998). Arbitrators also consider whether the discipline imposed was progressive. Elkouri & Elkouri at 964-967; Brand at 57.

The College argues that there is no evidence of disparate discipline and that the length of the suspension was consistent with discipline imposed for like misconduct. Whether the suspension was out of proportion to other discipline is not the issue here; it is whether the suspension is disproportionate to the offense.

I found that the College proved that Grievant made an inappropriate comment to a co-worker and then denied it. Hurley testified that he loosely figured two days' suspension for each of the three charges. The question is

whether a two-day suspension is an appropriate penalty for the proven misconduct.

Grievant is a long-term employee. There is no evidence of any prior disciplinary problems. Her performance as a custodian was by all accounts satisfactory or better. These are all mitigating factors, and there is no evidence that Hurley considered them in arriving at his choice of penalty.

Grievant's comment was offensive. In a diverse multi-cultural setting like the College, it was particularly inappropriate. The record does not show that she intended to offend Asmath, but she should have known better. Her denial of the comment was serious. Nonetheless, the parties' contract embodies the concept of progressive discipline. The point of that approach is to give employees the chance to correct improper behavior. An employer generally must first attempt to correct misconduct before turning to suspension.

For these reasons, I conclude that suspension was a disproportionate penalty for Grievant's conduct.

E. Conclusion and Remedy

In sum, I conclude the College did not have just cause to suspend Grievant for six days. I reach my conclusion for several reasons. The College failed to prove that Grievant was deliberately dishonest in her description of the Smith incident. The College failed to prove that Grievant made a deliberately false accusation that Finley directed she not receive help. Although the College proved that Grievant made an inappropriate comment to a co-worker and later

denied it, that misconduct did not warrant a suspension in light of mitigating circumstances and the College's failure to follow progressive discipline.

In arriving at this conclusion, I have considered all of the facts, arguments and authorities submitted by the parties even if not specifically mentioned in my decision. The grievance will be sustained in part and denied in part.

Make-whole relief is appropriate to remedy the just cause violation. The College will be ordered to make Grievant whole for the six days of suspension, and remove references to the suspension from her personnel file. I find, however, that a written reprimand to Grievant for her comment to Asmath and denial of it is appropriate.

