

65037-8

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 286,

Appellant,

v.

PORT OF SEATTLE,

Respondent.

Case No. 65037-8-I

BRIEF OF RESPONDENT

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I. NATURE OF CASE

Washington has a clearly-articulated and long-held public policy against harassment in the workplace. To implement that policy, the Port of Seattle (the “Port”) adopted a written anti-harassment policy, which specifically prohibits “[d]isplaying or circulating pictures, objects, or written materials... that show hostility to a person because of the person’s age, race, color, national origin/ancestry...or any other category protected by law.” The Port’s anti-harassment policy makes clear that the Port of Seattle has “zero tolerance” for violations of the policy. All Port employees receive anti-harassment training to ensure they understand the policy and the impacts of violating it.

On December 17, 2007, while on-duty at the Port, Port employee Mark Cann (“Cann”) tied a hangman’s noose in a rope and hung the noose on a rail overlooking an open, high-traffic work area. An African-American Port employee, Rafael Rivera, with whom Cann had a recent falling out, was working approximately 30 feet away from where Cann hung the noose. Mr. Rivera reported the noose to Port management.

The Port investigated the incident and offered Cann an opportunity to apologize to Mr. Rivera. Cann could not even muster a sincere apology and instead attempted to downplay and explain away his actions. Cann admitted that he had received the Port’s anti-harassment training, was

aware of the Port's anti-harassment policy and understood "zero tolerance" meant that he could be fired for violating the policy. After its investigation, the Port terminated Cann on February 11, 2008.

Appellant International Union of Operating Engineers, Local 286 (the "Union") grieved the termination on Cann's behalf and ultimately requested arbitration. The arbitrator held a hearing and issued his award on February 2, 2009. Despite finding that: (1) the Port conducted a thorough, fair and objective investigation; (2) the Port's anti-harassment policy was reasonably related to the orderly, efficient, and safe operation of the Port; (3) the Port applied its anti-harassment rules even-handedly to all its employees; (4) Cann had fair notice that hanging a noose in the workplace would result in discipline; and (5) Cann violated the Port's anti-harassment policy, the arbitrator determined that termination was too harsh a punishment. Instead, the arbitrator ordered Cann reinstated with full back pay except for a retroactive 20-day suspension and no forward-looking discipline.

The court below properly vacated the arbitrator's award because it was so lenient that it violates Washington's clearly-articulated and long-held public policy against harassment in the workplace by robbing the Port of its ability to effectively eliminate harassment.

II. RESTATEMENT OF ISSUES PRESENTED

A. Did the superior court appropriately vacate the arbitration award because it was so lenient that it violated Washington's explicit, well-defined, and dominant public policy that compels Washington employers to deter and eradicate harassment in the workplace?

B. Did the superior court act within its broad authority to determine the appropriate relief after vacating the arbitration award?

C. Did the superior court act within its discretion when it reduced the attorney fees awarded by the amount that was attributed to a Union employee who did not provide documentation sufficient to allow the superior court to determine the reasonableness of the amount requested?

III. STATEMENT OF THE CASE

A. **Mark Cann's workplace behavior leads to his termination.**

1. **Provisions of the Collective Bargaining Agreement and the Port's anti-harassment policy prohibit discrimination by employees.**

The Port and the Union were parties to a Collective Bargaining Agreement for the period June 1, 2007 through May 31, 2009 (the "CBA"), which covered certain Port employees, including Cann, and prohibited discrimination by employees on the basis of race:

During the life of this agreement, it is mutually agreed between the Port and the Union that there shall be no

discrimination against any employee...because of race, color, religion, national origin, sex, sexual orientation, age, disability (as established by statutory regulations), or Vietnam era veteran status.

CP 637 (citing Section 4.01 of CBA). Under the CBA, the Port may discipline or terminate the employment of any employee for just cause.

CP 637 (citing Section 7.07 of the CBA). The Port also has a written anti-harassment policy (“HR-22”) that forbids harassment in the workplace.

CP 638 (quoting HR-22). The Port’s policy explicitly prohibits “[d]isplaying or circulating pictures, objects, or written materials... that are sexually suggestive or that demean or show hostility to a person because of the person’s age, race, color, national origin/ancestry... or any other category protected by law.” Id. The Port is clear that it has a zero tolerance policy for harassment at the workplace:

A “zero tolerance” policy is a policy of having no tolerance for transgressions under the policy. Any alleged violation of this (anti-harassment) policy will generate an investigation and, if verified, will be considered “gross misconduct” and can subject an employee to immediate termination.

Id. Cann testified he understood that under this policy, he would be fired if he violated HR-22:

Q: So does [the zero tolerance policy] mean that if you violated HR-22 that you would be fired; is that what it meant?

A: Yes. That’s how I interpret that as.

CP 223 (Cann PERC hearing testimony).

2. Mark Cann ties a noose in an open work area at the Port after training on the Port's anti-harassment policy.

The Port developed an online training program to support its anti-harassment policy. CP 646. The training provides information about harassment, and makes clear that the intent of the person who makes a statement or displays an object in violation of the policy does not matter; all that matters is whether the statement or object is something a reasonable person would find offensive. CP 488 (anti-harassment training slide). The training also warns potential harassers that “[a]ny harassing behavior violates our employment policies, should always be avoided, and can result in disciplinary action, up to and including termination.” CP 646 (Award) (emphasis added). Cann testified that he took this training. *Id.*

On December 17, 2007, Cann tied a hangman’s noose¹ in a rope and, with the assistance of a co-worker, hung the noose on a rail overlooking an open work area at the Port. CP 636. A number of people pass through this area, as it is a shortcut between work sites. CP 651.

An African-American Port employee, Rafael Rivera – with whom Cann had a recent falling out – was working approximately 30 feet away from where Cann tied the noose on December 17. CP 211-212 (Cann

¹ The arbitrator noted that “the noose itself, introduced into evidence was of the appropriate size, shape, construction and material to unmistakably [sic] constitute a hangman’s noose to a reasonable person.” CP 652.

PERC Hearing Testimony). Mr. Rivera saw the noose and suffered an emotional reaction. CP 650 (Award). Mr. Rivera served in the Navy prior to working for the Port, and was stationed in Jacksonville, Florida in the 1960s, where he “witnessed first hand and lived daily with racism.” CP 308-309 (admitted exhibit read into PERC hearing testimony); CP 448 (Mr. Rivera’s email to Port management). The sight of the hangman’s noose caused Mr. Rivera to “relive a time in [his] life that was demeaning, degrading, humiliating, and de-humanizing.” *Id.* The arbitrator believed that Mr. Rivera’s initial reaction to the noose was “distress”; the parties distilled Mr. Rivera’s testimony into a stipulation that he was “not threatened, but angry” as a result of viewing the noose. CP 650 (Award). Mr. Rivera and the day shift foreman at the Port reported the noose to Port management. CP 652 (Award).

3. Cann shows no remorse for his act.

When Port management told Cann that Mr. Rivera had taken offense to the noose, Cann agreed to apologize to Mr. Rivera, but did so in an insincere manner. CP 652 (Award). In the course of his apology, Cann produced a definition of “noose” from a dictionary, “apparently to counter the notion that he had tied a noose.” *Id.* He also testified that he has tied and displayed hangman’s nooses in the workplace on prior occasions, as

an outgrowth of his “twisted” sense of humor. CP 235-236 (Cann PERC hearing testimony).

4. The Port terminates Cann for violating its anti-harassment policy.

On February 11, 2008 the Port terminated Cann for violating HR-22. CP 35 (termination letter). The Union makes much of the fact that Port police did not find that Cann violated RCW 9A.36.080, Washington’s hate crime statute, by hanging the noose. See Appellant’s Brief at 4. The Port police finding is irrelevant to the present case. Cann was terminated for violating the Port’s anti-harassment policy, not the hate crime statute.

B. After a hearing, the arbitrator reinstates Cann with full back pay except for a 20-day suspension, and no other discipline.

The Union grieved on behalf of Cann, and requested arbitration of the grievance pursuant to the CBA between the parties. The parties agreed to have the matter heard by a single arbitrator, Anthony Vivenzio, who presided over a two-day hearing on October 13 and 14, 2008. The arbitrator issued his award (the “Award”) on February 2, 2009. See CP 633-658.²

1. The Port met all of the tests for “just cause” discipline of Cann.

The arbitrator found that the Port met all of the tests for “just cause” discipline of Cann. Specifically, he found that the Port gave Cann

² For ease of reference, the Award (CP 633-658) is attached at Appendix A.

fair notice that “tying a noose into a rope and hanging it from an elevated position in a commonly used and traveled area in the workplace would result in discipline.” CP 648. In coming to this conclusion, the arbitrator noted the significance of a noose with regard to harassment in the workplace:

The noose is an object of a nature such that its display would reasonably be expected to be demeaning or to show hostility to people of a protected class within the purview of the policies of the Employer.... The Arbitrator takes notice that the noose, in our national history, literature, and consciousness, communicates hatred and death, frequently targeting African-Americans, and its display is a destructive element in a workplace.

CP 646.

The arbitrator also found that the Port’s anti-harassment policy was reasonably related to the orderly, efficient, and safe operation of the Port, and to the performance expected of Cann in the workplace. CP 648-649. The Port conducted a thorough investigation regarding the incident to determine whether Cann violated the anti-harassment policy, and the investigation was conducted fairly and objectively. CP 649. The Port gathered substantial evidence that Cann violated the anti-harassment policy, in the form of Cann’s admission of hanging the noose. CP 652. Finally, the arbitrator found that the Port applied its anti-harassment rules even-handedly to all its employees. CP 654. Ultimately, the arbitrator

concluded “that on December 12, 2007, grievant Cann performed acts constituting a violation of the Employer’s anti-harassment policy, warranting discipline, even substantial discipline.”³ CP 653 (emphasis added).

2. The arbitrator found that termination was not warranted.

Although the arbitrator found that the Port satisfied all of the elements of just cause for discipline, he concluded that termination was too harsh a punishment. CP 655 (Award). In doing so, the arbitrator purportedly applied the following test: “Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the Employer?” CP 655 (Award).

The arbitrator went well beyond the scope of this test in reaching his conclusion. In considering Cann’s record at the Port, he noted that Cann had worked for the Port for 12 years, was reliable, and had no history of performance problems. However, he also considered Cann’s professed intent behind creating and hanging the noose, the impact of the

³ The Union strives to present the Port’s harassment claim against Cann as no more than “an accusation” (Appellant’s Brief at 23-24), but the arbitrator clearly found that Cann violated the Port’s anti-harassment policy.

noose on workers in the area where the noose was displayed⁴, and the input of other Port employees regarding Cann's discipline. CP 655-656 (Award).

