STATE OF CONNECTICUT
ADMINISTRATIVE & RESIDUAL EMPLOYEES UNION

In the Matter of the Arbitration between

ADMINISTRATIVE AND RESIDUAL EMPLOYEES UNION, LOCAL 4200 - AFT/AFTCT, AFL-CIO
Union,

OPINION

AND

AWARD

and

STATE OF CONNECTICUT
(Department of Transportation),
Employer.

Grievance: Joseph Clark-Dismissal
OLR File No. 16-4415
Union Code: 08.021

BEFORE: Jeffrey M. Selchick, Esq.
Arbitrator

APPEARANCES:

Administrative and Residual Employees Union
Denise Bevza, Esq., of Counsel

State of Connecticut, Department of Transportation
Judith P. Lederer, Esq., Labor Relations Specialist
OPM-Office of Labor Relations

In accordance with the provisions of Article 15 ("Grievance Procedure") of the 2007-2011 Agreement (Joint Exhibit 1) of the parties (hereinafter,"Union" and "State"), the undersigned was duly designated Arbitrator. Hearings were held on September 25, 2008, February 10, 2009 and April 7, 2009 in Hartford, Connecticut.

09-32

The parties were accorded a full and fair hearing, including the opportunity to present evidence, examine witnesses, and make arguments in support of their respective positions. The parties filed post-hearing briefs, and the record was closed upon their receipt on or about May 22, 2009.

ISSUES

1. Was the dismissal of the Grievant, Joseph Clark, for just cause? If not, what shall be the remedy, consistent with the contract?

2. Did the State violate the Articles set forth in the Amended grievance dated May 12, 2008? If so, what shall be the remedy, consistent with the contract?

CONTRACT PROVISIONS

Article 14 ("Dismissal, Suspension, Demotion or Other Discipline) of the parties' 2007-2011 Agreement reads in pertinent part as follows:

> **Section One. (a)** No employee shall be suspended, demoted, or reprimanded except for just cause.
>
> **(b)** No permanent employee in the classified service who has completed the Working Test Period and no unclassified employee who has completed six (6) months of service or the pre-tenure period, whichever is longer, shall be dismissed except for just cause.

(Joint Exhibit 1, 24).

BACKGROUND FACTS

The instant proceeding involves the termination of Grievant Joseph Clark as set forth in a March 28, 2008, letter to him from Assistant Agency Personnel Administrator, Wanda N. Seldon. The letter of termination stated:

> In accordance with Section 5-240 of the Regulations of Connecticut State Agencies and Article 14 of the Administrative and Residual (P-5) contract, this is to notify you that you are being terminated from State service effective the close of business, April 11, 2008. The reason for this action is your violation of Personnel Memorandum 99-2, "Violence in the Workplace Prevention Policy" and Personnel Memorandum 80-16A, "Employee Conduct and Behavior".
>
> A fact finding meeting was convened on January 3, 2008 to gather information regarding your actions of December 31, 2007. The information provided documents that you used your cane to physically threaten your supervisor. You held your cane over the head of your supervisor while yelling and using profanity toward her, subsequently hitting the desk with your cane. When the unit manager tried to defuse the situation by asking you to put the cane down, you again used your cane to physically threaten him, continuing to yell and swear at him also and throwing your cane down on the floor. You continued to yell, using profanity and slamming file cabinet drawers. This behavior was disruptive to the unit and both your immediate supervisor and the unit manager expressed fear and felt threatened by your behavior: Your immediate supervisor felt threatened to the extent that she subsequently filed a police report.
>
> You admitted to being enraged and confronting both managers and acknowledged having an anger problem that builds until it explodes. Your statements during the fact finding meeting raised a heightened concern by the fact finding panel for the safety of these employees and your co-workers. The Loudermill meeting that was held on February 8, 2008 with your union representative did not bring forth any further information that would mitigate the Department's position to terminate your employment.

> This is not your first incident whereby you displayed inappropriate behavior in the workplace and it was brought to your attention. Your behavior on December 31, 2008 was a very serious violation of our policies. The Department has an obligation to create a safe workplace for its employees.
>
> After discussions with your union representative, we agreed to allow you to use your sick leave to seek medical treatment pending the agency's decision concerning your continued employment. You will continue to be coded to sick leave (FMLA) until the close of business on **April 11, 2008.** If you have any remaining personal items that you need to retrieve or if you have any Department issued items that you need to return, it is important that you contact Michael Morrison, Director of Security at 594-3053 to make further arrangements. You are not to return to the Department or its facilities, including all Department property, unless permission is granted from the Office of Security or Human Resources.
>
> You have the right to appeal this action in accordance with the provisions of the Administrative and Residual (P-5) Contract. An Unemployment Compensation Notice (UL-16) will be mailed to you separately in the near future. (Joint Exhibit 2, emphasis in original).

