

FEDERAL MEDIATION AND CONCILIATION SERVICES
REGION 3
FMCS CASE NO. 241006-00174

IN RE ARBITRATION BETWEEN:
SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE MINNESOTA
(SEIU HCMN)

and

SAINT THERESE HOME D/B/A ST. THERESE OF NEW HOPE
TERMINATION OF DI' ANDRE GROCE DISCHARGE GRIEVANCE
GRIEVANCE DATED AUGUST 11, 2023

HEARING OF April 23, 2024
BRIEFS RECEIVED May 24, 2024

DECISION AND AWARD OF ARBITRATOR
STEVEN G. HOFFMEYER
June 16, 2024

APPEARANCES:**For Union:**

Tyler Norsted, Attorney
 Norsted Law Firm
 Natalie Tonkovitz, Paralegal

For Employer:

Brian T. Benkstein, Attorney
 Felhaber & Larson Law Firm

WITNESSES:**For Union:**

Di'Andre Groce, Grievant

For Employer:

Christine Delander, Campus Director/Administrator
 Emmanuel Johnson, Environmental Supervisor
 Alice Reilly, Environmental Supervisor
 Rosie Murungi, Dining Room Manager
 Rachel Schade, Campus Human Resources Manager

JURISDICTION OF ABRITRATOR

Saint Therese (Company or Employer) is a health care facility which offers a full spectrum of services, such as long-term (i.e., nursing home) care to approximately 275 residents. About 300 employees work on the campus. [Company Brief, page 4, testimony] That workforce has a collective bargaining agreement (CBA) with SEIU HCMN (Union). The Union is the exclusive representative of a workforce comprised of "*all full-time and regular part-time service and maintenance employees of the Employer in the classifications. . .certified.*" The positions are largely housekeeping and dining room staff. The Grievant is within the Bargaining Unit as a Dining Services Aide. **[Joint Exhibit 1, Article 1 Recognition and Union Security, Section 1.1, Bargaining Unit.]**

The CBA provides for arbitration of discipline grievances such as here within Article XII Grievance and Arbitration. The Parties selected the undersigned to hear this matter.

The above matter came on for hearing before neutral arbitrator Steven G. Hoffmeyer on April 23, 2024 at the Minnesota Bureau of Mediation Services offices in St. Paul, Minnesota. The Parties were afforded full opportunity to present testimony, documentary evidence and arguments in support of their respective positions. All witnesses were sworn. At the conclusion of the Hearing the Parties Stipulated to their CBA as Joint Exhibit 1, and the Union Grievance as Joint Exhibit 2. The Union withdrew their Exhibits #9 and #25. They were not used in the Hearing, and were returned to the Union unread by the undersigned. The Parties agreed to submit Closing Briefs by Friday May 24, 2024. Both Party Briefs were received and exchanged by Friday May 24, 2024. Upon receipt of the Closing Briefs, the record was closed. Neither Party raised an issue with regard to either substantive or procedural arbitrability. The full documentary record, Party Briefs and cited case law, and additional research were reviewed and considered in crafting this Award.

STATEMENT OF ISSUE BEFORE THE ARBITRATOR

I adopted the standard arbitral issue statement for a matter such as this:

Was the Grievant discharged for Just Cause under the Parties' CBA? If not, what shall be the remedy?

RELEVANT COLLECTIVE BARGAINING PROVISIONS

Joint Exhibit 1, Collective Bargaining Agreement, Effective November 1, 2021 – October 31, 2023.

Article II – Management

The management of the Employer and the direction of the working forces shall be vested solely and exclusively in the Employer, except as specifically limited by the express written provisions of this Agreement. This provision shall include, but is not limited to, the right ... to require reasonable observance of reasonable Employer rules, regulations, ... and other policies, ... to determine methods of compliance with federal and state regulations affecting nursing homes; to decide employee qualifications consistent with federal and state standards, ***.

Article VIII Discipline and Discharge

Employees may be disciplined (including discipline or suspension) for just cause. A written notice of any discharge, suspension or disciplinary action shall be given the employee at the time of the disciplinary action, or as soon as practicable thereafter, and a copy sent to the Union within seven (7) calendar days.

Article IX Probationary Period

The first ninety (90) days of employment shall be a probationary period, during which time an employee may be discharged at any time with or without cause.

Article XII Grievance and Arbitration

Section 12.1. Grievance Procedure.

A grievance is hereby defined as any claim by the Union or an employee relating to the interpretation of or adherence to the terms and provisions of this Agreement.

Section 12.2. Authority of the Arbitrator.