Ultimately, the arbitrator found that Cann was "more clueless than racist"⁵ in hanging the noose. CP 657 (Award). He directed that Cann's discipline be reduced to 20 days' suspension without pay, and that the Port reinstate Cann to his prior position, with full back pay. CP 657.

C. The superior court vacates the Award.

On February 25, 2009, the Port timely applied to King County Superior Court for a Writ of Certiorari to review the Award, which Writ was granted by Judge Paris Kallas on April 1, 2009. CP 740-741. The Port filed a Motion to Vacate the Award on June 17, 2009. CP 726. In turn, the Union filed a Motion for Summary Judgment on the same day, requesting that the trial court enforce the Award. *Id.* King County

⁴ The arbitrator's reliance on employee responses to the noose is misplaced, as he himself noted in the Award: "As the Arbitrator has noted, it is the display of the noose as a prohibited object in the open workplace that is the crux of the violation, not the claimed responses of the [Port's] employees..." CP 650.

⁵ The Union repeatedly incorrectly states that the arbitrator definitively found Cann's act not to be racially-motivated. Appellant's Brief at 23-24. In truth, the arbitrator's only discussion of this issue is the vague phrase "more clueless than racist" that he used to describe Cann's actions. CP 657. Although this phrase could be interpreted to suggest that Cann's motivation was not wholly discriminatory, it is not at all clear that the arbitrator concluded that race was not involved in Cann's act of tying and hanging a noose at the Port. What is clear is the arbitrator's conclusion that Cann "performed acts constituting a violation of the Employer's anti-harassment policy..." CP 653 (Award). This means that the arbitrator found that Cann "[d]isplay[ed] or circulat[ed] pictures, objects, or written materials... that demean or show hostility to a person because of the person's age, race, color, national origin/ancestry... or any other category protected by law." CP 638 (HR-22).

Superior Court Judge Gonzalez announced his oral ruling on August 3, 2009, and issued a written order on February 4, 2010. CP 725-727.⁶

The superior court vacated the Award “because it violates Washington’s explicit, well-defined, and dominant public policy prohibiting discrimination in the workplace.” *Id.* The court below explained the rationale for its ruling as follows:

Employers have an affirmative duty to provide a workplace free from racial harassment and discrimination. Employees have a right to such a workplace. The Award undermined the well-defined, explicit and dominant public policy expressed in [the Washington Law Against Discrimination (“WLAD”)] because it was excessively lenient. Under the Award Mr. Cann was ordered back to work with back pay and without significant consequence, without training or other warning.

CP 727.

As part of its order, the court below reinstated Cann. CP 726. Cann returned to work at the Port on September 22, 2009 and remains employed at the Port. *Id.* The superior court also ordered the Port to pay Cann six months of back pay, reduced by any other compensation that Cann received during that time period. *Id.* And the court ordered Cann to submit a letter of apology and to complete the Port’s training on diversity and anti-harassment issues, both of which Cann did upon his

⁶ For ease of reference, the superior court’s February 4, 2010 Post-Hearing Order (CP 725-727) is attached at Appendix B.

reinstatement. CP 726-727. Finally, the court below ordered that if Cann violated the Port's anti-harassment policy again in the four-year period following his reinstatement, then he would be terminated without further process. CP 727.

D. The court below awards the Union reasonable attorney fees.

The Union requested an award of \$123,780 in attorney fees under RCW 49.48.030 for its efforts to recover wages for its member, Cann. CP 728-733. Of that total, \$70,350 was to reimburse the Union for an estimated 201 hours spent by Terry Roberts, the Union's salaried employee. CP 728-733; 735-737. The Union argued that an hourly rate of \$350 was appropriate for Mr. Roberts's time, thus resulting in the \$70,350 total for Mr. Roberts's time. CP 745-747.

The only evidence the Union provided in support of the 201 hours attributed to Mr. Roberts was his declaration that contains conclusory statements regarding the number of hours Mr. Roberts spent on broad categories of tasks. CP 735-737. For example, Mr. Roberts indicates that he spent "at least forty eight hours drafting argument opposing the Port's position and supporting the Union's position, and at least eight hours preparing for oral argument before this court." CP 736 at ¶ 9.

The court below awarded the Union \$53,430 in attorney fees. CP 738-739.⁷ The court deducted \$70,350 from the fee award because it was impossible to evaluate the reasonableness of the fees requested for Mr. Roberts's time given the inadequate documentation provided. CP 739.

IV. ARGUMENT

A. Summary of Argument.

1. The court below properly vacated the Award.

In his Award, the arbitrator reinstated, without any meaningful discipline, an employee who hung a noose, a symbol of “hatred and death, frequently targeting African-Americans,” in a common area of the Port for his co-workers to see. See CP 646 (Award). This act made one of Cann's African-American co-workers angry. CP 650 (Award). Although the arbitrator explicitly found that Cann violated the Port's anti-harassment policy, he nonetheless ordered Cann reinstated with almost no discipline. Cann was retroactively suspended for a mere 20 days, awarded full back pay, and given no probation, final warning, or last-chance agreement. CP 658 (Award).

The Award violated Washington's clearly-articulated and long-held public policy against harassment in the workplace because it failed to

⁷ For ease of reference, the superior court's Order Granting in Part the Union's Motion for an Award of Reasonable Attorney Fees, under RCW 49.48.030 (CP 738-739) is attached at Appendix C.

provide any deterrent to harassing behavior and prevented the Port from effectively fulfilling its duty to maintain a work environment free from harassment. Cann was trained before his harassing actions (to no effect) and showed no remorse for his actions (e.g., his insincere apology). The scanty punishment in the Award provided no financial or forward-looking deterrent to stop further harassing behavior by Cann or any other Port employee. On the contrary, the discipline imposed by the Award was so slight, given the serious offense, that it virtually condoned Cann's behavior. The arbitrator's rationale for rejecting the Port's chosen discipline did not nullify Cann's violation of the Port's anti-harassment policy, or of the Washington laws that policy enforces.

2. The superior court's attorney fee award was not an abuse of discretion.

The court below awarded the Union the attorney fees it requested under RCW 49.48.030 except for those attributed to the Union's employee, Terry Roberts, which the court below found it could not evaluate for reasonableness given the information provided by the Union. CP 739. The court below awarded the Union \$53,430 in attorney fees. CP 738-739. The superior court's attorney fee award was reasonable and not an abuse of discretion.

B. Standard of Review.

The Union accurately presents the appropriate standards of review. Regarding the standard for review of the trial court's attorney fee award, "[a]n abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." Singleton v. Frost, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987).

C. The superior court did not commit error when it vacated the Award.

1. The arbitrator did not have authority to issue an Award that violates public policy.

In its Brief, the Union spends five full pages arguing that the arbitrator had authority to decide the proper discipline for Cann, and that great deference should be given to the arbitrator's Award. See Appellant's Brief at 16-21. The Port agrees that the arbitrator had the authority under the CBA and the parties' pre-hearing stipulation to decide the appropriate discipline for Cann if the arbitrator found that termination was inappropriate. However, that authority does not include issuing an award that violates public policy. Pursuant to clear Federal and State law, the Court may not enforce an arbitration decision that is contrary to public policy. Kitsap County Deputy Sheriff's Guild et al. v. Kitsap County, et al., 167 Wn.2d 428, 436, 219 P.3d 675 (2009). See also W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers, 461 U.S. 757, 766

(1983) (holding that if arbitrator's award violates explicit public policy, courts are obliged to refrain from enforcing it); Virginia Mason Hosp. v. Washington State Nurses Ass'n, 511 F.3d 908, 917 (9th Cir. 2007) (holding that court can vacate arbitrator's decision if it is contrary to explicit, well-defined, and dominant public policy).

Although the Washington courts have not yet had an opportunity to consider whether an arbitrator's award should be vacated as contrary to a public policy against racial harassment, courts in other jurisdictions have vacated awards on this ground. See City of Hartford v. Casati, No. CV000599086S, 2001 WL 1420512 (Conn. Super. Ct. Oct. 25, 2001) (unpublished) (vacating as against public policy arbitrator's award that reinstated employee who made discriminatory comments at the workplace because award "effectively undermines the City's efforts to comply with its legal duty pursuant to federal and state law ... to take reasonable steps to eliminate racially, ethnically and sexually discriminatory language..."); State v. AFSCME, Council 4, Local 387, AFL-CIO, 747 A.2d 480 (Conn. 2000) (holding arbitration award violated public policy because it reinstated state employee whose conduct violated statute and employment regulations issued by his employer); Nebraska v. Henderson, 762 N.W.2d 1 (Neb. 2009) (affirming refusal to enforce arbitration award reinstating police officer who was affiliated with Ku Klux Klan).

In State v. AFSCME, the Connecticut Supreme Court affirmed a trial court's decision to vacate an arbitration award as violative of public policy. AFSCME, 747 A.2d. at 486. The arbitration award reinstated a corrections officer (after reducing his termination to a 60-day suspension without pay) who placed an anonymous obscene and racist telephone call to a state legislator from his workplace, while on duty. Id. at 482-83. In his award, the arbitrator found that the officer had in fact made the harassing phone call, but justified the reinstatement on the ground that the call was “the outgrowth of various personal stressors.” Id. at 486. The trial court vacated the award on public policy grounds and denied the defendant’s cross-application to confirm the award, noting that the former employee’s racist behavior is “wholly incompatible with continued employment by the [plaintiff],” and that “[a]nything less than termination is not sufficient to uphold this important policy [against harassment].” Id. at 483-84.

Applying the same analysis as do Washington courts, the Connecticut Supreme Court found that the state had an explicit, well-defined, and dominant public policy against harassment. Id. at 486. In determining whether the arbitrator’s award was contrary to this public policy, the court squarely rejected the arbitrator’s justification of the employee’s actions: “in doing so, the arbitrator ‘minimize[d] society's

overriding interest in preventing conduct such as that at issue in this case from occurring.” Id. Ultimately, the Supreme Court held that the arbitration award violated a clearly defined public policy because it reinstated a state employee whose conduct blatantly violated both a criminal statute and the employment regulations issued by his employer.

Id.

2. **The arbitrator’s Award violated Washington’s public policy, and was properly vacated.**
 - a. **Washington has explicit, dominant, and well-defined public policies against harassment in the workplace.**

Washington has explicit, well-defined, and dominant laws prohibiting race-based harassment in the workplace. In enacting the Washington Law Against Discrimination (“WLAD”), the Legislature made clear that the State would not tolerate discrimination based on race, or on many other grounds:

The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010. WLAD's purpose is advanced in its substantive provisions. "The right to be free from discrimination because of race ... is recognized as and declared to be a civil right. This right shall include, but not be limited to: (a) The right to obtain and hold employment without discrimination..." RCW 49.60.030(1)(a). The statutory declarations in WLAD "clearly condemn[] employment discrimination as a matter of public policy." Roberts v. Dudley, 140 Wn.2d 58, 69-70, 993 P.2d 901 (2000).

