

IN THE MATTER OF ARBITRATION)

BETWEEN)

WASHINGTON FEDERATION)
OF STATE EMPLOYEES,)

Union,)

and)

THE EVERGREEN STATE COLLEGE,)

Employer.)

ARBITRATOR'S OPINION

AND AWARD

GRIEVANCE OF

STEVE JOHNSON

HEARING SITE:

Office of Attorney General
Olympia, Washington

HEARING DATE:

June 8, 2010

POST-HEARING BRIEFS DUE:

Postmarked July 30, 2010

RECORD CLOSED ON RECEIPT OF BRIEFS:

August 5, 2010

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ARBITRATOR:

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I. INTRODUCTION

This case arises out of the 45-day suspension of Steve Johnson (Grievant) on January 30, 2009, by The Evergreen State College (Employer). Washington Federation of State Employees (Union) filed a grievance alleging the suspension was without just cause. When the parties were unable to resolve the dispute in the lower levels of the grievance procedure, the Union advanced the case to arbitration.

II. STATEMENT OF THE ISSUE

The parties stipulated to the submission of the following issue in this case:

Was there just cause for discipline pursuant to the Collective Bargaining Agreement between the parties? And if not, what is the appropriate remedy?

The parties further agreed that the Arbitrator shall retain jurisdiction for at least 60 days to assist in the implementation of an award if the Union prevails in this matter. If the Employer prevails, the issue of remedy becomes moot.

III. RELEVANT CONTRACTUAL PROVISIONS

**ARTICLE 27
DISCIPLINE**

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

...

Jt. Ex. 1.

THE EVERGREEN STATE COLLEGE
Policies and Procedures
Workplace Violence

The Evergreen State College is committed to the safety and security of its students, faculty, staff and visitors. To support this effort, Evergreen has adopted the following workplace violence policy:

The Evergreen State College will not tolerate violent or threatening behavior directed at students, faculty, staff, visitors, oneself or property. This includes any acts of violence, harassment or threats made on Evergreen property, or at Evergreen sponsored events; and refers to acts or threats of violence made directly or indirectly, by words or gestures or symbols.

Prohibited Behavior

The following are examples of violence and are prohibited under the terms of this policy:

- The use of physical force with the intent to cause harm;
- Threats of physical force or violence, which can be reasonably expected to intimidate, coerce, or cause fear of harm;
- Acts or threats of violence made directly or indirectly by words, gestures or symbols;
- Property crimes that would reasonably be anticipated to have the effect of intimidating or causing fear of harm.

...

As stated in the policy, violators of the policy who are employees or students are subject to disciplinary action, in accordance with college policies, up to and including termination, suspension

Ex. R. 1.

IV. STATEMENT OF FACTS

The Evergreen State College is located in Olympia, Washington. At the time of his suspension on January 30, 2009, Steve Johnson had worked for the

Employer for approximately 25 years as an Engineering Technician 2 in the Residential and Dining Services division of the college. He had no active disciplinary actions as of November 2008.

The three events that resulted in Johnson's 45-day suspension occurred on November 17, 18, and 19, 2008. The basic facts are not in dispute. Grievant typically drove a motorcycle to work. His 10-year habit was to park in a designated "motorcycle only" area located adjacent to bicycle parking. The Employer made a decision to re-designate the area as "bicycles only." Grievant was not aware of this change when he arrived at work on November 17, 2008. He parked his motorcycle in the same area he had utilized for approximately 10 years.

Grievant's immediate supervisor, Mark Lacina, is the Assistant Director of Residential Facilities. At approximately 11:00 a.m. on November 17, 2008, Lacina told Grievant his motorcycle was parked in an area that was not approved for motorcycles and that he needed to move to another parking area. Grievant stated that he had parked in the same area for years. Lacina reiterated that Grievant needed to immediately move his motorcycle. Grievant refused stating that he would wait until he received a parking ticket and then go through the appeals process. Later that same day Grievant received an email from Lacina reiterating in writing that he needed to move his motorcycle. Grievant then went to move the motorcycle and saw that it had been ticketed. Because a ticket had already been issued, Grievant left the motorcycle in place until the end of the workday.