In response, the Union filed its grievance on behalf of Grievant, alleging that he was terminated "without just cause and with no regard for his disability." (Joint Exhibit 3A). The State, after a Step 3 conference on May 12, 2008, denied the grievance at Step 3 on May 16, 2008. Thereafter, the Union duly moved the grievance to arbitration where it now stands for resolution.

It is noted that the Union also filed an amended grievance on May 12, 2008 claiming that Grievant's rights under Article 19 and 8 were violated because he was "denied and continues to be denied use of sick leave." (Joint Exhibit 3B). It was also contended that Grievant "was further denied use of FMLA." (Id.). The remedy

sought was to "allow Grievant to use sick leave and FMLA" and make his "whole for all medical costs incurred/lost through termination." (Id.). This grievance was denied on May 16, 2008 by the State, and is also before the Arbitrator for resolution.

The events giving rise to the State's decision to terminate Grievant occurred on December 31, 2007. The record shows that on that date, Grievant was a long term employee of the State, having entered State service in 1990, and having accumulated good service ratings as an Accountant during his period of employment. On the date in question, according to Fiscal Administrative Manager in the Agency, Lee-Etta Zaccaro, who had supervised Grievant since 1992, the office was quiet. Grievant was in the computer room, according to Ms. Zaccaro, performing a daily start up for the computer. Ms. Zaccaro testified that she sent Grievant an e-mail on that date at approximately 10:30 a.m., stating as follows: "Joe, this is my third request for the earned time. Please have it to me by end of day Thursday 1/3/08. I will not be able to approve any earn time for you after that date. thanks Lee." (State Exhibit 1).

According to the witness, "earned time" was similar to overtime, but was not compensated as wages, and resulted in accrual of compensatory time. In any event, Ms. Zaccaro testified that she also sent Grievant, and a number of other employees, another e-mail, earlier in the morning hours of December 31, 2007 regarding "original invoices" and a notification she had received from Accounts Payable that "faxed copies of invoices" could no longer be accepted. (State Exhibit 2).

Ms. Zaccaro testified that at approximately 10:20 a.m. on the date in question, she was at her desk reading e-mails in an L-shaped cubicle when she heard Grievant go to the coat rack, and then heard hangers moving with a loud bang. Ms. Zaccaro testified that she looked up to find Grievant in front of her desk, holding a cane over his head, causing her to put her hands up to protect her head. Ms. Zaccaro testified that Grievant was yelling and ranting, though she could not recall what he said, and, as he was doing so, he was shaking the cane over his head.

Ms. Zaccaro testified that she told Grievant to "back off" and that she would "call Security." In response, Ms. Zaccaro testified, Grievant said "go ahead and call fucking Security." She described Grievant as "livid, like in a rage, tense and staring and yelling." Ms. Zaccaro stated that she left her cubicle bit did not see anyone else in the office. Grievant, she testified, then came towards her again, so she ran down the aisle and told another employee to call Security. According to her testimony, Grievant followed her to another unit and then turned around and went back to his cubicle.

Ms. Zaccaro testified that she then saw Manager Mark Daley and yelled that Grievant was trying to attack her with a cane. Daley, Ms. Zaccaro testified, turned to Grievant and asked what was going on, at which point Grievant still had the cane in the air and starting yelling at Daley. Ms. Zaccaro testified that she headed back to her desk but could see Grievant coming towards her and could hear him say "where is she?" Ms. Zaccaro testified that she went into someone else's cubicle and

hid behind a wall. While she was in this position, Ms. Zaccaro testified, she heard Grievant yelling at Daley, who kept saying to Grievant to put the cane down. Ms. Zaccaro testified that she then saw the cane go down and "hit file cabinets" as if "Grievant threw it against something." She also heard Daley then say to Grievant that "you have to go home now." According to Ms. Zaccaro, Daley walked Grievant out and neither she nor Daley could reach Security or Personnel. At this point, Ms. Zaccaro testified, another employee walked her to her car and she left the workplace at 11:00 a.m.