The Supreme Court of Washington has held on numerous occasions that WLAD embodies a public policy "of the highest priority." Antonius v. King County, 153 Wn.2d 256, 257, 103 P.3d 729 (2005); Xieng v. Peoples Nat'l Bank of Washington, 120 Wn.2d 512, 521, 844 P.2d 389 (1993); Allison v. Housing Auth. of City of Seattle, 118 Wn.2d 79, 86, 821 P.2d 34 (1991). Moreover, the Washington courts have made clear that the purpose of WLAD is to deter and to eradicate discrimination in Washington. Brown v. Scott Paper Worldwide Company, 143 Wn.2d 349, 359-360, 362, 20 P.3d 921 (2001) (holding that there is a "broad public policy to eliminate all discrimination in employment" in Washington); Marquis v. City of Spokane, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). As discussed in more detail below, and as found by the court below, the arbitrator's Award imposed such minor discipline on Cann that

it did not deter, let alone “eradicate,” future harassment by Cann or any other Port employees. Therefore, it ran contrary to established Washington public policy, and the court below acted appropriately in ruling that it not be enforced.

b. Federal laws applying to Washington employers also have a strong public policy against discrimination at the workplace.

Federal law includes a similar public policy against race-based discrimination. Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) prohibits racial discrimination against any individual with respect to employment. Under federal law, an employer has an affirmative duty to maintain a work environment free from race-based harassment; this duty encompasses a requirement to take positive steps to eliminate such harassment taking the form of, for example, insults in the workplace. Equal Employment Opportunity Commission (“EEOC”) Compl. Man. §§ 15-VII & 15-IX (2006).

c. Many of the cases cited by the Union turn upon significant discipline found in the respective arbitration awards, which is not present in the Award.

The Union presents two cases involving racial epithets to support its position, but fails to inform the Court that the rulings in both cases relied upon significantly more punitive arbitration awards than the Award here. See Appellant’s Brief at 26. In Way Bakery v. Truck Drivers Local

No. 164, 363 F.3d 590, 592 (6th Cir. 2004), an employer terminated a white employee for breaching the company's Equal Employment Opportunity policy after he made a racial remark to a black employee. The arbitrator reversed the termination, but subjected the employee to a six-month loss of pay and placed him on probation for five years, during which time any instance of racial harassment or racially-abusive language would be the basis for the employee's immediate discharge. Id. The Sixth Circuit affirmed the arbitrator's decision largely on the fact that the award, through its significant discipline for the offending employee, did not "condone or fail to discourage hostile behavior in the workplace." Id. at 595-596.

Similarly, in Gits Manufacturing Co., L.L.C. v. Local 281 International Union, 261 F. Supp. 2d 1089, 1092 (S.D. Iowa 2003), an employee terminated for making a racial epithet was reinstated by an arbitrator, but without six months of back pay. In enforcing the award, the court emphasized that because the arbitration award docked the employee six months' pay, the employer would not be seen as sending the message that it accepted or condoned the employee's comments by reinstating him. Id. at 1096 & 1099.

The same rationale found in the Way Bakery and Gits courts' rulings is also present in a number of other cases cited by the Union. See

Eastern Associated Coal Corp. v. United Mine Workers of Am., District 17, 531 U.S. 57, 65-66, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000) (noting that arbitrator’s award did not condone employee’s conduct or ignore potential consequences: “Rather, the award punishes Smith by suspending him for three months, thereby depriving him of nearly \$9,000 in lost wages; it requires him to pay the arbitration costs of both sides; it insists upon further substance-abuse treatment and testing; and it makes clear (by requiring Smith to provide a signed letter of resignation) that one more failed test means discharge.”); Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, 886 F.2d 1200, 1203 (9th Cir. 1989) (affirming award stating that employee’s “reckless conduct on October 14, 1985 [] warrants severe discipline... reinstatement with a one-hundred and twenty (120) day suspension should serve as an object lesson and impress upon [him] that he is required to follow instructions and perform his job duties fully and carefully.”); New York State Elec. and Gas Corp. v. System Counsel U-7 of the Int’l Bhd. of Elec. Workers, 328 F. Supp. 2d 313, 315 (N.D.N.Y. 2004) (affirming award of reinstatement without back pay or benefits, on a last-chance basis).

The Award did not contain any of the significant present and future-looking penalties found in the Union’s cited cases. In Eastern, Way Bakery, Gits, Stead, and NYSE, employees lost meaningful amounts of

wages through long suspensions or de minimus back pay awards. Beyond the financial deterrent, the employees were further deterred from repeating their offenses through probation or last-chance agreements. In contrast, the Award, with its negligible 20-day suspension, no probation or other forward-looking disciplinary measure, and award of full back pay to Cann upon reinstatement, effectively condoned Cann's actions and failed to discourage hostile behavior in the workplace, as required by WLAD. If the arbitrator's penalty for Cann's behavior were more in line with the seriousness of his offense, then the Port may not have challenged the Award. But because the Award had virtually no deterrent effect, the Port had no choice but to seek judicial review. Washington's public policy against discrimination specifically militates against the negligible discipline meted out in the Award, and the court below did not err by vacating the Award on that ground.

3. Kitsap County does not support a different result.

The Union may argue in its Reply Brief that the Court should reverse the court below's order in light of the recent Supreme Court opinion in Kitsap County Deputy Sheriff's Guild v. Kitsap County, 167 Wn.2d 428, 219 P.3d 675 (2009). Under Kitsap County, the Court must consider the arbitrator's award, and not merely the underlying misconduct, in light of the identified public policy. Here, the court below did just that;

it evaluated the Award against the identified public policy in WLAD of deterring harassment in the workplace, and concluded that the Award violated the public policy because the Award was too lenient to prevent harassment in the workplace. Therefore, the court below fully complied with the holdings of the Supreme Court in Kitsap County in vacating the Award.

The Supreme Court in Kitsap County refused to affirm vacation of an arbitrator's award. There are a number of obvious distinctions between the facts in Kitsap County and this case that support a different result here.

- a. **In Kitsap County, there was no clear public policy placing an affirmative duty on the employer to correct or prevent the employee's acts.**

The employer in Kitsap County, the Kitsap County Sheriff's Office, terminated the employment of Deputy Brian LaFrance for multiple incidents of misconduct, including dishonesty to his employer. Id. at 431-432. In identifying a Washington public policy that the award reinstating LaFrance allegedly violated, the Sheriff's Office pointed to criminal statutes prohibiting anyone from knowingly making false statements to public servants, statutes prohibiting public officers from knowingly making false statements, and the Brady rule, which requires prosecutors to disclose exculpatory evidence, including evidence that an involved police

officer was found to be untruthful. Id. at 436 and 438. Washington’s Supreme Court held that the proffered sources of public policy were not adequate to vacate the award because they did not “prohibit[] persons found to be untruthful from serving as officers or plac[e] an affirmative duty on counties to prevent police officers from ever being untruthful.” Id. at 437. Ultimately, the Supreme Court held that “[t]he Court of Appeals erred when it vacated the arbitrator’s award without explaining the explicit, well-defined, and dominant public policy violated by that award.” Id. at 439.

Here, unlike in Kitsap County, the court below identified Washington’s explicit, well-defined, and dominant public policy prohibiting discrimination in the workplace, which supported vacation of the Award. CP 726-727. Moreover, as expressly recognized by the court below in its written order, this public policy does, unlike the statutes that the Supreme Court found inadequate in Kitsap County, place an affirmative duty on employers to prevent acts like those perpetrated by Cann. Id. Washington courts have made clear that the purpose of WLAD is to deter and to eradicate discrimination in Washington. Brown, 143 Wn.2d at 359-360, 362; Marquis, 130 Wn.2d at 109.

Washington employers’ duty to prevent harassment is seen in cases where negligent employers were exposed to significant liability for failing

to properly deter harassment by their employees. See Perry v. Costco Wholesale, Inc., 123 Wn. App. 783, 793, 98 P.3d 1264 (2004) (award of \$500,000 against employer that transferred harasser to different shift and required sensitivity training, rather than terminating him); Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002) (affirming award of \$52,000 and attorneys' fees against employer who terminated one, but not all, harassing employees on grounds that employer's "remedial action... was not of such a nature to have been reasonably calculated to end the harassment"). The court below recognized this duty in its Order ("[e]mployers have an affirmative duty to provide a workplace free from racial harassment and discrimination"), and this duty justifies his vacation of the Award. CP 727.

b. The grievant's acts in Kitsap County were not as serious as those here.

In Kitsap County, the Sheriff's office fired LaFrance for multiple incidents of misconduct, including working outside his regular shift without permission, maintaining an unacceptable number of open cases, failing to return case files and equipment, and failing on one occasion to secure a pistol. Kitsap County, 167 Wn.2d at 431-432. These acts are a far cry from Cann's offensive act here – hanging a noose in open view of Port employees after receiving anti-harassment training, and providing a

less-than sincere apology to a person seriously affected by viewing the noose.

c. The grievant's acts in Kitsap County were the result of a disability.

In addition to the difference in the severity of the acts committed in Kitsap County and this case, in Kitsap County the grievant's violations of his employer's policies were not knowing, but were the result of a temporary mental disability. During the County's investigation, the grievant appeared "erratic and confused," and it became "obvious in hindsight that Deputy LaFrance was disabled and incapable of performing his job." *Id.* The arbitrator in that case specifically found that "LaFrance's mental disability was apparent from his behavior and that the County should have recognized this and referred him for counseling and fitness-for-duty exams" rather than terminating him. *Id.* at 432. In contrast, Cann was fully aware of his acts, and, even after receiving the Port's anti-harassment training, hung a noose intending for others to see it.

d. The arbitrator's award in Kitsap County was significantly more stringent than the Award here.

Despite finding that the Sheriff's Office should not have terminated Deputy LaFrance for his acts, the arbitrator in Kitsap County nonetheless issued an award that acknowledged the need for discipline. While the arbitrator reinstated LaFrance, such reinstatement was without

back pay for the four year period from his placement on administrative leave until he was reinstated. Id. at 432-33. Also, the arbitrator upheld the County's allegations of misconduct, and allowed the County to place three final written warnings in LaFrance's personnel file. Id.

In contrast, the Award, with its negligible 20-day suspension, no probation or forward-looking disciplinary measure, and award of full back pay to Cann upon reinstatement, effectively condones Cann's actions and fails to discourage harassing behavior in the workplace. The light discipline meted out in the Award violates Washington's clear policy against discrimination in the workplace, and the court below acted appropriately in vacating the Award on this ground.