The authority of the arbitrator shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement and the arbitrator shall have no authority to add to, subtract from, or modify in any way the terms and provisions of this Agreement. The award of the arbitrator shall be confined to the issues raised in the grievance and the arbitrator shall have no power to decide any other issues. The award of the arbitrator shall be made within thirty (30) calendar days following the close of the hearing. The award of the arbitrator shall be final and binding upon the Union the Employer and the individual employee filing the grievance.

COMPANY POLICIES

Violence in the Workplace [Employer Exhibit 4, Union Exhibit 21] Dated December 2020

Workplace Bullying Policy [Employer Exhibit 2, Union Exhibit 22] Dated December 2014

Workplace Relations Policy [Employer Exhibit 3, Union Exhibit 23] Dated March 13, 2014

Grievant signed an acknowledgement of having read and understanding this policy, which also included "All Employees will be held accountable for any behavior that does not meet the standards outlined in the policy." on 4-13-2023, 5-2-2022, 4-29-2019, 3-14-2017, and 11-1-2014.

[Employer Exhibit 5]

Coaching and Counseling Policy [Employer Exhibit n/a, Union Exhibit 24]

The Basics of Workplace Safety, RELIAS [Employer Exhibit 7]

Non-Company policy: U.S. Department of Labor, Occupational Safety and Health Administration, Workplace Violence, <https://www.osha.gov/workplace-violence>. [Employer Exhibit 1]

The DISCIPLINE INCIDENT, GRIEVANCE, and INVESTIGATION

On August 11, 2023 the Employer conducted a meeting with Grievant, witness Laura -----, Supervisor Rosie Murungi, and HR Representative Rachel Schade. They discussed and issued Grievant an Employee Counseling Report terminating his employment for "Conduct/Behavior" described as "DEE violated Saint There Workplace Violence, Workplace Bullying and Workplace relations policy. EE engage in swearing, intimidating and behaving in an aggressive behavior towards another employee." Grievant "refused to sign" and "walked out before able to" give him a copy of the Employee Counseling Report form. [Employer Exhibit 15, Union Exhibit 2]

Subsequently on August 11, 2023 the Union submitted a Grievance seeking his reinstatement and to be made whole. **[Joint Exhibit 2]**

The Employer conducted 10 Investigatory Interviews looking into the matter, all on August 9 or 10, 2023. Two interviews were conducted after the Grievant was interviewed.

EXHIBITS

Grievant received extensive training shows documented in their training tracker since 2017, covering a variety of topics regarding patient care for older adults, residents with dementia, Alzheimer's Disease, abuse, neglect, Cleanliness and Sanitation in Assisted Living Food Service. [Employer Exhibit 6]

He also had received Employee Counseling Reports over this tenure, with testimony of Union and Employer witnesses stating once he received these he did not repeat the behavior.

Employer witnesses stated his behavior leading to termination was an exception. Each form contained this at the bottom of the form: *NOTE: This information is not a disciplinary action but documentation of our conversation today to help improve employee's performance.* [Union Exhibits 3-6]

- 01/16/2002 Cell Phone [Union Exhibit 3] Grievant was coached to not be on his cell phone in a work area, future violations will result in the next progressive disciplinary action.
- 10/06/2021 Attendance [Union Exhibit 4] Grievant was absent and tardy on numerous days from which he received 9 points on the attendance tracker. He was coached to be on time and present on future shifts, with failure to do so will result in the next step of disciplinary action.

- 08/16/2018 Temperature Testing [Union Exhibit 5] Grievant failed to take meal temperatures before meal services.
- 04/09/2018 Relias Training [Union Exhibit 6] Grievant's training was behind schedule, he was given until April 30, 2018 to get up to date.

Grievant had satisfactory Performance Evaluations over his tenure with the Employer 2008-2023. [Union Exhibit 7]

Review Date 4/13/2023

Strong Areas of Performance: Gives quality attention to details and often maintains an extraordinary level of precision with work.

Areas Needing Improvement: Keep working on getting to work on time and continue to work on your Relias.

Action Plan – Comments: Supervisor: You communicate with your coworkers in a respectful manner. You have also shown a strong commitment to the customers experience in Café Rose.

Review Date 5/2/2022 [Employer Exhibit 13]

Strong Areas of Performance: Di'Andre is very Knowledgeable of majority of the job duties within the department. He is willing to pick up shifts when available. He is very fast when working in the Dish room or when scheduled as server.

Areas Needing Improvement: Returning from break on time. Disappears during scheduled shifts often. When scheduled in the Café Rose clean and sanitize tables. Bring soiled trays to dish room.

Action Plan – Comments: Employee: Be sure to wash hands at the beginning of each shift and before any meal service. Provide great customer service to the Café Rose customers.