On November 18, 2008, when Grievant arrived at work he parked in a different lot. He went to the parking office to pay the fine and to file an appeal on the

parking citation he had received the day before. At the parking office Grievant learned that the reason his motorcycle had been ticketed was because his supervisor, Lacina, had telephoned the parking office and instructed them to ticket Grievant's motorcycle.

A Residential and Dining Services staff meeting was scheduled for 10:00 a.m. on November 18, 2008. The staff meeting was a recurrent twice-monthly meeting for the department's professional staff members. Approximately 12--13 people regularly attend the meeting. After Johnson left the parking office he attended the staff meeting, as scheduled. As usual, the meeting agenda designated time for updates from attendees. It was typical for individuals to sit while addressing the group, unless utilizing the white board for written illustration. During the meeting updates, Johnson expressed a desire to address the group. He stood and talked about the parking ticket he had received the day before. Johnson began in a relatively calm manner and then became increasingly agitated, loud, and red-faced. The December 29, 2008 Pre-disciplinary Notice summarized the incident:

... You stated that, while looking at and directing your comments at Lacina, you thanked him for calling Parking and demanding that they ticket your motorcycle. You told Lacina that the \$10 for the ticket had to be paid out of your Toy Run money and, that because of it, some kid wouldn't be getting a gift. You said that you should buy a toy, take the toy out of the box and replace it with a lump of coal, and put Lacina's name on the box; that way some kid would know that it was Lacina who ruined their Christmas.

According to you, at that point you started walking towards the door. When you got to Lacina, who was sitting close to the door, you stopped about one foot away from Lacina and, with one hand on your hip, you leaned over Lacina (you were standing; Lacina was sitting), and while shaking your finger on the other hand at Lacina, in a loud voice, you told Lacina that you were, *"sick and tired of him acting like a child, laughing like a child, and leading like a child. A word*

of advice, the next time you jump into the corral with the bull, the horns are sharp, and you don't know what will happen." ... you called Lacina a "little boy" a couple of times. ... Lacina's only response to your statements was to say, "yes Steve." At that point ... you walked out of the room, without asking for or receiving permission to leave the staff meeting.

...

Ex. R-1.

The precise statement Grievant made regarding the bull and its horns is disputed. Mark Lacina testified that: "And I was seated and he stood over me and stated that -- something to the effect of if you want to mess with the bull, be prepared for the horns. ..." Tr., p. 52. Sharon Goodman testified "... he wagged his finger at him and stated something about, if you take the bull -- next time you take the bull by the horn you're going to get hurt. " Tr., p. 72. Susan Stapleton testified "... he kind of stopped and pointed at Mark and told him that if you're going to play with -- if you're in the field with the bulls you better watch out for the horns. Something like that." Tr., p. 113. Matthew Lebens testified "... I recall kind of pointing down at Mark saying if -- a phrase related to if you mess with the bulls, you better be prepared to deal with the horns. Something along those lines." Tr., pp. 134, 135. Liza Rendon testified that she did not recall Grievant making any expression about a bull and horns. Tr., p. 150.

After Grievant left, the meeting room was completely silent for a short period before the meeting was resumed. Grievant worked the remainder of that day without incident.

On November 19, 2008, Johnson reported to work as scheduled. He prepared smoked turkeys for a holiday celebration that was being held later that day. After he completed his work Grievant wanted to take the remainder of the day off. He was unable to find his immediate supervisor so at approximately 2:45 p.m. he went to

the office of Sharon Goodman, Director of Residential and Dining Services, to have a leave slip signed. Grievant and Goodman briefly chatted and he gave her the leave slip. Goodman then gave Grievant a letter from Human Resource Services stating he was to report to Laurel Uznanski, Assistant Director Human Resource Services to discuss the incident, which had occurred at the November 18, 2009 staff meeting.