4. The court below had the right to fashion alternate relief after vacating the Award.

The Union asserts that the court below erred when it imposed discipline on Cann after vacating the arbitrator's Award. This is not error: the trial court has broad authority to fashion whatever relief it deems appropriate as long as it does not disturb the factual findings of the arbitrator. Reviewing courts regularly make changes to awards that they find excessive or insufficient. See, e.g., Kiessling v. N.W. Greyhound Lines, 38 Wn.2d 289, 297, 229 P.2d 335 (1951) ("The verdict of a jury or a pronouncement by the court determines and fixes a definite amount of

recovery, but the demand is not fully liquidated until the entry of judgment for the reason that the court may grant a new trial because the award is excessive or insufficient; or may raise or lower the amount and afford the party adversely affected the option to accept the same or submit to a new trial of the case, or, in the case of an award by the court, the trial judge may change his mind and make a different award than included in the original pronouncement.”) (emphasis added). Our situation is analogous to one where a court determines that an award is excessive, and the court below acted within its authority in fashioning alternate relief after vacating the Award.

a. The Union’s cited cases are inapposite.

The Union cites to the United States Supreme Court case United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38, 108 S. Ct. 364 (1987), for the proposition that courts have no authority to disagree with arbitrators’ “honest judgment” regarding remedies. Appellant’s Brief at 20. This proposition is mere non-binding dicta, as the main defect identified by the Court in Misco was that the Court of Appeals improperly based its holding that a reinstatement violated public policy on “general considerations of supposed public interests,” not “laws and legal precedents” as required by W.R. Grace. Misco, 484 U.S. at 43. Moreover, the Supreme Court’s decision to reverse the lower courts was

also based on the fact that they had improperly made factual determinations regarding evidence that the arbitrator excluded and did not consider. See id. at 30. The defects present in Misco are not present here; the court below vacated the Award based on WLAD's requirements, rather than general considerations of public interest, and the judge made his ruling without disturbing the factual findings of the arbitrator.

The Union also cites Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, 886 F.2d 1200, 1212-13 (9th Cir. 1989), for a similar principle, that the "arbitral judgment of an employee's 'amenability to discipline'" cannot be second-guessed by a reviewing court. Appellant's Brief at 30. The Stead decision has been roundly criticized by other courts: it was rejected by the 5th Circuit in Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A., 991 F.2d 244, 253 (5th Cir. 1993), and the 2nd and 10th Circuits declined to follow it. Int'l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 722 (2d Cir. 1998); Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1024 (10th Cir. 1993). The Gulf Coast court best articulated the problems with the proposition that the Union now advances:

We reject such a restrictive test, which would have the practical effect of ousting the courts of jurisdiction and abdicating the public policy question entirely to arbitrators. Under the plurality's problematic decision, if an arbitrator finds the discharged employee amenable to discipline and

therefore unlikely to breach a properly-framed public policy in the future, such a determination would be unreviewable. Our reading of Misco does not compel such a “hands-off” policy. The plurality’s rule of no judicial power to evaluate amenability does not comport with W.R. Grace’s teaching, acknowledged in Misco, that ‘the question of public policy is ultimately one for resolution by the courts.’

991 F.2d at 254.

Moreover, like Misco, Stead is factually distinct from our case. In Stead, the employer pointed to a general regulation prohibiting the operation of a vehicle in unsafe condition to justify its termination of a mechanic. 886 F.2d at 1216. Unsurprisingly, the court found that the employer’s cited regulatory provisions might signify the California Legislature’s perception of public interest in safe cars and trucks, but did not show an explicit, well defined, and dominant public policy to support termination of employees working on those vehicles. Id. In contrast, here the superior court identified an explicit, well-defined, and dominant public policy to support vacation of the Award.

D. The court below did not abuse its discretion when it reduced the Union’s fee award by the amount attributed to time spent by a Union employee.

The Port does not dispute that the trial court properly awarded attorney fees to the Union under RCW 49.48.030. The superior court’s award of attorney fees is reviewed for an abuse of discretion. “An abuse

of discretion exists only where no reasonable person would take the position adopted by the trial court.” Singleton, 108 Wn.2d at 730. The trial court did not abuse its discretion by awarding less than the full amount of fees requested by the Union.

1. The court below properly examined the reasonableness of the fees requested.

In Washington, trial courts must make an independent determination of a reasonable fee in responding to a fee application. See Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). The reasonableness of requested attorneys’ fees must be determined in light of the circumstances of each case. Singleton, 108 Wn.2d at 731. The trial court has broad discretion in determining the appropriate amount of attorneys’ fees to award the requesting party. Id.

The determination of a reasonable fee begins with the calculation of a lodestar figure, and the fee applicant bears the burden of proving the reasonableness of fees. See Fetzer, 122 Wn.2d at 151; see also Bowers v. Transamerica Title Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983); Absher Constr. Co. v. Kent Sch. Dist., 415, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). The lodestar amount is arrived at by first “multiplying a reasonable hourly rate by the number of hours reasonably expended.” Fetzer, 122 Wn.2d at 149-50 (emphasis added).

To allow the trial court to properly analyze the requested fees, “the attorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work . . .” Am. Civil Liberties Union of Washington v. Blaine, 95 Wn. App. 106, 975 P.2d 536 (1999) (emphasis added) (reversing the trial court’s award of fees where the trial court failed to follow the lodestar method).

2. The court below properly awarded fees only to the extent it could determine they were reasonable based on the information provided.

In Blaine, the Court of Appeals noted that for the purpose of calculating reasonable attorneys’ fees, “...attorneys must provide reasonable documentation of the work performed.” Blaine, 95 Wn. App. at 118. The Union failed to provide the superior court with the tools necessary to determine whether the fees requested for the work of its employee, Terry Roberts, were reasonable. The level of detail required to make a finding of “reasonableness” for any attorney fee award was markedly absent from Mr. Roberts’s declaration. In that declaration, Mr. Roberts offered only conclusory statements as to the number of hours expended by him on this matter, and the general nature of the tasks performed. CP 735-737.

Mr. Roberts admitted that his calculation of hours spent on this case is estimated, and he failed to attach any documentation showing an actual accounting of the work he performed. Id. Furthermore, given Mr. Roberts's incredibly general descriptions of the tasks he performed for which the Union was seeking fees, it was impossible for the trial court to determine whether Mr. Roberts and the Union's outside counsel duplicated efforts, an important component in determining the reasonableness of an attorney fees award. Bowers, 100 Wn.2d at 597. The trial court did not abuse its discretion when it awarded fees only to the extent it could determine they were reasonable.

V. CONCLUSION

By adopting its anti-harassment policy, training its employees, and acting on its plainly-stated "zero tolerance" for violations of the policy, the Port was attempting to do what Washington employers are compelled to do under State and Federal law – maintain a work environment free from harassment. When a thorough, fair investigation revealed that a Port employee, Mark Cann, blatantly violated the Port's anti-harassment policy by hanging a noose in the workplace even after he received anti-harassment training, and Cann showed no remorse for his actions, the Port terminated Cann's employment.

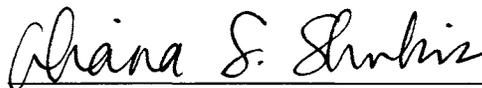
Obliterating the Port's efforts to eradicate harassment in the workplace by rigorously enforcing its anti-harassment policy, the arbitrator ordered Cann reinstated with full back pay less a retroactive 20-day suspension. The arbitrator's Award was so lenient that it violates Washington's clearly-articulated and long-held public policy against harassment in the workplace because it prevented the Port from effectively fulfilling its duty to maintain a workplace free from harassment. The court below properly vacated the Award because it violated public policy.

The court below was well within its discretion to limit the attorney fees award to the Union to those fees that it could determine were reasonable based on the information provided.

The Port respectfully requests that this Court affirm the superior court's orders.

RESPECTFULLY SUBMITTED this 14th day of September, 2010.

CAIRNCROSS & HEMPELMANN, P.S.



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Certificate of Service

I, Greta A. Nelson, certify under penalty of perjury of the laws of the State of Washington that on September 14, 2010, I caused a copy of the document to which this is attached to be hand-delivered to the following individual(s):

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DATED this 14th day of September, 2010, at Seattle, Washington.

s/ Greta A. Nelson

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APPENDIX A

TO

BRIEF OF RESPONDENT

IN THE MATTER OF THE ARBITRATION BETWEEN)

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 286,

Union,
and

PORT OF SEATTLE

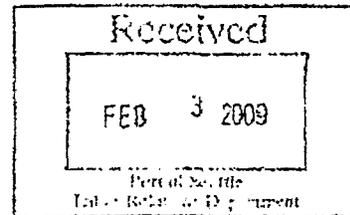
Employer

) FMCS CASE NO's:

) 080408-55091-8 (MARK CANN)

) 080408-55093-8 (TERRY CHAPMAN)

) ARBITRATOR'S AWARD



ARBITRATOR: ANTHONY D. VIVENZIO

AWARD DATE: FEBRUARY 2, 2009

APPEARANCES FOR THE PARTIES

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PROCEDURAL HISTORY

The Port of Seattle is hereinafter referred to as the "Employer," or the "Port." The International Union of Operating Engineers, Local 286, is hereinafter referred to as the "Union." Mark Cann and Terry Chapman are hereinafter referred to as the "grievants."

This matter involves the termination of grievant Mark Cann on February 11, 2008, based upon his alleged violation of the Employer's Anti Harassment Policy HR-22 and associated work rules by tying a noose in a length of rope at his workplace and hanging it from a railing. Terry Chapman is alleged to have assisted him in this action, and was given a "verbal warning" for his participation on January 30, 2008. Following unsuccessful attempts at resolving the grievance, arbitration was requested by the Union pursuant to Article 22.01 of the collective bargaining agreement on April 8, 2008. The Parties, rather than convening a Board of Arbitration as provided in Article 23.01 of the contract, agreed to have the matter heard by a single arbitrator. Using the services of the Federal Mediation and Conciliation Service, Anthony D. Vivenzio was appointed as Arbitrator. An arbitration hearing was held on the premises of the Port of Seattle, located at SeaTac Airport on October 13 and 14, 2008. Insofar as the cases involving grievants Mark Cann and Terry Chapman involved virtually identical witnesses and fact patterns, the matters were heard together. The parties stipulated that all prior steps in the grievance process had been completed or waived, and that the grievance and arbitration were timely and properly before the Arbitrator. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The evidentiary record was closed on October 14, 2008. The Arbitrator received timely post-hearing briefs from both parties on November 14, 2008. The Employer later notified the Arbitrator alleging a problem with the Union's brief and a conference call was

conducted on December 2, 2008 to resolve the matter. The full record was deemed closed and the matter submitted on December 2, 2008.