Supervisor: Di'Andre has been with the company for 14 years. He is a knowledgeable and reliable staff member. We will assist Di'Andre in the areas of improvement.

Review Date 04/30/2021

Strong Areas of Performance: Di'Andre is always willing to pick up available shifts when there are staffing challenges.

Areas Needing Improvement: Work on not wearing hooded jacket while working.

Disappearing throughout the shift, during non-designated break times when D3A.

Argumentative when redirected by management that is not Greg. Be sure to label racks when D1A.

Action Plan – Comments: Employee: Be sure to wash hands at the beginning of each shift and before any meal service.

Supervisor: Di'Andre is a valuable employee within our department. With improvement in some areas, he can be even better, he just has to take initiative. He is knowledgeable of majority of the job duties but lacks the enthusiasm he had a year ago.

Review Date 05/26/2020

Strong Areas of Performance: Di'Andre is a hardworking reliable employee. He is always willing to pick up any available shifts. He even works in other departments when needed.

Areas Needing Improvement: Work on not taking longer breaks when scheduled as CR2. Make sure he is working on the correct floor, not wondering off to go talk to another employee before all job duties are completed.

Action Plan – Comments: Employee: Be sure to wash hands at the beginning of each shift and before any meal service.

Supervisor: Di'Andre is an excellent employee with potential growth within the company. We are so glad that Di'Andre is part of the dining team!

Review Date 04/29/2019

Strong Areas of Performance: Di'Andre is a solid worker. He is always willing to step in to help staff members or help the operation when someone calls out. Knowing that Di'Andre is on the schedule makes the job easier. He can do a lot in a short while without complaints. He can step into any role that is needed at a moments notice.

Areas Needing Improvement: Keep working on making sure temperatures are taken and documented.

Action Plan – Comments: Employee: Be sure to wash hands and the beginning of each shift and before any meal service. Keep working on temps. Keep hot foods stirred and looking fresh to sell, move heat lamp items forward as the sell.

Supervisor: In his eleven years at St. Therese, he has grown into an excellent employee with leadership potential. We are so glad that Di'Andre is part of the dining team!

Review Date 07/13/2018

Strong Areas of Performance: Di'Andre does a great job filling in whenever we have staff call-ins. He can always be counted on to help. He knows most all duties within the kitchen. This makes him a valued employee within Dining Services.

Areas Needing Improvement: Keep remembering to check Café Rose food temps. Sometimes these get missed. This is vital to keep sanitation standards high. Also keep up with cleaning and stocking during slow or down times.

Action Plan – Comments: Employee: Continued work on tracking Café Rose food temps.

When you need to leave Café for something, have someone cover for you – don't shut off the light and leave. Bring ideas for improvement to management to try to implement, so suggested menus items for the café rose to help increase revenues.

Supervisor: Help encourage Di'Andre in his future plans with CDM and ServSafe.

Review Date 07/14/2017

Strong Areas of Performance: Always willing to pick up shifts as needed when short staffed. Works well with co-workers and residents.

Areas Needing Improvement: Needs to work holding the PM staff accountable for jobs when PM Cook redirecting staff if needed, communicating to supervisor if needed. Finding tasks in the café rose that needs to be completed everyday. Such as cleaning of steamtable wiping down and sanitizing surfaces End of the day cleaning, in-services, had washing. Watching breaktimes.

Action Plan – Comments: Supervisor: I will be here to answer any questions.

[Earlier Performance Evaluations (03/14/2017 back to 4/29/2012) had similar communications, and tone of praise for Grievant's work and attitude. Within Union Exhibit 7]

The Employer's HR Manager Rachel Schade, conducted numerous Investigatory Interviews [Union Exhibits 10-19], based on the first report, [Union Exhibit 20] an email from Heidi McCormick, Clinical Director of Nursing to Rachel Schade, HR Manager on Thursday, August 3, 2023 at 2:28 p.m. title Employee Incident:

"Good afternoon:

There was an incident on 2 west where 2 employees were shouting at each other in a resident room. Thankfully there was not a resident present but it was heard down the hall. There are two witnesses. Mary Zehn the CNA, and Justine the OT. Mary came and got me and said they were fighting and yelling. The OT confirmed that she was several rooms down with a patient and heard the staff yelling at each other. One was a male from housekeeping/carpet care and the other Mary said was from kitchen. She may be able to give you more details. By the time I got down there, it was over and only one staff present in the area."

Mary Zehn Investigatory Interview 8/9/2023 [Union Exhibit 14, Employer Exhibit 17 dated August 4, 2023 signed August 9, 2023]: Heard Grievant yelling at Emmanuel, "fuck you fuck you" over and over, "no residents were around," "a lot of yelling and swearing and she didn't want to be around it."