Ms. Zaccaro testified that she had earlier dealt with Grievant's "outbursts". She identified an incident of January 2, 2002, regarding a co-worker, Montalto, which led her eventually to tell Grievant that it was not acceptable to use "profanities in the workplace" and that he needed to control his anger.[1] She acknowledged that Grievant was a "good worker" except that he had a problem of "not letting others help" and at times he seemed "almost too conscientious."

Mark Daley, the Manager described in Ms. Zaccaro's testimony, also testified. According to this witness, at around 10:15 a.m., he saw Ms. Zaccaro in her office, visibly shaken and upset, "barely able to speak", and learned from her that Grievant "had just attacked her with a cane." Mr. Daley testified that he was "surprised by this situation" and that he left to find Grievant, who was in his cubicle.

---

[1]It is noted that this earlier 2002 incident did not result in any discipline and that Grievant, in fact, had a unblemished disciplinary record as of December 31, 2007.

Mr. Daley described Grievant as "standing there" and he asked Grievant what was going on when Grievant "went off and began screaming about his work load." Mr. Daley described Grievant's words as "incoherent" and that he was "opening and slamming drawers" and speaking about how there was "so much work in these drawers." Grievant was quite agitated and was swearing, according to Mr. Daley, as well as "pacing back and forth", with a cane in his hand, which he "raised at times." Eventually, after requests were made by Mr. Daley, Grievant, Mr. Daley testified, threw his cane down in the corner of the cubicle, though he still was "pacing and yelling that there was too much work to do." Mr. Daley testified that he asked Grievant to "calm down and to leave the building." According to Mr. Daley, Grievant replied that there was "more work to do and he sat down like he was going back to work." Mr. Daley insisted that Grievant leave, and, according to his testimony, he walked Grievant out of the building.

According to Mr. Daley, when he next found Ms. Zaccaro,, she was still "very upset." Mr. Daley allowed that during the episode he too "felt fearful" because Grievant "was in a full rage and raised the cane over his head" and was also "screaming" when "he threw the cane down hard into the corner of the cubicle."

According to Mr. Daley, Grievant previously expressed some concerns about his work load. Mr. Daley stated that Grievant "takes on a lot of work by himself" and "goes beyond his assigned tasks" and would perform the tasks of others "if not being done on his time line." Mr. Daley did state that he was "not fearful of Grievant" but he basically wanted to calm Grievant down and end the situation.

The State offered the testimony of Wanda Seldon, who currently is employed as the Assistant Human Resource Administrator of DOT. Ms. Seldon testified that for many years, she has been involved with disciplinary determinations made by DOT. She identified her participation in the fact finding process and in the recommended penalty process. She acknowledged receiving a "fact finding" memo dated January 11, 2008 from Robert J. Bruno and Jeffrey A. Stewart. (Joint Exhibit 10). It is noted that the memo to Ms. Seldon included the following factual findings:

- It was brought to our attention that Mr. Clark was seeking help through EAP, but there were no satisfactory results and therefore he stopped seeing them.

- The Union representatives informed us, with supervisory confirmation, that Mr. Clark has had previous encounters with employees; some documented and some not documented.

- He was asked if he had any intentions on of hurting his supervisor and his response was; "No, I am not big enough or strong enough. I can't do that, maybe if I were a marine."

- Mr. Clark repeatedly asked for help in getting proper assistance to address his anger management throughout the fact finding session.

- The Union informed us that at home he is under pressure from his wife to produce more income.

- Mr. Clark also stated that he feels that he cannot meet management's expectations with work performance. We found this statement to be odd since both his superiors had stated that he is a hard worker and receives good or better service rating.

- "Okay, I have an anger problem. I try to ignore, the anger, but it builds and builds until it explodes."

- Mr. Clark's supervisors have tried to reassign work, but he would either take back the work or not train others because he did not feel that they would perform quality work. (Id.)

In addition, the memo addressed a recommended penalty as follows:

- 10 day suspension;

- Mr. Clark should sign a stipulated agreement to seek professional counseling to deal with his anger management and determine his "fitness for duty" as stated in #80-16A" Employees Conduct and Behavior Policy, and;

- Upon his return to state service, we recommend that Mr. Clark return to a different unit or agency due to the concerns of his co-workers. (Id.).