STATEMENT OF THE ISSUE BEFORE THE ARBITRATOR

At the hearing the parties stipulated the issues before the Arbitrator as follows:

Did the Employer have just cause for their termination of Mark Cann on February 11, 2008, and, if not, what shall the remedy be?

Did the Employer have just cause for their discipline of Terry Chapman on January 30, 2008, and, if not, what shall the remedy be?

BACKGROUND

The Port of Seattle is the governmental agency responsible for the operation of the Seattle International Airport located at SeaTac Washington. It is one of the largest and busiest airports in the United States, accommodating thousands of airline passengers, their families and possessions, every day. Passenger jets continuously land on a number of runways, beginning and ending their flights at "satellite terminals" to which the various airlines are assigned. The immense flow of passengers and belongings first passes through a security system, and then boards an underground subway system to travel through tunnels to reach the airlines' satellite terminals. The system utilizes unmanned rail cars that operate on a twenty-four hour basis. As can be expected, these transit cars are subjected to constant wear and tear and require ongoing, skilled maintenance. Cars are directed to a shop on their level, and skilled, licensed employees perform repairs and routine maintenance. The complement of employees is diverse, with different ages and ethnic groups represented. The work area contains an open mezzanine and

catwalk, offices and storage areas, areas to accommodate the transit cars including a pit for underbody service, and a workshop for the fabrication of parts, and tools and supplies for repairs. Employees from other work units also frequently pass through the area in the course of performing their duties.

On December 12, 2007, a noose was found tied in a rope hanging over a rail overlooking an open work area. Grievant Mark Cann was identified as the employee who tied the noose in the rope. Terry Chapman, an employee as to whom Mr. Cann held the position of "lead," was identified as having assisted him. An investigation was conducted by the Employer, which concluded that the Employer's anti-harassment policy, HR-22, had been violated by the grievants by their displaying an object in the workplace that conveys hostility to protected classes of employees. Following the Port's "Zero Tolerance" policy, the event led to the termination of Mr. Cann, and a "verbal warning" for Mr. Chapman, attempts at resolving the resulting grievances, and finally to this arbitration.

**PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT
AND WORK RULES**

From the collective bargaining agreement effective June 1, 2007-May 31, 2009:

Article 4: Equal Employment Opportunity

4.01 During the life of this agreement, it is mutually agreed between the Port and the Union that there shall be no discrimination against any employee or applicant for employment or against any Union member or applicant for membership because of race, color, religion, national origin, sex, sexual orientation, age, disability (as established by statutory regulations), or Vietnam era veteran status.

ARTICLE 7: Seniority

7.07 The Port reserves the right to discipline or terminate the employment of any employee for just cause. The Union shall be notified of any discharge within twenty-four hours thereof.

7.08 In the event of a dispute as to whether or not "justifiable cause" existed, such dispute may be processed through the grievance procedure contained in Article XXII of this Agreement.

ARTICLE 22: Grievance and Arbitration Procedure

22.01 Grievances arising between the Port, its employees, and/or the Union with respect to the interpretation or application of the terms of this Agreement shall be settled according to the following steps:

Step 3 The grievance shall be submitted to...Arbitration...The expense of the arbitration shall be borne equally by the Union and the Port.

22.02 The powers of the arbitration board shall be limited to the application and interpretation of this agreement and its addenda, appendices, and schedule A. The arbitrator board shall have jurisdiction to decide any dispute arising under the agreement, but they shall not add to, delete, or modify any article of the agreement or of its addenda, appendices, or schedule A.

ARTICLE 23: Union Activities

23.01 B The Port agrees not to discriminate against the plant steward because of the performance of his/her duties as a steward. The Union agrees that the plant steward shall be covered by the terms and conditions of this Labor Agreement, and shall not be entitled to any preferential treatment as a result of being a steward.

From the Employer's Anti-Harassment Policy, "HR-22 as of 5/16/06":

I. STATEMENT OF THE POLICY:

The Port of Seattle does not tolerate illegal harassment in the workplace. Illegal harassment refers to behavior that is not welcome, that is personally offensive, that debilitates morale, and that, therefore, interferes with work effectiveness. Illegal harassment includes but is not necessarily limited to unwelcome verbal or physical conduct that is derogatory of an employee's age, race, color, national origin/ancestry... Violations of this policy may result in disciplinary action up to and including termination.

II. DETAILS:

Examples of conduct prohibited by this policy include:

- Displaying or circulating pictures, objects, or written materials (including graffiti, cartoons, photographs, pinups, calendars, magazines, figurines, novelty items) that are sexually suggestive or that demean or show hostility to a person because of the person's age, race, color, national origin/ancestry... or any other category protected by law.

The Employer's "Zero Tolerance" Policy:

A "zero tolerance" policy is a policy of having no tolerance for transgressions under the policy. Any alleged violation of this (anti-harassment) policy will generate an investigation and, if verified, will be considered "gross misconduct" and can subject an employee to immediate termination.

From the Employer's "Aviation Maintenance Work Rules":

Code of Conduct

9. Behavior in the Workplace:

- Employees should make every effort to ensure that there is absolutely no discrimination on the basis of race, creed, color, national origin, sex, sexual orientation, marital status, age or any sensory, mental or physical handicap.
- Employee conduct that is potentially threatening or harmful to the employee or others may result in dismissal from the job site.

STIPULATIONS OF THE PARTIES

At the commencement of the hearing, the parties presented the following stipulations to the Arbitrator:

1. Mark Cann took the anti-harassment training provided by the Employer.
2. Mic Dinsmore, a Port manager, had circulated an email requiring such training of all employees.
3. All staff (including the grievants) were "cc'd" of an email informing them of the Port's "Zero Tolerance" policy concerning acts prohibited by the Port's anti-harassment policy.

Additionally, in the course of the hearing, a question arose concerning the response of a fellow employee, Raphael Rivera, to the display of the noose. After conferring, the parties stipulated that Mr. Rivera's response to the display would be characterized as "not threatened, but angry."

POSITIONS OF THE PARTIES

Position of the Employer

The position on the Employer is summarized as follows:

This dispute arose out of an employee's ill-considered display of a hangman's noose in the workplace. To most people, the hangman's noose represents violence, death, and the racial harassment of African-Americans. This employee, however, openly displayed the hangman's noose for all his coworkers to see, including one African-American co-worker, who was highly offended. This incident represented a severe violation of the Employer's policies. In this day and age, no employee should be able to hide behind the excuse that he considers the hangman's noose to be a relic of the days of "Cowboys and Indians" or the child's game of "hangman." Such ignorant, reckless thinking exposes coworkers to a hostile workplace, and exposes the Employer to significant liability. This behavior warrants no less penalty than termination.

Grievant Cann had been told by his supervisor to remove a length of coiled rope from the

floor of the workplace, as it represented a tripping hazard. Instead, the grievant hung a full-sized hangman's noose with the help of a subordinate, co-grievant, Terry Chapman. An African-American employee, Raphael Rivera, with whom the grievant had a recent falling out, was working nearby. When he later saw the noose, he reported the incident.

The arbitrator must consider several legal standards in considering this matter: First, the arbitrator must recognize that the collective bargaining agreement limits the arbitrator's role. If the arbitrator were to find just cause existed for discipline, but imposed some other penalty, the decision would run afoul of well-accepted arbitral principles, and he would be dispensing his own brand of industrial justice. Moreover his decision would contradict state and federal policies of anti-discrimination, as well as the Port's own anti-harassment policy. Only if the arbitrator finds that the Port lacked just cause for the penalties imposed may the arbitrator impose a remedy other than those imposed by the Port. Second, the arbitrator must apply the "preponderance of the evidence" standard of proof to the Employer's ultimate burden, and recognize that the Union bears the burden of proving any affirmative defenses, such as anti-union animus towards the grievant. Third, the arbitrator must examine the factors of just cause. In doing so, the arbitrator will find: an Employer policy that promotes an effective workplace by seeking to eliminate behavior that can contribute to a hostile environment, and that protects the Employer from significant liability; a fair investigation by the Employer that confirmed the circumstances surrounding the display of the noose, and employee reactions to it; the grievants' lack of appreciation for the significance of the noose, its potential impact in the workplace and of the policy prohibiting such displays; insufficient evidence to contradict the Employer's non-discriminatory application of its rules; and, discipline reasonably related to the seriousness of the offense, considering the symbolism of the hangman's noose, the lack of remorse, or even

understanding shown by Mark Cann, and the somewhat less culpable complicity of Terry Chapman. Claims of jest, or of lack of intent, or lack of offense taken should not be credited as defenses to the Employer's policy. Recklessness or lack of intent can result in liability, such as in the case of violation of a no-fault attendance policy. Based on the evidence in this case, the arbitrator should not disturb the discipline the Employer has administered to these grievants.

Position of the Union

The position of the Union is summarized as follows:

Mark Cann had worked for the Port for almost 12 years and possessed a number of licenses and certifications. He had never received discipline during his tenure at the Port. As a shop steward for Local 286, he was a vocal protector of the Union and its members. He also worked with the co-grievant, Terry Chapman, and was his "lead man." He freely admits that on December 12, 2007, he picked up a rope that had been lying on the shop floor, and which he had been told to remove by his supervisor, and "in a joking fashion, tied a noose and said 'this is for Calhoun (75-year-old white coworker) to put himself out of his misery'."

In this matter, the Employer has the burden of proof to establish that it had just cause to terminate Mark Cann and discipline Terry Chapman. Because the Employer has contended that both Cann and Chapman committed an act, which if proven, could constitute a crime in the State of Washington (Malicious Harassment/Hate Crime RCW 9A.36.080), the Employer must be required to prove beyond a reasonable doubt that there was just cause for the Employer's action. Alternatively, because the alleged offenses, if proven, will forever tarnish the employment records and seriously hamper, or foreclose, employment opportunities for these two employees, the requisite quantum of proof must be 'proof beyond a reasonable doubt'.

Regardless of the standards of proof, whether it be "beyond a reasonable doubt", "clear and convincing", or by a "preponderance of the evidence", the Employer has not demonstrated, and cannot demonstrate, that it had just cause to terminate, or discipline, Mr. Cann or Mr. Chapman for the events that occurred on December 12, 2007. Rather than to prove "just cause", a good portion of the evidence adduced in this matter points to the fact that the harsh treatment Mark Cann received here was because of his union status and union activities. The evidence in this regard is clear and compelling that his union involvement was a motivating factor in the Port's decision to fire him.