Justine Ahmann Investigatory Interview 8/9/2023 [Union Exhibit 19, dated August 4, signed August 9]: "Heard two raised voices talking about the elevator being down." "She said that the voices were a male and female, "doesn't know" whose voices she heard. "Said the conversation seemed disgruntled and loud but sounded angered."

Rosie Murungi Investigatory Interview 8/9/2023 [Union Exhibit 16, Employer Exhibit 11 dated August 4, signed August 9]: "She heard from Preston Roberts that there was an issue between Emmanuel and Diandre yesterday. Preston reported that Diandre dropped water and requested housekeeping to wipe it up, but Emmanuel was there as well. Rosies said Diandre Groce came into the kitchen and was screaming and yelling - very loudly. Rosie said that Diandre told her that Emmanuel Johnson told him that he is the supervisor but wasn't finishing a sentence due to being so mad. She allowed him to calm down but didn't get a chance to talk to him because he was gone for the day."

Preston Roberts Investigatory Interview 8/9/2023 [Union Exhibit 15, dated August 8, signed August 9]: "He said that Diandre was trying to carry water on 1E (ice water) and accidentally fell off the cart. Diandre went to Preston in the serving kitchen which is where the water fell off the cart. Preston said he will clean up water and he could carry the coffee. Diandre asked where housekeeping is and specifically Emmanuel Johnson. Preston told Diandre that he can take care of it. Diandre then went to look for Emmanuel. Preston then saw Emmanuel and told him that Diandre was looking for him. Emmanuel said that they should talk to Greg regarding

needing help with a spill. Preston told Emmanuel that he would clean the water up. When Diandre came back to the kitchen and said that Emmanuel confronted him about how Diandre was looting for him. He declined being present during any argument. “

Joetta Dayway Investigatory Interview 8/9/2023 [Union Exhibit 17]: Said that she did not work this past Thursday and is not aware of any arguments between two employees.

Jessica Matty Investigatory Interview 8/9/2023 [Union Exhibit 18]: She heard about the disagreement, but heard from Mary Zehn, NAR, told her they were disagreeing. She said she heard yelling down hallway 2 from two males and sounded like employees not residents.

Emmanuel Johnson Investigatory Interview 8/9/2023 [Union Exhibit 11, Employer Exhibit 8 dated and signed August 9]: He said he was by the elevator on 1st floor with carpet shampooer to complete a room flip. He saw broken glass in the elevator so was going to find a broom to sweep up the broken glass. He said that Diandre Groce came to him a telling him bring up the dirty dishes. Emmanuel said that he is in a rush to get room ready and unable to do so. He told him also that he is a supervisor and requested Diandre to stop telling him what he needs to do. Emmanuel said that anytime Diandre makes a mess he asks housekeeping to take care of it (not said to Diandre). Then about 15 minutes later Diandre came down to the 2nd floor where Emmanuel was at the time. Sonnie Supoe, Housekeeping Aide was present as well when Diandre entered the room. Diandre came in and said that he is a grown freaking man and I ask you for help and you tell I am a supervisor. Then Diandre said this is bull shit. During this time he said that Diandre was yelling and swore many times. He said a resident wasn't in the the room, but the rooms across the hall were occupied. Due to Diandre yelling and screaming at Emmanuel he shut the door because it is in a resident area. He told Diandre that this is a residents home and we can talk about this. Then later Diandre came down to his office and apologized and said that he has anger management issues. Emmanuel said that Ruth Melchor, RN, and Joetta Dayway, NAR, asked him what happened. Emmanuel said that he felt scared so this is why he did not report it because of how he followed him to different areas in the building and due to the incident. He said they have never had any issues in the past and now today they are okay. Emmanuel denied raising his voice at him and attempted to calm him down.

Grievant Investigatory Interview 8/9/2023 [Union Exhibit 10, Employer Exhibit 14 dated August 9, unsigned; was conducted with Union Steward present]: The whole thing was a big misunderstanding regarding the water. He had spilled water off a cart, looking for towels to pick up the water and Preston Roberts was present. Grievant jokingly said where is Emmanuel as he could use the machine to pick up the water. Preston told him he can take care of it. He said he believes Preston told Emmanuel that he was looking for him because Emmanuel came up to him and said I heard you were looking for me. Grievant said no he was not and he was joking. Emmanuel told him that he is the supervisor, then pointed his finger at Grievant and said he was mad at him. Grievant responded that is is everyone's responsibility to help pick up the water as it is in a general area, everyone helps out. Emmanuel told him he can't tell him