Ms. Seldon testified that she did not agree with the proposed ten day suspension. Previous incidents concerning "violence in the workplace" violations, according to Ms. Seldon, resulted in dismissals and, in her estimation, the instant case was "more serious." She testified that "anger and rage at the level exhibited by Grievant cannot be tolerated in the workplace." She testified that she took into account Grievant's "long term service and good service ratings" and that she also offered Grievant the opportunity to resign. It is noted that on cross examination Ms. Seldon did acknowledge a situation where an employee had been charged with pulling a knife on another employee that did not end in discharge. She contended that this was because there was a question about the "facts". She also recalled a situation concerning an employee "throwing a wrench", but could recall nothing further about it.

The Union introduced its documentation (Union Exhibit 1B) demonstrating a situation where an employee throwing an ax received a five day suspension. It is noted that the ax was not thrown at any person and was thrown off a truck "in anger." Ms. Seldon testified that there was no "provocation" in the instant case and that "threats of physical violence are the most serious" and thus "more serious than verbal confrontations."

It is also noted via the testimony of Union Steward and attorney, Laila Mandour, that Ms. Seldon allowed Grievant to use some of his sick leave until receipt of the dismissal letter. According to her understanding of the situation, Ms. Mandour testified that Grievant was a "top worker" and "very productive." Grievant was described by her as a "perfectionist."

POSITION OF THE STATE

The State maintains that there was just cause for Grievant's discharge due to the circumstances of his misconduct. The State relies on the testimony of Ms. Zaccaro and Mr. Daley regarding Grievant's misconduct. Special emphasis is placed by the State on how Grievant's conduct affected and upset Ms. Zaccaro, particularly in view of the description given of her by Mr. Daley that she was "a tough woman, not easily shaken." The State further maintains that "[o]ne of the most troubling parts of this conduct" on Grievant's part was that "it was truly like a bolt out of the blue, that no one could have predicated an outburst of such intensity."

The State then raises the public concern that no one can guarantee that such an outburst "will not occur again", particularly "because there are no workplaces that are free of deadlines or irritations." In this regard, the State emphasizes that Grievant engaged in his conduct after what "appeared to be a minor request for information."

The State also maintains that the record shows that it sought to reduce Grievant's workload but that Grievant always took back what work had been given to his co-workers. The State contends that in the final analysis, Grievant's relationship towards his work is one bordering on the "obsessive". The State also notes that the record indicates that co-workers who were not present on December 31, 2007, stated concerns about Grievant being returned to work. There is no reasonable basis, according to the State, to blame management for Grievant's behavior, especially since Grievant did not respond to efforts to reduce his workload.

As to the Union's grievance that Grievant had been discharged "with no regard to his disability" (Joint Exhibit 3A), the State responds that there was no information produced in the record about Grievant's disability. Nor, the State claims, can it fairly be contended that Grievant was subjected to disparate treatment. It points to the testimony of Ms. Seldon that would indicate that Grievant's misconduct could be distinguished from other matters. It emphasizes that Grievant, in its belief, made a "direct threat", causing Ms. Zaccaro to feel "extraordinarily threatened" to the point where she remains "fearful of the Grievant."

The State also claims that it is routine for Human Resources, upon review, to modify, "either upwards or downwards," recommendations that emerge from fact finding. The State concludes by referencing its "zero tolerance for violence in the workplace" and observes that on occasion "verbal violence" may not result in termination where no one has been threatened. Nevertheless, the State maintains, the instant case shows "over the top" behavior on Grievant's part that was reasonably perceived to be very threatening by Ms. Zaccaro.

The State maintains that there was just cause for Grievant's dismissal and that the instant grievance must be denied in its entirety.

POSITION OF THE UNION

On behalf of Grievant, according to the Union, the State has overreacted to the factual situation that occurred on December 31, 2007 involving Grievant. The Union posits that the State has not meet its burden of establishing that just cause exists for Grievant's termination. It identifies that portion of Ms. Seldon's testimony that "zero tolerance does not mean termination" and that "it is a continuum of behaviors." Contrary to Ms. Seldon's assertion that Grievant's behavior overtook his work record, the Union claims that his "work record far surpassed his actions on December 31, 2007." Thus the Union points out that Grievant had an unblemished record and that in fact, his record is filled with "glowing reports that he was an excellent employee, doing the work of many."