Grievant left Goodman's office and after a brief period returned. He entered Goodman's office and closed the door behind him. He stood in front of the closed door and said he wanted to talk about the need to meet with Human Resource. Grievant proceeded to talk for 5-10 minutes about how upset he was that Lacina had called parking services to have him ticketed. Grievant was obviously angry and vented about things he did not like about the department. Susan Stapleton and Liza Rendon, two office workers, had positioned themselves right outside of Goodman's office. Both had witnessed Grievant's behavior during the previous day's staff meeting. Both employees could hear Grievant's animated tone of voice and both were concerned about the anger Grievant was continuing to express. The employees testified that they did not feel it was safe to leave Goodman alone with Grievant. After Grievant seemed to be finished venting his frustrations he opened the door to Goodman's office and then stopped while standing in the opened doorway.

Grievant then told a disturbing story about an incident that had occurred when he was a child. Testimony as to the precise verbiage used differs. In summary, Grievant said that he was beaten and bullied by others when he was a child. One day he retaliated by cornering a boy who had bullied him. He doused the boy with gasoline and stood over him with a lighter while making the boy strip and perform certain acts.

Goodman, Stapleton, and Rendon all found the content of the story to be very disturbing. Goodman was visibly shaken by the encounter.

While still standing in Goodman's doorway, Grievant made a comment. Witness accounts vary regarding the words used. Goodman compiled a note a couple of days after the incident writing as follows:

...

When I thought he was going to say goodbye and leave because he opened the door, he told me a story that scared me. He told me that he was beaten as a child by his father, and that when he was home with his sisters they beat him and that he had a student at school beat him. He said that one day he had poured gasoline on this student and held a lighter, made him cry but that he didn't light it. He said that on Tuesday if he had a lighter he would have used it. I infer this to mean that on Tuesday if he could have "burned Mark who had gasoline on him" he would have. ...

Ex. R-12; emphasis added.

In a narrative following the incident, Susan Stapleton wrote:

...

... He then made reference to if he had had a lighter he would have lit him (I am assuming that it was a reference to Mark Lacina and the incident of the previous day at staff meeting). ...

...

Ex. R-15: emphasis added.

Stapleton testified:

A And then he said -- the last thing I remember him saying was if he'd had a lighter yesterday -- I didn't exactly know what that meant. But at that point then he walked out the door. ...

Tr., p. 120.

Rendon testified:

A ... I heard Steve Johnson say to Sharon Goodman that if he had a match in his hand yesterday he would have lit him on fire.

Q Meaning?

A He would have lit Mark Lacina on fire.

Tr., p. 152.

Grievant Johnson testified:

Q ... You've heard testimony from a number of people today concerning what you said next. And they have testified that you said something to the effect if I had a lighter, that's what I would have done to Mark. Is that accurate?

A What happened next is after I said what I had done to this other kid, Sharon said, well, is that what you intended to do to Mark yesterday? And I said no. I didn't have gas or a lighter, did I.

Q And did you intend to convey the fact if you had --

A No. And then I followed up with that I just want him to know I want him to stay out of my personal life. That's my intent. That's all I did when I yelled at him. I said stay out of my personal life.

Tr., pp. 180, 181.

After Johnson left Goodman's office on November 19, 2008, he encountered Lacina. The two had an amicable conversation wherein Lacina invited Johnson to stay and attend the Thanksgiving party. Lacina was leaving early, as was Grievant. Grievant Johnson declined the invitation to stay in an appropriate manner.

Goodman telephoned campus police to file a report regarding the exchange that had occurred in her office. Campus police met with Sharon Goodman at approximately 3:45 p.m. on November 19, 2008. The brief narrative report reads, in part:

... Goodman stated that she had just had an encounter [sic] with an employee, later identified as Steve Johnson, which had left her upset. Goodman said that Johnson had not threatened her specifically but instead she had felt intimidated by his actions and a brief story that he had told her before he left. According to Goodman, Johnson came into her office and closed the door standing in front of it blocking the entrance and proceeded to be angry regarding another employee's actions towards him. It was the story that mostly concerned her and made her uneasy. ...