what to do. Later Grievant went to have a conversation with Emmanuel, tried to explain what happened and he was just joking, that he believed other people compared to checking with him, that Emmanuel blamed him for breaking dishes in the elevator but he never brought dishes up. They were in an unoccupied room. He declined yelling, but the carpet cleaning machine was on. He said that a housekeeping aide was in the room the entire time, but not paying attention. He declined swearing, yelling fuck you, or screaming, there was none. At 2:30 pm. He went to Emmanuel to apologize and said this just all started as a joke. He said that Emmanuel said he understood and you are my son. Diandre said then he hugged Emmanuel. Diandre stated this happened by the mens locker room, and he is unsure how at the nurses station they heard anything because there (w)as no yelling or swearing. [sic]

Sonnie Supoe Investigatory Interview 8/9/2023 [Union Exhibit 12 dated August 9, signed August 10]: At first she declined hearing anyone argue this past Thursday. She and Emmanuel Johnson were cleaning a room when a person from dining came into the room. The dining employee said to Emmanuel are you mad at me. Emmanuel told him that no he is not. She focused on her work, and not the conversation, and wasn't present the entire time. There was no yelling between them.

Alice Reilly Investigatory Interview 8/9/2023 [Union Exhibit 13, Employer Exhibit 10 dated August 9, signed August 10]: Emmanuel came to her because Diandre came to speak with him. Diandre went to him and said why did you report me. Emmanuel said he did not and it was reported by someone else. Alcie said that they should come talk to me about this. Emmanuel requested Alice to not tell anyone. She said that he said he doesn't want anyone to get into trouble. Alice came to speak with me regarding this anyways due to how Emmanuel was talking and prior statements of saying he is scared.

EMPLOYER'S POSITION

The Employer took the position that there was just cause to terminate the Grievant in this matter. In support of this the Employer made the following contentions:

1. The Employer's investigation confirmed he engaged in a profanity-laced tirade, toward a supervisory employee, in a resident area of the nursing home. The evidence adduced at the hearing proves the Grievant did, in fact, engage in the conduct alleged. The Grievant's repeated, self-serving denials merely underscore his lack of credibility. Especially in light of the heavily regulated environment in which the Employer operates and the risks facing all employers with respect to workplace violence, this was a terminable offense, and the grievance should be denied. Nothing the Union presented should cause the Arbitrator to substitute his judgment for that of the dedicated professionals who are charged with operating the nursing home.
2. The Grievant worked for the Employer as a Dietary Aide ("DA") from April 2008 through August 11, 2023. The Grievant had general responsibilities related to the nursing home's foodservice operations. At the time of his involuntary termination, he was directly supervised by Dining Room Manager, Rosie Murungi. The Grievant was a not a stellar employee. Although he was not subject to formal corrective action, he was

repeatedly coached about his performance.¹ (Union Ex. 3 (on his cellular phone in violation of policy); Union Ex. 4 (excessively absent); Union Ex. 5 (failed to properly check food temperatures); Union Ex. 6 (failed to stay up to date on training). His formal performance reviews establish his performance ebbed and flowed. For example, the Grievant's April 2023 review was positive, but his reviews in 2022 and 2021 definitely were not. In 2022, he was ranked "Needs Improvement" in multiple categories. (Employer Ex. 13) He was also warned about the fact that he "disappears" during his shift. (*Id.*) In 2021, the Grievant was ranked as "Needs Improvement" in over half of the performance categories. (*Id.*) What is especially noteworthy is that the Grievant was put on notice that he needed to improve because he was "[a]rgumentative when directed by management that is not Greg [a Director]." (*Id.*)

3. The Employer operates health care facilities in a "campus" setting in New Hope. The Employer offers a full spectrum of services, including long-term (*i.e.*, nursing home) care. As Christine DeLander (Executive Director) made clear, all residents² who reside in Employer's facilities, by virtue of that fact alone, are "vulnerable adults" under state law.³ The Employer is legally obligated to provide a safe and therapeutic environment for them because, after all, it is their home.
4. The Employer has a sizable workforce. There are approximately three hundred employees who work on the campus. DeLander is informed about the risks associated with workplace violence. She testified she is generally aware of information in the public domain that makes clear the threat of workplace violence is real. United States OSHA describes workplace violence as "any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site." (Employer Ex. 1, p. 1) "Verbal abuse" is a form of workplace violence. (*Id.*) According to OSHA, "[i]n most workplaces where risk factors can be identified, the risk of assault can be prevented or minimized if employers take appropriate precautions." (*Id.*, p. 2) OSHA affirmatively encourages employers to take decisive action, "[o]ne of the best protections employers can offer their workers is to **establish a zero-tolerance policy** toward workplace violence." (*Id.*) (emphasis added) The National Safety Council (NSC) recognizes the health care industry is more prone to workplace violence than other industries. (*Id.*, p. 7) Like OSHA, the NSC endorses a zero-tolerance approach with respect to incidents of workplace violence. (*Id.*, p. 8)
5. The Employer maintains specific policies related to violence, bullying and workplace relations. (Employer Exhibits 2, 3, 4) At the hearing, DeLander explained their overall importance and purpose; namely, to set standards of appropriate workplace behavior. The Workplace Bullying Policy prohibits repeated inappropriate behavior, including verbal conduct, making violations a terminable offense. (Employer Ex. 2, p. 1) Verbal bullying encompasses "abusive and offensive remarks." (*Id.*, p. 2) The policy outlines specific examples of behavior that can implicate the policy such as, "shouting or raising voice at an individual ..." and "[u]sing verbal or obscene gestures" (*Id.*) The