The noose was a singular result of the thoughtless prank directed toward Mark Cann's white, elderly friend, not towards Raphael Rivera, whom the Employer characterizes as a target for a racial slur. Mark Cann apologized to Mr. Rivera, who stated he didn't think the noose was meant for him, and did not feel threatened as a result. Mark's supervisor himself stated that he did not find the noose incident harassing or criminal. The policy prohibits displaying objects that demean *because of* the person's age, race... The context of this act shows a complete lack of demeaning or hostile conduct toward anyone because of race or age. External state and federal law are references in examining this matter for their clarifications of "illegal harassment" and conduct "because of" a person's age, race, etc. The conduct must be based on the protected status.

The Employer did not make adequate inquiry of employees it presented as supposed targets of Mark Cann's allegedly harassing behavior. The older white gentleman, Richard Calhoun, was never interviewed. The African-American, Raphael Rivera, did not testify and would not even provide a statement for evidence. The Employer's witness had to admit on cross examination that Mr. Rivera told her he didn't think the noose was harassing or criminal.

The evidence will show that the Port has not applied its rules even handedly, and the Union produced several examples which it believes illustrates this, cases involving: harassing behavior by

Port police; explicit solicitation of a gay female; sexual and racial harassment by a supervisor; possession of child pornography; bringing "magic cake" (marijuana brownies) into the workplace.

The Union believes the real reason for Mark Cann's termination was his vocal, vigorous defense of the Union and of its members.

As to Mark Cann, as he is guilty of no wrongdoing, there should be no penalty. Alternatively, if the Arbitrator does find some wrongdoing on his part, he should find that the punishment of termination was much harsher than that given to others, and that the appropriate discipline would be a suspension of three to five days. The Union would further request an award of back pay with interest. As to Terry Chapman, the Arbitrator should order that his verbal warning be removed from his file.

DISCUSSION

At the outset, the Arbitrator would like to express his appreciation for the professional manner in which the parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy.

It is well established in labor arbitration that where, as in the present case, an employer's right to terminate or suspend an employee is limited by the requirement that any such action be for "just cause," the employer has the burden of proving that the suspension or termination of an employee was for just cause. Therefore, the Employer here had the burden of persuading the Arbitrator that its termination of the grievant, Mark Cann, and its "verbal warning" of grievant Terry Chapman were for just cause.

"Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the grievant engaged in the

conduct for which he or she was terminated or disciplined. The second area of proof concerns the issue of whether the penalty assessed by the employer should be upheld, mitigated, or otherwise modified. Factors relevant to this issue include a requirement that an employee know or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or termination, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

These considerations were summarized in what is now a commonplace in labor arbitration, known as the "Seven Tests," by Arbitrator Carroll Dougherty, in *Enterprise Wire Co.* at 46 LA 359 (1966):

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?
3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Employer's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?

While these standards have been tailored to address different work places and circumstances, they serve as a useful construct for considering this case. The Arbitrator will now consider their application in this matter.

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

The Arbitrator answers this question: "yes." The Employer bases its discipline in this matter upon violations of HR 22, its anti-harassment policy and associated work rules. The policies and heightened awareness and response to harassing behavior on the part of the Employer came about as results of the discovery of a pattern of abuses on the part of Port Police that came into the spotlight before this matter arose. The situation became a public scandal, reflecting poorly on the Port, and was a matter of common knowledge and discussion among Port employees. Among the Employer's responses to that situation was the implementation in January of 2007 of mandatory anti-harassment training for all employees, to be completed by mid-2007 (Jt. Ex. 5, tab 7).

The policy and rules state in pertinent part:

The Port of Seattle does not tolerate illegal harassment in the workplace. Illegal harassment refers to behavior that is not welcome, that is personally offensive, that debilitates morale, and that, therefore, interferes with work effectiveness. Illegal harassment includes but is not necessarily limited to unwelcome verbal or physical conduct that is derogatory of an employees age, race, color, national origin/ancestry... Violations of this policy may result in disciplinary action up to and including termination.

II. DETAILS:

Examples of conduct prohibited by this policy include:

Displaying or circulating ...objects that demean or show hostility to a person because of the person's age, race, color, national origin/ancestry... or any other category protected by law.

A "Zero-Tolerance" policy with regard to this kind of behavior was communicated by the Employer to all of its staff by a generally circulated e-mail dated June 12, 2007 (Jt. Ex. 5, tab 7), six months before the event in issue. The "Zero-Tolerance" policy was later codified as:

A "zero tolerance" policy is a policy of having no tolerance for transgressions under the policy. Any alleged violation of this (anti-harassment) policy will generate an investigation and, if verified, will be considered "gross misconduct" and can subject an employee to immediate termination.

Also in place was a "Code of Conduct," contained in "Aviation Maintenance Work Rules":

10. Behavior in the Workplace:

- Employees should make every effort to ensure that there is absolutely no discrimination on the basis of race, creed, color, national origin, sex, sexual orientation, marital status, age or any sensory, mental or physical handicap.
- Employee conduct that is potentially threatening or harmful to the employee or others may result in dismissal from the job site.

The Arbitrator finds that a noose is an object of a nature such that its display would reasonably be expected to be demeaning or show hostility to people of a protected class within the purview of the policies of the Employer. Though the policy does not specifically prohibit the fashioning and display of a noose, the alleged conduct is of a kind that does not require the Employer's publication of specific rules for its prohibition. The Arbitrator takes notice that the noose, in our national history, literature, and consciousness, communicates hatred and death, frequently targeting African Americans, and its display is a destructive element in a workplace. The Employer has a legitimate interest in expecting that its employees would be so aware as to avoid its display.

In support of the anti-harassment policy, the Employer developed an online training module, to be taken by individual employees. The training (Jt. Ex. 5, tab 29) provides information about harassment, and how and why it is to be avoided, and itself recites:

Any harassing behavior violates our employment policies, should always be avoided, and can result in disciplinary action, up to and including termination

Testimony at the indicated that Mark Cann took this training. No evidence was presented at the hearing to suggest that Terry Chapman did not take the training.

The Union asserts that the use of the term "illegal harassment" is misleading, as that term imports state and federal law that define "harassment" and "hostile environment," and that impose requirements of intent on the part of an accused person directing their behavior toward another *because of* that person's protected status. The Union notes that an "innocent mistake" is significantly different from intentionally engaging in offensive behavior and cites Federal Aviation Administration, 109 LA 699 (1997).

In the case cited by the Union, the arbitrator there still found facts supporting the commission of the offense, affirmed that discipline was proper, and reduced the discipline. HR-22 uses the term "illegal harassment" in its opening statement as the evil ultimately to be avoided in the workplace and the policy's thrust then turns to the behaviors that are to be avoided. What is being addressed in the Employer's case is *violation of their policy*, not of external law. One might say that the external law creates a kind of "floor" of prohibition, which an employer may reasonably exceed in fashioning policy. Though an act may not be characterized as harassing under statutory or civil law, it may still constitute harassment, violating an employer's policy. The behavior that is prohibited by the policy has the potential to lead to harassment that can come within the ambit of anti-harassment statutes and that can *contribute* to the creation of a hostile work environment, and the Employer has a legitimate interest in seeking to minimize that potential through its policy. The phrase, "because of," in this context, is read by the Arbitrator to describe the relationship of the object (the noose) to a protected class, the potential audience, and not as creating a requirement of specific intent or target in the display of the object. Given the foregoing, the Employer has a right to impute knowledge to an employee that such behavior should be avoided and could merit punishment. Considering the totality of communications from the Employer to the grievants, the notoriety of the recent Port Police harassment scandal,

the circulated emails, the promulgation of HR-22, and its associated training, the Arbitrator finds that the Employer satisfied this element of the test of just cause, giving fair notice to the grievants of the probable consequences of the alleged behavior, that is, that tying a noose into a rope and hanging it from an elevated position in a commonly used and traveled area in the workplace would probably result in discipline.

2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?

The Arbitrator answers this question, "Yes." The Employer's case stressed several major interests that it sought to protect through its policies: the elimination of discrimination in the workplace, protecting itself from costly lawsuits that could arise from discrimination, and the preservation of its reputation.

At the hearing, numerous examples were given of the destructive effect that behaviors suggesting discrimination can have in the workplace. The Arbitrator takes note of the long history of activism and litigation documenting the multiple ill effects of a discriminatory or hostile work environment upon employees, their livelihood, health, families, and communities, and upon employers, in terms of shop morale, productivity, management effectiveness, competitiveness, and liability. The Employer cited, through presentations of news articles and material gleaned from websites, the extent and cost of litigation in the area of discrimination. The behavior that is sought to be prevented by the Employer's policy is such that has the potential to contribute to a hostile environment, leading to the described harms. The Arbitrator finds that the interests sought to be protected by the Employer are legitimate, and, upon a review of its policies, and as they have been applied in this matter, that they are reasonably related to the

orderly, efficient, and safe operation of its business and the performance that it might properly expect of its employees. Although HR-22 and the "Zero Tolerance" policy were not bargained with the Union, there was no evidence presented of the pursuit of any claim of an unfair labor practice, or of a claim of refusal to bargain, or of attempts to bargain these matters, attending its installation by the Employer.

3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

The Arbitrator answers this question, "Yes." In the course of the hearing, Witness Cynthia Alvarez, Employee Relations and Diversity Program Manager for the Employer, testified at length concerning the investigative steps taken to determine the events surrounding the fashioning and display of the noose, and of the implications and impacts of the noose itself, as they relate to the Port's policies. In the course of interviews, she obtained Mark Cann's admission of tying the noose, and Terry Chapman's admission of assisting him. Ms. Alvarez interviewed and maintained ongoing communication with the African American who was angered by the display. She interviewed the grievants' supervisor and other employees to gain an understanding of the people and events involved, and worked in concert with the legal department to develop an investigation plan and assess the violation, a process that took the better part of a month. A Union representative was present at key interviews and at the subsequent Loudermill hearing.

4. Was the Employer's investigation conducted fairly and objectively?

The Arbitrator's answer to this question is, "Yes." The Union's concerns in this regard are as follows:

Richard Callhoun, the elderly white male for whom Mark Cann fashioned the noose as a joke, was not interviewed by the Employer. He provided an affidavit (Jt. Ex. 5, tab 9) to the Union before he passed away stating, "I was never questioned or interviewed by officials, managers, or supervisors of the Port, or Port personnel, concerning the alleged incident... as to whether Cann had ever harassed or demeaned me because of my age, or whether I considered any of Mark's alleged comments as being demeaning, derogatory, offensive, or harassing, illegal, unwanted, or unwelcome." Mr. Callhoun went on to state that he did not so consider them. Further, while the Port's investigation largely focused on Raphael Rivera, the African American, they never obtained a statement from him, nor was he called as a witness. Witness Alvarez was present with Mr. Rivera when he stated that he did not think that the noose was harassing or criminal. (Jt. Ex 5, Transcript, p. 125, ln. 21-25). In sum, the actual target of the joke was not offended or threatened, and the African American, who was not the target, did not find the display harassing or criminal.