Ex. R-8; emphasis added.

On November 21, 2008, Grievant participated in the first investigatory meeting regarding the alleged misconduct. He was placed on "home assignment" pending the outcome of the investigation. A second investigatory meeting was held on December 9, 2008. On December 12, 2008, Grievant gave the Employer a note from a medical care provider, which stated Johnson appeared to be suffering from Post Traumatic Stress Disorder (PTSD). It was stated that Grievant was not believed to be a threat for violence. Ex. R-6.

A Pre-disciplinary Notice was sent on December 29, 2008 to Grievant Johnson at his home address. The notice stated that Grievant was being given the opportunity to respond to "... allegations of insubordination, misconduct, and violation of the Workplace Violence Policy." The letter detailed the results of the investigation and specified: "The evidence that forms the basis for action includes:"

- 1) Your insubordinate behavior on Monday, November 17, 2008. Specifically, for your refusal to comply with a directive from Mark Lacina, Assistant Director of Residential Facilities, to move your motorcycle to A Building motorcycle parking.
- 2) Your insubordinate behavior, misconduct, and threatening statements and violent actions during the Tuesday, November 18, 2008 RAD staff meeting.

3) Your threatening statements made during a conversation with me, Sharon Goodman, Director of Residential and Dining Services, on Wednesday, November 19, 2008.

Ex. R-1.

On January 30, 2009 a Discipline Notice was issued. The six-page notice concludes:

The accumulation of events on November 17, 18, and 19, 2008, and the impact of your behavior and statements, simply cannot and will not be accepted or tolerated. Based on the totality of your insubordinate behavior, misconduct, and egregious and threatening behavior, your inappropriate actions and behavior provides ample justification for imposing a forty-five (45) day suspension without pay. The suspension is effective February 3, 2009 through March 19, 2009. You are to report back to work at your regularly scheduled time and work station on March 20, 2009.

Ex. R-2; emphasis added.

On February 4, 2009, the Union grieved the disciplinary action claiming a violation of the just cause provision in Article 27.1 of the parties' Collective Bargaining Agreement (CBA). The grievance reads, in part, "... Our contention on this issue is the severity of discipline issue on this matter. We believe it not to be reasonable." The grievance requested that the current discipline be revoked and that an appropriate discipline be issued. Ex. R-2. The Employer denied the Union's grievance. A Step 2 hearing was held on March 24, 2009. In a response dated April 8, 2009, the Employer reiterated just cause for the 45-day discipline imposed and again denied the Union's grievance.

The Union then elevated the case to arbitration. A hearing was held at which time both parties were provided the full and complete opportunity to present evidence and argument. Post-hearing briefs were timely filed. The grievance is now properly before the Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. The Employer

The Employer takes the position Grievant was suspended for just cause. The clear and convincing evidence proves that Grievant engaged in workplace misconduct, which included insubordination and two incidents of workplace violence. The nature of Grievant's misconduct was so excessive that the 45-day suspension was an appropriate penalty.

Insubordination is generally defined as the refusal by an employee to follow an order given by an employee's supervisor. If the employee believes the order violates the CBA, the employee must follow the fundamental "obey now--grieve later" principle. The Employer cites six tests to follow in determining insubordination: (1) The employee's refusal to work must be knowingly, willful, and deliberate; (2) The order must be explicit and clearly given; (3) The order must be reasonable and work related; (4) The order must be given by someone with appropriate authority; (5) The employee must be made aware of the consequences of failure to perform or follow the directive; and (6) If possible, the employee must be given time to correct his alleged insubordinate behavior. Grievant intentionally and willfully refused to follow the order to move his motorcycle. This refusal rose to the level of insubordination and resulted in the subsequent disciplinary action.