The Union also notes that on the date in question, there is some evidence that Grievant was experiencing back pain such that he had to use a cane and that while suffering from such pain, he received the e-mail concerning a deviation from past practice about what documents would be accepted by Accounts Receivable. Shortly thereafter Grievant then received another e-mail from Ms. Zaccaro that the Union labels as "somewhat misleading" concerning what she claimed was a "third request for earn time" despite the fact that Grievant, the Union puts forth, "already provided his information" on an earlier occasion.

In the Union's estimation, the testimony of Ms. Zaccaro concerning Grievant raising his cane while becoming agitated does not establish that the cane was hovering over her head. The Union points out that while she testified that after she left the area she believed Grievant was returning, she also acknowledged on cross-examination that he was with Mr. Daley, though she had not seen the latter's head when she thought it was only Grievant who was returning. The Union also claims that, based on the testimony of Mr. Daley, it can be concluded that Ms. Zaccaro falsely accused Grievant of attacking her with the cane. This simply did not happen. Further, the Union highlights for the Arbitrator Mr. Daley's testimony that he was never fearful of his safety during his interactions with Grievant on the date in question.

Mr. Daley's cross-examination, the Union claims, must be considered significant regarding his explanation of Grievant's workload. Included in his

testimony is that in December of 2007 Grievant may have been upset because efforts were being made to get a CORE system in place. Ms. Zaccaro's departure from the workplace at 11:00 a.m. on the date in question, the Union also notes, was in conformity with her schedule.

The Union emphasizes that the DOT fact- finding hearing held on January 3, 2008, resulted in a recommendation that Grievant not be terminated. It also notes that Grievant sought immediate clinical assistance and submitted, on January 30, 2008, FMLA paperwork. The State further observes that Grievant had accumulated 183 sick leave days during his years of service. Notwithstanding the recommendation that resulted from the DOT fact finding, Ms. Seldon, the Union observes, elected to terminate Grievant and in the process, ignored not only the fact finding recommendation but also Grievant's FMLA application.

The Union disputes Ms. Seldon's testimony that the anger depicted in Grievant's conduct was something rarely seen. In this regard, the Union questions how Ms. Seldon could have believed that Grievant's behavior justified termination while other similar instances resulted in far lesser punishment, as in a five day suspension for throwing an axe 40 feet, or a 20 day suspension for pulling a knife on a subordinate, or a three day suspension for throwing equipment toward an overhead garage door, or a written warning for kicking a garbage can and telling a co-worker to "fuck off", or a one day suspension for spinning tires and slamming brakes on a 9 ton dump truck during a heated argument, or a five day suspension

for operating a State vehicle on State property while driving erratically at excessive rate of speed.

The Union also relies on an Award from Arbitrator Bloodsworth overturning a decision by Ms. Seldon to terminate an employee. The Union notes that in that case the fact finding panel recommended a five day suspension for violation of the computer use policy and a 30 day suspension for violating the Violence in the Workplace Policy. It observes that Arbitrator Bloodsworth agreed with the panel's recommendation and found that the termination was arbitrary and not supported by just cause. The two Awards submitted by the State to justify termination, the Union contends, "reflected instances where the employee had received prior counseling and had prior discipline. The behavior depicted in these cases, according to the Union, was far more violent than Grievant's conduct on the date in question. The Union likens the instant case to other disciplinary decisions made by Ms. Seldon resulting in one day, three day, and five day suspensions. It was simply not credible for Ms. Seldon to claim that it was the "worst case" she had ever seen, according to the Union.

In summary, the Union maintains that the instant grievance should be sustained and that Grievant should be returned to State service and made whole with back pay and benefits, including his sick leave bank. Further, it seeks removal of "all derogatory material" from his personnel file.

OPINION

The State, in this disciplinary proceeding, has the burden of establishing that a just cause basis existed for terminating Grievant. Just cause inquires essentially involve three areas. First, there are the procedural components of just cause, including notice and fair investigation. Secondly, there is a need to find, for discipline to be sustained, that, in fact, the employee engaged in the alleged misconduct. Finally, the penalty administered must be consonant, not only with the nature of the offense but also the employee's previous record and the treatment other employees have received for similar misconduct.