As the Arbitrator has noted, it is the display of the noose as a prohibited object in the open workplace that is the crux of the violation, not the claimed responses of the two employees relied upon by the Union. Further, assuming without conceding that it might be determinative, the Employer and the Union stipulated, in distilling the volumes of interviews and emails in this matter, including interviews and emails with Mr. Rivera, that he was "not threatened, but angry." His emails and statements nearest in time to the event expressed his emotional reaction to viewing the noose as influenced by his time in the military in the South during the sixties. Were his state of mind to be dispositive of the matter here, this Arbitrator would not engage in a psycho-semantic dissection of what credibly appears as distress at the display of the noose. While the Arbitrator might view the absence of incriminating material from Mr. Callhoun, and

the non-production of Mr. Rivera, personally, or by statement, as serving other purposes, they do not overcome a finding that the investigation possessed indicia of fairness and objectivity sufficient to satisfy this test in this matter.

5. At the investigation did the "Judge" obtain substantial evidence or proof that the employee was guilty as charged?

The Arbitrator answers this question: "Yes." In the course of the investigation, the Employer obtained the admission of the grievants, Mark Cann and Terry Chapman. Both grievants testified at the hearing and ratified their admissions: Mark Cann testified that on December 12, 2007, at approximately 6:30 a.m., he had let another employee have access to the "loop" (tunnel work area) to access a valve. At that time, he saw a rope, which his direct supervisor Wallace Mathes had earlier directed him to remove as a tripping hazard, lying on the floor of the work area. He testified that he then picked it up and tied a noose in it, saying in a joking manner, "This is for Dick Calhoun, to put him out of his misery." He then tossed the rope over a beam. This testimony is consistent with a photograph taken near the time the rope was tossed, (Er. Ex. 2) showing the rope tied to a railing on the upper mezzanine landing, run under an access ladder, and arranged over a beam overlooking the shop floor. Mr. Cann's supervisor testified that a number of people pass through this area, which is a pedestrian traffic area, sometimes hurriedly, as it is a shortcut between work sites. This testimony is also consistent with a "view" taken by the Arbitrator.

Wallace Mathes testified that on the morning of the incident he asked Mark Cann why there was a rope hanging from the ladder on the mezzanine, loosely touching the floor. The rope had previously been on the mezzanine level above. Mr. Cann told the witness he would "practice making a noose" with it. The witness told him to put it up where it belonged or to take

it down as it was a tripping hazard. Later, he saw the noose when Raphael Rivera and the day shift foreman encountered him and told him of the problem. The Arbitrator notes that the noose itself, introduced into evidence (Er. Ex. 1) was of the appropriate size, shape, construction and material to unmistakably constitute a hangman's noose to a reasonable person. The witness knew that it would offend others, especially those not part of his and Cann's workplace. After photographs were taken of the noose, it was taken down, secured, and held as evidence. The witness testified that Raphael Rivera took offense, but did not want to make it a criminal matter. When the witness told Mark Cann that Rivera took offense, Cann replied that he didn't mean any harm and would apologize." The witness testified that Mark did try to apologize to Rivera while trying to preserve his macho image: "He did his best." In the course of the apology however, Mr. Cann produced a page from a dictionary (Er. Ex. 3) defining what a "noose" was, apparently to counter the notion that he had tied a noose.

Witness Alvarez testified that there was no dispute that Mark Cann had fashioned a noose on the date in question, and had displayed it in the manner alleged. In the course of her interviews, she found Mark's statement that he had done it as a joke to poke fun at an older employee, with whom he had a joking relationship, as credible. She found Terry Chapman's statement that he had initially resisted assisting Mark, because their supervisor had asked for the rope to be removed as a tripping hazard, but had relented so as to maintain good relations with Mark, who was his "lead man," credible. Both Mr. Chapman and Mr. Cann repeated those statements at the arbitration hearing. Based upon the symbolism of the noose, the facts surrounding the event, and the provisions of the Port's policy, HR-22, Ms. Alvarez recommended Mark Cann's termination under the authority of Port policy HR-18 (Jt. tab 6).

The Union argued that the Port failed to show the kinds of factors that, for example, Washington law, as contained in RC W. 49.60, would require, and that a police investigation had been performed concerning this matter, but was "closed as insufficient." (Jl. Ex 5, tab 8) However, the criminal law serves different purposes than does an employer policy, punishment of offenders and the protection of society, versus the preservation of a productive work force, and imposes different procedures and standards of proof; thus, comparisons to its outcomes are not persuasive.

The Union also argues that, as Mark Cann testified, Raphael Rivera had been friends with Mr. Cann, but had had a falling out when Mr. Cann became upset with Mr. Rivera's supervisor for loaning out a piece of equipment in violation of company policy. The Union further offered evidence that Mr. Rivera had told another employee that the incident "could be his ticket out of here," implying an incentive to get Mark into trouble. The Arbitrator finds neither of these scenarios of sufficient basis in fact or interpretation to overcome the weight of the direct evidence of the event, a substantial portion of which comes from Mr. Cann. The Arbitrator finds that on December 12, 2007, grievant Cann performed acts constituting a violation of the Employer's anti-harassment policy, warranting discipline, even substantial discipline. The evidence before the terminating authority, and before the Arbitrator, indicates that Mr. Chapman, likewise, on December 12, 2007, performed acts constituting a violation of the Employer's anti-harassment policy warranting discipline, based upon his knowledge of the policy and his training in its application, but discipline of a lesser degree because of his more remote participation and his relationship with his "lead man," Mr. Cann. In the end, he did have a choice, albeit not a comfortable one. The Arbitrator makes these findings by whatever standard would be applied, preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt.

6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

At the hearing, the Union urged a number of examples it claimed supported its claim that the penalty administered to Mark Cann was disproportionate to that meted out to other allegedly similarly situated employees. Having examined these examples, the Arbitrator finds that they are not sufficient to sustain the Union's burden of proof upon this affirmative defense. They are insufficiently related as to nature and quality of behavior, or context. For example, one matter involved the bringing of magic cake (marijuana brownies) into the workplace. Another involved the possession of child pornography. Another (Price) was not cited under the anti-harassment policy. Some behavior occurred before the Employer undertook its formulation of a comprehensive policy regarding harassment.

The Union raised the argument that the Employer's true motive for terminating Mark Cann's employment was his vocal, vigorous protection of Union interests and of its members. As a shop steward he had urged the membership not to approve a collective bargaining agreement because it represented a two-year extension without including adequate reopener language. Also, he had vigorously championed the cause of an employee facing discipline. Soon after his termination, the Port succeeded in firing her. A review of the record indicates that the disciplined employee was eventually terminated for violating a Last Chance Agreement concerning her absence and tardiness. The Arbitrator finds insufficient basis in the record viewed as a whole to support this argument, especially as weighed against the more direct proof of the conduct basing the Employer's discipline.

7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?

The Arbitrator answers this question, as to Mark Cann, "No," and as to Terry Chapman, "Yes." Mark Cann had worked for the Port for twelve years prior to his termination, the last seven of which he spent as a Maintenance Operating Engineer. He held a Grade 2 Steam Engineer's License from the City of Seattle, and a CFC recovery card. Witness Paul Price testified that Mr. Cann was a skilled and reliable worker, with no history of performance problems. Witness Mathew testified that other employees had come forward to ask that Mr. Cann not be terminated for a joke. Witness Alvarez testified that a supervisor named Tim Wray had suggested that Mr. Cann had "race problems," but had later retracted that statement.

In discussing the training module that accompanied HR-22, Mr. Cann testified that he took the online training two years ago in his work area. He recognized that it presented scenarios of abuse, and gave various "do's and don't's." He took the training alone, as an individual, on company time, while facing work-related deadlines. There was a Q&A section to the training, but he found he had no Q&A's to input. Mr. Cann further testified that on the morning of the event, he had told his supervisor, Wallace Mathes, that he had tied nooses in ropes at the workplace several times over the years. Mr. Mathes laughed and said, "I remember that. I thought that might be you. Just pick it (the rope), up." Mr. Cann had spent several years in the Navy and had frequently played with rope, often tying a noose to pass the time. His impression of a noose was not racial, but derived from "Cowboys and Indians."

The Employer was justifiably concerned with an employee's being unaware of, and failing to take into consideration, the impact of his actions as they may affect unknown others in his work environment and ignoring the order of a supervisor to remove a trip hazard.

While the Arbitrator has not given much, if any, weight to claims of the presence or absence of harms to workers in the environment where the noose was displayed, in connection with the commission of a prohibited act, he may consider that in connection with the discipline of the grievants. The Arbitrator is left with less than solid impressions of the impacts upon Calhoun and Rivera. He is also left with questions about the sincerity of Mr. Cann's apology to Mr. Rivera. A sincere apology is characterized by the following:

Regret—a statement of regret for having caused the hurt and damage to the other person;

Responsibility—an acceptance of responsibility for one's actions.

Remedy—a statement of your willingness to take action to remedy the situation.

While the Arbitrator wouldn't expect complete compliance with such a recipe, Mr. Cann's apology appeared to fall short.

In arguing to limit the Arbitrator's authority to modify the penalty in this case, the employer has cited Central Illinois Public Service Company, 105 LA 372 (1995). In that case, the arbitrator found that when there is lesser, rather than greater, disparity between what penalty the arbitrator believed just, and what the employer imposed, then the arbitrator should not disturb the discipline. As that is not the case here, the case is distinguished. Likewise distinguished is Stockham Pipe Fittings, 1 LA 160 (1945), which arose in a context of a fight between employees resulting in serious injury to both employees. The arbitrator there was rightfully reluctant to disturb the penalty or termination where the employees made denials of material facts, such as picking up a piece of iron pipe during the fight. Where, as here, there is no express limit in the language of the just cause provision of a collective bargaining agreement on an arbitrator's ability to consider the penalty as well as the fact of commission of an offense underlying termination, an arbitrator will be considered as having that ability.