The Employer has a clearly stated Workplace Violence Policy, which is essentially "zero tolerance." The stated consequences for violating the policy warn that disciplinary action can be taken up to and including termination. A full and fair investigation was conducted in this case, proving that Grievant made both direct and

indirect threats toward his supervisor, Mark Lacina. Grievant unquestionably, in front of numerous witnesses, warned Lacina that if he “messed with the bull, he was liable to get the horns.” Lacina felt both physically and verbally threatened by Grievant’s demeanor and statement. It was also proved that Grievant repeated his threats toward Lacina the following day when he stated that he would have lit Lacina on fire if he had a match the day before.

The Employer argues that Grievant had no compelling defenses to the charges made against him or any reasonable excuses for his misconduct. The excuses Grievant did make were without justification. There is no evidence to support that Grievant’s supervisor was engaging in idle harassment. Grievant’s additional argument that he suffers from PTSD, which triggered his conduct, is insufficient to justify his misconduct. Even if the college was on notice that Grievant suffered from PTSD he did not make the Employer aware of this until after the admitted misconduct occurred.

The Employer concludes that the 45-day unpaid suspension is appropriate in light of the nature of the misconduct. Management acted in good faith on a fair investigation and rendered a fair penalty. The Arbitrator must uphold management’s decision unless an abuse of discretion occurred, which did not occur in this case. The Arbitrator should deny the grievance and uphold the 45-day suspension, given the egregious nature of Grievant’s conduct, his failure to demonstrate remorse, and the adverse impact his misconduct had on other employees.

B. The Union

The Union takes the position the Employer overreacted and that the disciplinary sanction issued was grossly unsupported by the actual facts at hand. The

Employer lacked just cause for the 45-day suspension imposed under the circumstances.

Grievant was a 25-year employee with only one disciplinary action taken, at an unspecified time, for wholly unrelated conduct. The Union concedes that Grievant exhibited inappropriate behavior by losing his temper at a staff meeting although the basis for doing so was not objectively unreasonable. Grievant's refusal to move his motorcycle from a parking place that he had been utilizing for ten years was not insubordination. Lacina did not have responsibility for or authority over campus parking services.

The Union does not agree that Grievant's statements rose to the level of insubordination. Grievant did not believe Lacina was correct in his assessment of the parking spot. Grievant did not believe that Lacina had any justification for making parking site decisions. And Grievant's response that he had been parking in the same spot for ten years so he would take his chances with being ticketed was appropriate. Further, the Infraction Review Committee voided the parking ticket after an investigation on the validity of the citation. Under the entirety of these facts, disciplinary action for insubordination is not supported.

The Union concedes that the manner in which Grievant conveyed his frustrations during the staff meeting was inappropriate. Grievant felt picked-on and responded emotionally. His behavior was later explained by a diagnosis of PTSD resulting from brutal harassment he suffered as a young boy. Grievant had no prior history of anger management issues. He took affirmative steps, outside of work, to address and fix the root cause of the issue. Under the circumstances, the Arbitrator

should commute Grievant's discipline to a Letter of Reprimand for his inappropriate outburst during a staff meeting.

The Union does not agree with the Employer's finding that Grievant's statements made during the staff meeting violated the Workplace Violence Policy. Grievant never had any intent to physically harm Lacina. The statement about the bull's horns was not precise and even the Grievant himself did not really know exactly what he meant when he made the statement. People in attendance at the meeting did not feel threatened as much as uncomfortable. Grievant unwittingly, out of frustration, made a comment that was misconstrued. This is not the same as an employee who intends and does threaten physical violence. Grievant's statements did not rise to the level of a threat in violation of Employer policies and the penalty assessed should reflect a lower level of misconduct.

The final basis for discipline resulted from the incident in Sharon Goodman's office. Grievant adamantly denies making the specific comment, which has been cited as a violation of the Workplace Violence Policy. Goodman believes Grievant stated that if he'd had a lighter on Tuesday he would have used it. Grievant testified that he responded to an inquiry from Goodman asking him if he intended to light Lacina on fire with the statement "no, I didn't have a lighter." The two witnesses to the incident both stated the comments made by Grievant were vague and there was no mention of Lacina by name. Further, the comments could not be a threat because it was a past tense reference made in a hypothetical manner about an event that never occurred. A threat must necessarily convey intent, which is lacking under the circumstances in this case.