¹ The Grievant testified he associated coaching with being in "trouble."

² In the nursing home setting, patients are referred to as "residents."

³ Minnesota Statutes Section 626.5572, subd. 21.

Workplace Violence Policy is consistent, prohibiting, among other things, intimidating acts and verbal abuse. (Employer Ex. 4)

6. The Workplace Relations Policy rounds out the Employer's expectations by stating that all employees must treat each other with "courtesy, professionalism, dignity and respect." (Employer Ex. 3, p. 1) The policy defines unacceptable behaviors to include yelling, swearing, intimidating, and provoking comments or behaviors. (*Id.*, p. 3) The policy puts employees on notice that they must "**adhere to the above standards ... [a]ll employees will be held accountable for any behavior that does not meet the standards outlined above.**" (*Id.*) (emphasis in original) The Grievant acknowledged in writing (multiple times) that he read and understood the Workplace Relations Policy, including most recently in April 2023, (Employer Ex. 5), a mere four months before he verbally accosted supervisory employee Emmanuel Johnson. The Grievant's testimony on cross examination confirmed he did, in fact, understand the Employer's expectations.
7. The Employer's records establish the Grievant was also well trained. For example, in February 2023, he underwent training on resident rights. (Employer Ex. 6) DeLander explained this training addresses the fact that employees work in the resident's home and, as a result, they must act accordingly. The Grievant also underwent training on July 27, 2023, literally a week before the August 3 incident with Johnson, on the Basics of Workplace Safety. (*Id.*, p. 7) The written course materials specifically addressed workplace violence and called out "angry or agitated comments," "irritability or irrational behavior," and "body language such as threatening gestures." (Employer Ex. 7, p. 6) The fact that the Grievant received this training just seven days before the incident with Johnson makes the Grievant's conduct even more egregious.
8. On August 3, 2023, the Grievant was working as a DA in the role of First Floor Server. (Employer Ex. 12) Johnson, the Environmental Services Supervisor, had a brief exchange with the Grievant near the elevator on the first floor. The Grievant asked Johnson to clean up a mess. Because Johnson needed to clean the carpet in a resident room on the second floor, he told the Grievant he would need to handle the mess himself. Murungi confirmed it was the DA's responsibility to clean up a spill if they made it. Johnson specifically denied saying he was "mad" at the Grievant, that he yelled at the Grievant, or repeatedly reminded the Grievant of his supervisory status. Johnson described the initial exchange as brief.
9. Nonetheless, Johnson's response apparently rubbed the Grievant the wrong way and made him angry. Approximately fifteen minutes later, while on his break, the Grievant followed and/or tracked Johnson to the second floor in a resident area. (Employer Ex. 9). The Grievant admitted he had no job-related reason to go to the second floor. Rather, the Grievant deliberately sought out Johnson in order to confront him. The Grievant was yelling and screaming at Johnson and using profanity, including "bull shit." (Employer Ex. 8) The Grievant also used the "fuck" word over and over. At the hearing, Johnson demonstrated the volume of the Grievant's verbal communications and there can be no dispute, *it was extremely loud*. Johnson described the Grievant's body language as angry, aggressive and agitated. The Grievant was moving his hands

around and pointing his finger at Johnson. In response, Johnson's objective was to calm the Grievant down because they were in a resident area. (*Id.*) Unsurprisingly, the entire incident left Johnson rattled and scared. The fact that the Grievant tracked him down to confront him was unnerving, to say the least.