The ultimate impression the Arbitrator holds concerning Mr. Cann is that, in this matter, he was more clueless than racist. While Mark Cann's conduct deserves discipline, even substantial discipline, the Arbitrator finds that, on the complete record, termination was excessive, and without just cause. This finding is consistent with Federal Aviation Administration and National Air Traffic Controllers Association, 109 LA 699 (1997). There, the employee's two-day suspension for displaying a noose in a prominent portion of the workplace was converted to a written admonishment. The arbitrator there believed that the grievant intended a prank had no idea the display would be offensive. The penalty awarded there, less severe than the penalty this Arbitrator is awarding, was a result of the employee's having received no training in diversity, and having made a sincere apology. With regard to Terry Chapman, the Arbitrator finds that his verbal warning was administered with just cause. As a recommendation only, the Arbitrator believes it might be productive for both of these employees to retake the training module, perhaps with mentoring, and not during work hours.

CONCLUSION

Based upon all of the evidence surrounding the conduct of the Grievant, Mark Cann, the traditional tests of just cause for discipline, and his record for work and conduct, the Arbitrator finds that termination is too harsh a penalty under the circumstances, and was not imposed for just cause.

Based upon all of the evidence surrounding the conduct of the Grievant Terry Chapman, the traditional tests of just cause for discipline, his record for work and conduct, the Arbitrator finds that a verbal warning is not too harsh a penalty under the circumstances, and was imposed for just cause. The Arbitrator will enter an award consistent with the above analysis and conclusions.

IN THE MATTER OF THE ARBITRATION BETWEEN)	FMCS CASE NO:
INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 286,)	080408-55091-8
Union,)	ARBITRATOR'S AWARD
and)	
PORT OF SEATTLE)	GRIEVANT:
Employer)	Mark Cann

Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussions, FMCS Grievance No. 080408-55091-8 (Cann) is granted in part:

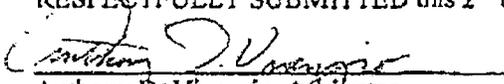
1. The Employer had just cause to discipline MARK CANN on February 11, 2008, consistent with the its anti-harassment policy, "HR-22, as of 5/16/08" and associated work rules;

2. The Employer did not terminate MARK CANN for just cause;

3. The Employer shall convert MARK CANN's termination to a twenty (20) day suspension without pay or other accrual of benefits for that period. All records, electronic or otherwise, related to this matter shall be corrected to reflect this change in his employment status. All references to his termination shall be purged from all files. Within five days of the receipt of this award, the Employer shall reinstate MARK CANN to the position that he held at the time of his termination. He shall be made whole for any and all lost wages (with no interest thereon) and benefits that would have been afforded to him with the exception of the time period encompassed by the suspension provided in Item 3. From any back pay due the Grievant, the Employer may subtract an amount equal to the total of (1) sums paid the Grievant for unemployment compensation as a result of having been unemployed, and (2) sums earned by the Grievant as a result of substitute employment. If the Employer elects to reduce back pay due the Grievant as a result of his having been paid unemployment compensation, the Employer shall pay to whatever governmental agency paid unemployment compensation to the Grievant an amount equal to the amount by which the Employer reduces back pay due the Grievant for unemployment compensation paid him.

The Arbitrator will retain jurisdiction of the present grievance until March 31, 2009, solely to resolve disputes regarding the remedy directed herein, if any. If the Arbitrator is advised by telephone or other means of any dispute regarding the remedy directed on or before 4:30 p.m. on March 31, 2009, the Arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the Arbitrator is not advised of the existence of a dispute regarding the remedy directed herein by that time and date, the Arbitrator's jurisdiction over this grievance shall then cease.

RESPECTFULLY SUBMITTED this 2nd day of February, 2009.


Anthony D. Vivencio, Arbitrator

APPENDIX B

TO

BRIEF OF RESPONDENT

HONORABLE STEVEN C. GONZALEZ

FILED
KING COUNTY, WASHINGTON
FEB - 5 2010
SEA
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 286,

Plaintiff,

v.

PORT OF SEATTLE,

Defendant.

CONSOLIDATED CASES
NO. 09-2-16679-0 SEA

POST-HEARING ORDER

PORT OF SEATTLE,

Applicant/Plaintiff,

v.

INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO,
LOCAL 286 and MARK CANN,

Respondents/Defendants.

NO. 09-2-10355-1 SEA

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POST-HEARING ORDER - 1

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

ll

1 THIS MATTER came before the Court on the Port of Seattle's (the "Port") Motion to
2 Vacate Arbitrator's Award (the "Award") and International Union of Operating Engineers,
3 AFL-CIO, Local 286's and Mark Cann's (collectively, the "Union") Motion for Summary
4 Judgment seeking to enforce the Award.

5 The Court has considered both motions, the responses and replies thereto, declarations in
6 support thereof, the record agreed to by the parties, the pleadings and files herein, and the
7 argument of counsel. The Court being fully advised, it issued its oral opinion on these matters
8 on August 3, 2009. Now, therefore, the Court reduces its oral opinion to this written order and it
9 is hereby ORDERED, ADJUDGED AND DECREED as follows:

10 The Port's Motion is GRANTED. The Award, found at pages 00625-650 of the Agreed
11 Record, is hereby vacated because it violates Washington's explicit, well-defined, and dominant
12 public policy prohibiting discrimination in the workplace. ^{* See p 3} The Award was excessively lenient
13 given the facts and circumstances of this case and is vacated.

14 The Union's Motion is DENIED because the Award is vacated.

15 The Court orders the following relief:

16 1. The Port must reinstate Mark Cann. The Port has complied with this ordered
17 relief. Mr. Cann returned to work at the Port on September 22, 2009 and has been employed at
18 the Port since that time.

19 2. The Port must pay Mr. Cann a total of six months of back pay, for the period of
20 time six months after his termination until 12 months after his termination. This back pay award
21 will be calculated at the wage rate Mr. Cann would have received pursuant to the Collective
22 Bargaining Agreement in place during this six month period. It will be reduced by any amounts
23 that Mr. Cann received from employment or unemployment insurance during the period six
24 months after his termination until 12 months after his termination.

25 3. Mr. Cann must write a sincere letter of apology to his co-workers at the Port,
26 recognizing the inappropriate nature of his conduct and promising that he will never again

POST-HEARING ORDER - 2

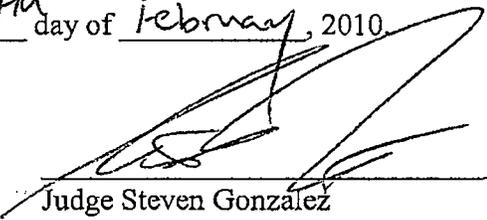
Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

1 engage in conduct similar to that which led to his termination. Mr. Cann has complied with this
2 ordered relief to the satisfaction of the Port.

3 4. Within two weeks of his reinstatement, Mr. Cann must attend diversity and anti-
4 harassment training, or, in the alternative, take the Port's diversity and anti-harassment training
5 module. Mr. Cann has complied with this ordered relief. Mr. Cann completed the Port's
6 diversity and anti-harassment training the first week that he recommenced work at the Port.

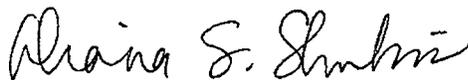
7 5. For a period of four years from Mr. Cann's reinstatement, any of his acts that the
8 Port finds, after a reasonable investigation, to be a violation of the Port's anti-harassment policy
9 will result in Mr. Cann's immediate termination. Such termination will be final without any
10 further process, including any process outlined in any then-effective Collective Bargaining
11 Agreement between Mr. Cann's union and the Port.

12 DONE IN OPEN COURT this 4th day of February, 2010.

13
14
15 
16 Judge Steven Gonzalez

17 Presented by:

18 CAIRNCROSS & HEMPELMANN, P.S.

19 

20 Diana S. Shukis, WSBA No. 29716
21 Michael S. Brunet, WSBA No. 35764
22 Attorneys for the Port of Seattle

23 * Employers have an affirmative duty to provide a work-place
24 free from racial harassment and discrimination. Employees
25 have a right to such a work-place. The Award undermined the
26 well-defined, explicit and dominant public policy expressed in
WLABO because it was excessively lenient. Under the Award
Mr. Cann was ordered back to work with back pay and without
significant consequence, without training or other warning.

POST-HEARING ORDER - 3

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

APPENDIX C

TO

BRIEF OF RESPONDENT

FILED
KING COUNTY, WASHINGTON

MAR - 1 2010

HONORABLE STEVEN C. GONZALEZ

SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 286,

Plaintiff,

v.

PORT OF SEATTLE,

Defendant

Consolidated Case Nos.

09-2-16679-0 SEA

and

09-2-10355-1 SEA

in part *SG*

PORT OF SEATTLE,

Petitioner,

v.

ANTHONY D. VIVENZIO;
INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO,
LOCAL 286 and MARK CANN,

Respondents.

**[PROPOSED] ORDER GRANTING
PLAINTIFF IUOE LOCAL 286'S MOTION
FOR AN AWARD OF REASONABLE
ATTORNEY FEES, UNDER RCW
49.48.030**

This matter came before the Court on Plaintiff IUOE Local 286's motion for attorney fees. After considering the pleadings filed in this matter, the Court hereby rules as follows:

1. Plaintiff IUOE Local 286's motion is GRANTED *in part * see p. 2.*

SG

ORDER GRANTING MOTION FOR FEES - 1
Case Nos. 09-2-16679-0 SEA & 09-2-10355-1 SEA

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

SG

2. Plaintiff is awarded \$53,430.

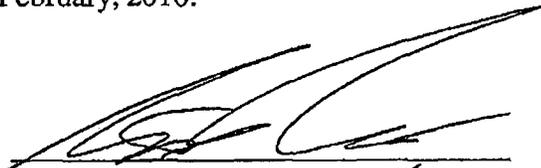
IUOE Local 286

2. For the time spent relating to the arbitration of the grievance, Plaintiff IUOE Local 286 is awarded \$ _____;

3. For the time spent relating to superior court matters, Plaintiff IUOE Local 286 is awarded \$ _____;

3. A. The Port of Seattle shall provide this amount to counsel for IUOE Local 286 within 30 days of the date of this order.

It is so ORDERED this ____ day of February, 2010.



The Honorable Steven C. González
King County Superior Court Judge

Presented by:

s/Dmitri Iglitzin

Dmitri Iglitzin, WSBA # 17673
Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 W Mercer Street, Suite 400
Seattle, WA 98119
206-285-2828 (phone)
206-378-4132 (fax)

Terry Roberts, WSBA # 14507
Staff Attorney
IUOE Local 286
18 "E" Street SW
Auburn, WA 98001-5268
253-351-9095 x302

Attorneys for Plaintiff/Respondent IUOE Local 286

* In-house counsel are entitled to reasonable fees if adequate documentation accompanies the request. The Union provides only an estimate of Terry Roberts' fees. The court is not able to evaluate the reasonableness of the fees given the quality of the information provided. Any calculation would be arbitrary. Therefore, the court has deducted \$70,350 from the award representing Terry Roberts' fees.