As to the procedural components of just cause, the record does not reflect any serious question. Clearly, the State's workplace violence policy satisfies all notice requirements. That policy is a "zero tolerance policy for workplace violence" and, among other prohibitions, states that "[n]o employee shall cause or threaten to cause death or physical injury to any individual in a State work site." (Joint Exhibit 4) The Policy also states that: "Violation of the above reasonable work rules shall subject the employee to disciplinary action up to and including discharge." (Id.). A revision of the Policy in 2005 as applied to Agency employees noted that the Policy prevented employees from engaging in "physical confrontations, bullying, abusive language, threatening gestures or remarks, or any other actions that intimidate or harm co-workers, supervisory, or the general public." (Joint Exhibit 5). Employees are reminded that violations of the Policy lead "to severe disciplinary action, including

lengthy suspensions or dismissal." (Id.). Finally, it is noted that employees engaging in conduct that is prohibited by the Policy, "may be subject to a 'fitness for duty' or other evaluation in conjunction with the Department's Employee Assistance Program as a condition of returning to the workplace, if not otherwise dismissed from State service." (Id.) That this is a reasonable and essential Policy cannot be disputed. All employees should be able to feel safe in their work environment.

The State also engaged in a fair investigation, as can be seen in the fact-finding process. There was not a rush to judgment. Grievant, it is noted, was allowed to participate in the process and the fact-finding process itself would appear to have been fair and even-handed.

The State easily fulfilled its burden of establishing that Grievant, in fact, violated the Violence in the Workplace Policy. That is to say, the record evidence conclusively establishes that on December 31, 2007, Grievant engaged in behavior that Ms. Zaccaro reasonably believed to be very threatening and intimidating toward her. Putting it simply, Grievant "lost it" and stood in Ms. Zaccaro's presence with a cane raised over his head while screaming. The Arbitrator would emphasize that any reasonable person in Ms. Zaccaro's position would have felt threatened. The Arbitrator does not accept any characterization of Grievant's misconduct that would support any conclusion that Ms. Zaccaro "overreacted" to Grievant's behavior. Seeing an otherwise normally behaved person "lose it" can be a very threatening and upsetting sight to witness and even worse, have it directed at you.

Having reached the conclusion that Grievant violated the Violence in the Workplace Policy and that Ms. Zaccaro was under the reasonable impression that she was threatened, the Arbitrator would also note that he finds that Grievant's behavior, viewed in a broader context than Ms. Zaccaro was able to experience, can be seen as unusual behavior of an otherwise normally behaved responsible employee who had become totally "unglued." The Arbitrator does not find that Grievant sought or had any intention to physically harm Ms. Zaccaro or, for that matter Mr. Daley. Instead, it would appear that Grievant was unable to control his emotions and was having a "temper tantrum" that can fairly be described as one in which he exhibited rage and substantial loss of verbal self control. Such behavior is without question unacceptable for the workplace, or for that matter, for public consumption.

The Arbitrator next turns to the question of penalty. Grievant's evaluative rating over his long years of service, the record shows, always fell within the "good or better" categories of "excellent, superior, satisfactory." His ratings for the period September 1, 2006 to August 31, 2007, for example, are in the "good or better" categories, and include being rated "excellent" in three of the five categories, including "quality of work", "quantity of work", and "dependability." No comments are made on that rating but in the previous year one finds the following comments:

> Joe continues to maintain a high level of accuracy in his work. Very rarely do I need to return anything for errors. Joe relentlessly produces an extensive volume of work in all phases of his job as Budget Coordinator for Bradley International Airport. Joe always manages to get his tasks done on time. He had truly been helpful whenever he has been asked to help out.

In the previous year one find the following comments:

> The quality of Joe's work is exceptionable. He work is neat with a high level of accuracy. Joe continues to work very hard and manages a tremendous work load. Joe is truly an asset to the Financial Office! He continues to work diligently with very little supervision, I can always rely on Joe to get the job done!

Needless to say, an excellent work record complied over a long period of time does not immunize an employee from the administration of discipline, including termination when appropriate. Grievant's exceptional work record, nevertheless, cannot be ignored by the Arbitrator and must be reviewed to determine if it serves to mitigate the penalty for his misconduct. The Arbitrator at this juncture would also note that Grievant's misconduct on the date in question does not appear to be entirely disconnected to his approach to work. That is to say, Grievant's penchant for addressing his work responsibilities with a high degree of responsibility, may have gone into "overdrive" and contributed to his outburst.