10. The primary witness to the incident (besides Johnson) was a member of the Union, Mary Zehn. As a result of Zehn's failure to appear at the hearing, despite being under a lawful subpoena, the parties stipulated Zehn would testify consistently with the written statement she gave to the Employer during its investigation.⁴ (Employer Ex. 17). Consequently, Zehn's statement must be given the weight of live testimony. According to Zehn:

**** Emmanuel Johnson was washing carpet in a residents room (between 273 and 271). She heard an echo and she was down hallway 2. She peaked her head round the lounge and saw [the Grievant] and Emmanuel [Johnson]. She heard [the Grievant] yelling at Emmanuel and kept hearing fuck you fuck you over and over. She isn't sure what caused it at all but didn't feel comfortable. ***.*

(*Id.*) (emphasis added)

11. Johnson's and the Grievant's actions immediately *after* the incident are completely consistent with the account above. Alice Reilly, Johnson's supervisor at the time, testified that Johnson talked with her after the incident. Based on his body language and demeanor, it was evident to Reilly that Johnson was shaken and upset. He told her the Grievant followed him to the second floor and was swearing/cussing at him. Because Reilly believed Johnson's information was truthful and credible, she immediately reported the incident to Human Resources.
12. As for the Grievant, according to Murungi (who witnessed the behavior firsthand), she testified the Grievant was in the kitchen and was screaming and yelling, very loudly. (*See also* Employer Ex. 11) The Grievant was still livid. The Grievant told Murungi that Johnson was "*acting like a supervisor*" (which is ironic because Johnson is a supervisor). The Grievant was so angry he could not even complete his sentences. (*Id.*)
13. Rachel Schade, the campus Human Resources Manager, led the investigation into the incident. She met with all of the firsthand witnesses and any potential witnesses. In fact, the hearing exhibits demonstrate the lengths to which Schade went to uncover the facts and to determine, "what happened?" (Employer Exhibits 8, 10, 11, 14, 17; *see also* Union Ex. 10-19) The Grievant was given an opportunity to tell his side of the story. In short, he lied. He outright denied yelling or screaming. He said a housekeeping aide was in the room the entire time. The Grievant claimed he never swore and, therefore, never said "fuck you" over and over. The Grievant's story stood in stark contrast to the information provided by Johnson and Zehn, both of whom confirmed the Grievant was

⁴ Pursuant to the same stipulation, the Union withdrew its hearsay objection.

yelling, screaming, and swearing. The Grievant's statement that the housekeeping aide (Supoe) was in the room the entire time was directly contradicted by the statement Supoe gave during the investigation. She "*said she wasn't present the entire conversation as she left the room for a while to remove the linens ... but both Emmanuel and DiAndre were still in the room.*" (Union Ex. 12) (emphasis added) Based on the information Schade gathered from all available sources, and in light of the Grievant's lack of credibility, the Employer rightly concluded the incident did occur as alleged by Johnson and Zehn.

14. The Employer does not take termination decisions lightly. However, as explained by Schade and DeLander, this was a terminable offense. The Grievant's loud, aggressive, and profanity-laced behavior was grossly inconsistent with the policies described above. The Grievant made a calculated decision to seek out Johnson and confront him. The confrontation was not the product of coincidence or mere happenstance; rather, it was deliberate *and retaliatory*. To make matters worse, the Grievant engaged in this wildly inappropriate behavior in an area of the facility that is literally the residents' home (Johnson was cleaning an actual resident room at the time and several rooms in the immediate area were occupied). (Employer Ex. 9) During the investigation, the Grievant took no accountability whatsoever and instead proceeded to deny everything. Under these circumstances, the Employer was well within its management rights to terminate the Grievant.⁵
15. The Union's grievance should be denied because the evidence and testimony introduced at the April 4, 2024, hearing plainly establishes the Grievant engaged in conduct that warranted discharge. The "just cause" standard mandates that the punishment be reasonable in light of all the circumstances. *City of Portland*, 77 LA 820, 826 (Axon, 1981). To establish "just cause," the Employer need only show that the Grievant engaged in the misconduct at issue and that the level of discipline imposed was commensurate with that misconduct. *See Lone Star Pennsuco*, 80 LA 875, 878 (Kanzer, 1983); *Combustion Eng'g*, 80 LA 503, 506 (Heinsz, 1983). Given the reliable and overwhelming evidence concerning the incident, contrasted against the Grievant's serious credibility issues, the Employer's evidence undoubtedly passes the test. Therefore, the Union is essentially asking the Arbitrator to substitute his judgment for that of the experienced professionals at the facility who are charged with protecting vulnerable adults and providing a safe working environment. The Arbitrator should categorically reject the Union's invitation to do so.
16. It is well-settled that an employee's egregious misconduct permits an employer to impose a severe penalty, even for a first offense. See Butler Metropolitan Housing Auth., 123 LA 1364, 1372 (Dean Jr., 2006) ("*[O]f course, under any progressive disciplinary policy, an employer is permitted to impose more severe penalties or to discharge employees for a first offense if misconduct is sufficiently egregious.*"); Corrigan Company, 1993 LA Supp. 106586 (O'Grady, 1993) (*explaining that a long-time employee may be discharged for a first*