What actually rattled the three women was the story conveyed by Grievant. It was a very disturbing story told with a great deal of raw intensity. Unfortunately, Goodman attributed connotations and implications to the story beyond that which Grievant intended to convey.

The Employer has failed to meet the burden of demonstrating the discipline is warranted because the testimony over the actual words spoken is contradictory; Lacina's name was never spoken; and a recitation of something that someone would have done cannot constitute a threat of future violence.

The 45-day suspension is grossly disproportionate to the alleged offences and generally unprecedented in duration. The Employer did not survey prior similar disciplinary infractions to determine the appropriateness of the penalty, which is clearly excessive. Although not applicable the Union asks the Arbitrator to take note of Washington State Administrative Code, which limits suspensions for non-union employees to fifteen days for a single penalty.

Contrary to the Employer's assertion otherwise, Grievant expressed remorse over his conduct. He apologized to coworkers as well as to Goodman. Grievant sought counseling to understand the source of his behavior. He did not act in a cavalier manner and expressed appropriate remorse. The Union concludes with a request that the Arbitrator find just cause does not exist for discipline in all matters except for the fact that Grievant lost his temper and expressed that inappropriately in a staff meeting. Reinstatement of lost wages is sought.

VI. DISCUSSION

The Arbitrator holds the Employer failed to prove by clear and convincing evidence there was just cause under Article 27 to suspend Grievant Johnson from work for 45 days for acts of insubordination coupled with violations of the Employer's Workplace Violence Policy. The Employer did prove Grievant Johnson was insubordinate and that he engaged in inappropriate workplace behavior. The Arbitrator will enter an Award setting aside the 45-day suspension of Grievant Johnson. For the misconduct of insubordination and inappropriate workplace behavior, I will enter an order suspending Johnson for 14-calendar days. Accordingly, the grievance will be denied in part and sustained in part. The reasoning of the Arbitrator is set forth in the discussion that follows.

In this case, the Employer bears the burden of proving by clear and convincing evidence: (1) Steve Johnson engaged in the conduct alleged in the Discipline Notice; and (2) the conduct was such as to provide just cause for suspending Grievant from work for 45 days.

I will first address the Employer's charge of insubordinate behavior alleged to have occurred on November 17, 2008. The facts surrounding that incident are not in dispute. Lacina told Grievant, both orally and in writing that he was to move his motorcycle to a different parking area. Grievant refused to comply with Lacina's directive. The conduct charged in the Employer's first allegation of misconduct occurred.

I must next decide whether the Employer proved Grievant Johnson's refusal to move his motorcycle when instructed was insubordinate. The Employer has a

fundamental right to control and direct the workforce. Permitting employees to deliberately defy orders of management would seriously undermine the ability of the Employer to conduct business in an orderly and efficient manner. Arbitral authority is well established that refusals to perform as directed can subject the employee to disciplinary action.

The long recognized rule in labor management relations is to “obey now--grieve later.” Allowing employees to elect what orders to follow would result in chaos in the workplace. When an employee can be disciplined for insubordination cannot be determined by hard and fast rules. Each case depends on its own facts and circumstances. Arbitral authority teaches that in order to establish just cause justifying discipline for the refusal to follow a directive, an employer must show that a lawful and reasonable order was given by a person in the position to provide supervisory direction. The directive must be clearly expressed in such a manner so as to be understood by the employee and the employee’s refusal to obey must be deliberate.