The very substantial nature of Grievant's misconduct, which, it must be noted, included the distress visited on Ms. Zarraro, must be placed alongside Grievant's previous work record. Another consideration the Arbitrator must take into account in determining if termination of employment is appropriate is how similar employees under similar or like circumstances have been treated by the State in terms of disciplinary penalties. The Arbitrator does not find that there is evidence of "disparate treatment" since, not surprisingly, the cases involving workplace violence issues truly seem to be unique. Clearly, the State should be afforded a wide degree

of discretion in administering penalties in this regard. The State, needless to say, has a compelling interest in creating and maintaining a safe workplace, and this Arbitrator is reluctant to overturn the State's disciplinary decisions and exercise of discretion in this area. But, as Grievant's years of dedicated service do not immunize him from termination, the State's compelling interest in maintaining a safe workplace does not immunize the State's termination decision from all arbitral review. Nor, the Arbitrator adds, is he precluded from taking into account the recommendation that emerged from fact-finding and review of other disciplinary decisions concerning violations of the Violence in the Workplace Policy.

The Arbitrator also notes that the State had not approached its "zero tolerance" for violence in the workplace so as to require that dismissal is always warranted. Ms. Seldon candidly acknowledged as much in her testimony. The Arbitrator also identifies the fact that the DOT fact-finding panel recommended a 10 day suspension without pay in its report to Ms. Seldon. (Joint Exhibit 10). Though the State was clearly not bound to accept the recommendation, and, in fact, the Arbitrator notes that it appear to him to have been too lenient, the fact remains that the fact-finders were able to consider the factual specifics of the incident while they were all closer in time to the incident and were able to hear from Grievant in the wake of the incident.

In the final analysis, the Arbitrator finds that the DOT fact finding panel recommendation that Grievant not be terminated and be allowed to rehabilitate himself and address his obvious emotional problems seems to be far more in accord with the notion of just cause than termination. Put differently, termination is economic capital punishment and, despite the seriousness of Grievant's misconduct, the execution of Grievant's career does not comport with the notion of just cause based on the particular facts and circumstances of the record, including Grievant's previous service with the State. As noted, the Arbitrator considers the DOT fact finding panel to have been too lenient in their recommendation of a 10 day suspension.

Therefore, it is the finding of this Arbitrator that a thirty (30) day suspension without pay seems to be far more consistent with the need to take a strong stand against violations of the Violence in the Workplace Policy and with the concept of just cause. The Arbitrator also notes that the Policy calls for a "fitness for duty" or "other evaluation" with a return to service. Clearly, the State, if it wishes and outside of the scope of this arbitration proceeding, may have Grievant present himself for such an evaluation and may require Grievant to undergo a reasonable course of counseling or EAP participation if that is the professional opinion of his evaluator(s).

In view of the Arbitrator's findings as to the "just cause" grievance, and his modification of the penalty of termination and the "make whole remedy" that will be issued in conjunction with the 30 day unpaid suspension, the need to address the

amended grievance of May 12, 2008 is mooted. That is to say, any use of sick time by Grievant beyond the 30 day period of suspension shall be restored to him. Any needed use for FMLA time also has been mooted, and if Grievant requires use of FMLA time upon his return to work as ordered herein, that need can be addressed by a new application citing current health circumstances.

Accordingly, and based on the foregoing, I find and make the following:

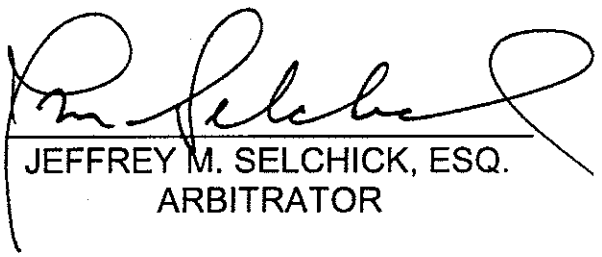
AWARD

The instant just cause grievance is sustained. The dismissal of Grievant Joseph Clark was not for just cause. The penalty of termination is modified to a thirty (30) day suspension without pay. Grievant shall be reinstated to his State employment and made whole for all pay and benefits lost beyond the thirty (30) day suspension period.

The Amended Grievance dated May 12, 2008, is dismissed as moot based on the findings of the Opinion.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss:

I, Jeffrey M. Selchick, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Opinion and Award.



JEFFREY M. SELCHICK, ESQ.
ARBITRATOR

Dated: June 20, 2009
Albany, New York