Applying the above-stated principles to the instant case, I find the order to move the motorcycle to another parking area was clearly given to Grievant Johnson by his direct supervisor, Lacina. The order was lawful and reasonable. The area where Grievant parked his motorcycle was being transitioned to bicycle parking and there was ample motorcycle parking in another area on campus. The order to move the motorcycle was clearly expressed and understood by the Grievant. Grievant Johnson deliberately refused to obey his supervisor’s directive, stating he would not move the motorcycle and would risk the consequences of a parking ticket. Grievant had worked for the Employer for 25 years. He understood chain of command and the need to follow

the direction given by his supervisor. If Grievant Johnson disagreed with the order to move his motorcycle, his responsibility was not to simply defy his supervisor but instead to obey the order and to grieve the order later. I hold the Employer proved by clear and convincing evidence that Grievant was insubordinate in his refusal to move his motorcycle when instructed.

I next address the Employer's second charge of insubordinate behavior, misconduct, and violations of the Employer's Workplace Violence Policy for Grievant's conduct during the November 18, 2008 staff meeting. During a regularly scheduled staff meeting Grievant stood in a room full of employees and directly addressed supervisor Lacina. He stated that Lacina acted, as a child would have by having him ticketed. Grievant stated that Lacina's actions would prevent his ability to spend \$10 on a child's Christmas gift. Grievant stated that he should take an empty box, place a piece of coal inside, and mark the box from Lacina so that the child would know who was responsible. Grievant made a comment to his supervisor about a bullring and bull's horns. In delivering his message to his supervisor, Grievant approached Lacina ranting. He stopped approximately one foot away, stood over Lacina and wagged his finger in Lacina's face. It is undisputed that Grievant was loud, expressed anger, and was red-faced when delivering this tirade.

Employers are not required to tolerate an employee's verbal abuse toward a supervisor. This is particularly true if the conduct occurs in front of other employees or is used to embarrass, ridicule, or degrade a supervisor. Allowing an employee to engage in verbal disrespect toward a supervisor undercuts authority and impacts the ability to effectively direct the workforce. Verbally inappropriate language directed

toward a supervisor is a form of insubordination and an employer is justified in rendering discipline for this type of behavior.

I find that Grievant Johnson's tirade during the staff meeting was excessive and out-of-line. Grievant's language and demeanor were disrespectful and highly inappropriate for the work place. Grievant clearly intended to degrade his supervisor in front of other employees. The fact that Lacina had issued a directive to have Grievant's motorcycle ticketed in no way justifies Grievant's behavior. Your Arbitrator holds that the record evidence proves Grievant was insubordinate and engaged in inappropriate behavior through his tone of voice, choice of language, and overall demeanor directed toward his supervisor, Lacina, during the November 18, 2008 staff meeting.

Your Arbitrator turns next to the Employer's allegation of two Workplace Violence Policy violations. The Employer contends that Grievant threatened violence toward his supervisor, Lacina. I do not agree that the record evidence rises to the level necessary to support the Employer's allegations. The Employer's first allegation emphasizes the statement Grievant made about bulls and their horns during the November 18, 2008 staff meeting. The second allegation focuses on a statement made by Grievant on November 19, 2008, following his rendition of a very disturbing story of violence from his childhood. The discipline notice claims Grievant stated: "If I would have had a lighter (match) yesterday, I would have done the same thing to Mark." Ex. R-2.

I find that both alleged statements by Grievant, relied upon by the Employer for rendering discipline, are vague and ambiguous. Exactly what was said in

both instances is disputed. Each witness who testified gave varying versions of what was said. The evidence proffered leads to a conclusion that Grievant's comments were not clear and can be interpreted in more than one way. Grievant's utterances on the two occasions simply do not rise to the level needed to find clear threats of violence occurred. A finding that Grievant threatened or engaged in violence is not sustained by the facts in this case.

The Employer's Workplace Violence Policy states:

The Evergreen State College will not tolerate violent or threatening behavior directed at students, faculty, staff, visitors, oneself or property. This includes any acts of violence, harassment or threats made on Evergreen property, or at Evergreen sponsored events; and refers to acts or threats of violence made directly or indirectly, by words or gestures or symbols.

Prohibited Behavior

The following are examples of violence and are prohibited under the terms of this policy:

- The use of physical force with the intent to cause harm;
- Threats of physical force or violence, which can be reasonably expected to intimidate, coerce, or cause fear of harm;
- Acts or threats of violence made directly or indirectly by words, gestures or symbols;
- Property crimes that would reasonably be anticipated to have the effect of intimidating or causing fear of harm.

...

As stated in the policy, violators of the policy who are employees or students are subject to disciplinary action, in accordance with college policies, up to and including termination, suspension

Ex. R. 1; emphases added.

The Employer's Workplace Violence Policy allows for discipline for "any acts of violence, harassment or threats" Examples given include "the use of physical force," ... "threats of physical force or violence," ... "acts or threats of violence," or "property crimes." In sum, the Employer's policy requires that an act of violence, harassment, or threats must occur.

During the staff meeting, Grievant did not use physical force or engage in a physical act of violence. Grievant did not commit any crime against property. Grievant made a statement to the effect that "before you jump in the ring with a bull, you should know what you are going to do with the horns." The exact words used and the precise meaning of the statement is not clear. Each of the witnesses who testified gave varying versions of what was said. Grievant testified that the statement was, "Kind of like don't throw rocks in glass houses. People in glass houses -- look before you leap. What goes around comes around." Tr., p. 169. I do not find sufficient evidence to support a finding that Grievant's actions or words displayed during the November 18, 2008 staff meeting violated the Employer's Workplace Violence Policy.

On November 19, 2008, Grievant conveyed a highly disturbing story describing an incident where he threw gasoline on another boy and threatened the boy with a match. Three employees heard the story. The police report prepared following the incident states in part: "Goodman said that Johnson had not threatened her specifically but instead she felt intimidated by his actions and a brief story that he had told her before he left. ... It was the story that mostly concerned her and made her uneasy. ..." Ex. R-8; emphasis added. But it was not the story itself that gave rise to the Employer's allegation of workplace violence. Instead it was the comment Grievant

made following the story that the Employer contended was a threat of violence. The testimony of all three witnesses varied as to what exactly was said or meant by Grievant. Grievant testified that when asked by Goodman whether he would have done the same thing to Lacina the day before, he replied “no, I didn’t have a gas or lighter, did I.” I hold the Employer failed to present clear and convincing evidence that Grievant intended to threaten Lacina with violence on November 19, 2008, and that a violation of the Employer’s Workplace Violence Policy did not occur.

In determining just cause it must be found that the penalty is reasonably related to the seriousness of the offense and to the person’s employment record. I hold the conduct of Grievant was highly inappropriate and deserving of a substantial penalty. Given Grievant’s discipline-free work record in 25 years of satisfactory employment with The Evergreen State College, I am persuaded that Johnson will benefit from the penalty of a suspension from work without pay and that his inappropriate behavior will not be repeated. This is the first and only insubordination complaint levied against Johnson in his 25 years of employment. Thus, I find that a 14-calendar day suspension is warranted to drive home the point to Johnson that similar conduct in the future need not be tolerated by The Evergreen State College.

AWARD

Having reviewed all of the evidence and argument, and having had the opportunity to observe the witnesses and their demeanor at the arbitration hearing, I find The Evergreen State College failed to prove by clear and convincing evidence there was just cause under Article 27 to suspend Grievant Steve Johnson from work for 45 days for acts of insubordination coupled with violations of the Employer's Workplace Violence Policy. The Employer did prove Grievant Johnson was insubordinate and that he engaged in inappropriate workplace behavior. The Arbitrator directs that the 45-day suspension of Steve Johnson be set aside and a 14-calendar day suspension be imposed. The Arbitrator orders that Johnson be made whole for all wages and benefits lost due to the 45-day suspension, minus the 14-calendar day suspension. The grievance is denied in part and sustained in part.

The parties shall share the expenses and fees of the Arbitrator equally. I will retain jurisdiction for a period of sixty (60) days from the date of this Award to resolve any disputes arising out of the remedy so ordered.

Respectfully submitted,

Gary L. Axon
Arbitrator
Dated: September 9, 2010