⁵ Tellingly, the Grievant engaged in the very same pattern of behavior at his termination meeting. The Grievant was loud, agitated and was repeatedly directing profanity (*i.e.*, "Fuck" and "Fucking Shit") at Schade and Murungi.

offense if the offense is sufficiently egregious); ChamberDoor Indus., 1995 LA Supp. 115877 (Goodman, 1995) (“It is well settled that some forms of offenses or misconduct are so egregious as to warrant discharge for a first offense whether such is included in written rules or not.”).

17. The Employer clearly met its burden and established the Grievant engaged in the conduct at issue. Johnson’s testimony at the hearing was credible and persuasive. The Grievant verbally accosted him. The Grievant was loud and he repeatedly used profanity. His body language indicated he was angry and animated. Johnson’s account of the incident is squarely in accord with the information provided by Mary Zehn, a witness whose written statement must be accepted as true as a result of the parties’ stipulation. She confirmed the Grievant was *yelling at* Johnson and that he was repeatedly saying “fuck you” over and over. Based on the combined testimony of Johnson and Zehn, the Employer proved the incident did, in fact, occur.
18. However, at the hearing, the Employer went even further by offering evidence that corroborates the testimony about the incident itself. For example, Reilly testified that following the incident, Johnson was visibly shaken and upset. Johnson’s reaction makes total sense; he was aggressively berated by the Grievant. The Grievant’s own post-incident conduct also proves the incident occurred. As Murungi testified, when the Grievant entered the kitchen after the incident, he was screaming, yelling, and agitated. He was so mad he was having difficulty completing his sentences. Given the totality of the evidence concerning the incident, the Employer has proven it did, in fact, happen.
19. The Arbitrator should also consider the Grievant’s lack of credibility when evaluating the incident and when deciding this case generally. In the face of the Employer’s overwhelming evidence, the Grievant continues to deny he yelled at Johnson or that he used any profanity toward him. In order for this to be true, Johnson and Zehn must both be lying. Aside from the Grievant’s self-serving and speculative assertions, there is literally no evidence in the record to establish the same. Moreover, for the Grievant’s side of the story to add up, it must follow that Murungi is also lying about what she observed in the kitchen immediately after the event. There is no evidence of this either. In reality, it is the Grievant who has repeatedly lied about what happened. He lied during the Employer’s investigation into the incident and he continued to lie during the evidentiary hearing. The Grievant’s serial dishonesty and his total failure to take any personal responsibility for the incident speaks for itself.
20. It is well settled it is not the role of an arbitrator to second-guess management decisions concerning the level of discipline imposed on an employee. See *Stockholm Pipe Fittings Co.*, 1 LA 160 (McCoy, 1945) (“If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would be abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management.”); see also Norman Brand & Melissa H. Biren, *Discipline and Discharge in Arbitration*, 57 (BNA Books 2d. ed. 2008) at 2-83 (“it is generally understood that where proof of misconduct has been established, the decision as to the appropriate penalty is a determination that lies within the discretion of management”) (citations omitted); *Park Geriatric Village*, 81 LA 306 (Lewis, 1983) (“It has generally been held that where an employee has violated a rule or engaged in conduct meriting disciplinary

action, it is the function of management to decide upon the proper penalty.”). An arbitrator may modify or reverse a disciplinary penalty only if it is deemed discriminatory, arbitrary, capricious, or an abuse of discretion. *Stockholm Pipe Fitting*, 1 LA 160.

21. Arbitrator Cohen’s decision in *American Red Cross*, 138 BNA LA 1109 (2018), is instructive.⁶ In that case, the grievant was a 15-year employee with a clean disciplinary record. The grievant engaged in intimidating and abusive conduct toward a supervisory employee. *“The Grievant had several opportunities to cooperate, yet she chose to escalate the situation ...”* In upholding the discharge, the arbitrator noted:
[a]lthough the Grievant is known as a good employee with no past disciplinary record, there is no reason to mitigate the Employer’s decision to terminate the Grievant. The Grievant showed no remorse for her own conduct at the hearing, while consistently pointing her finger at management for its rightful enforcement of basic rules. (Id., p. 17)
22. Arbitrator Scholtz’s decision in *Rockwell International*, 88 BNA LA 418 (1986) also supports the Employer’s position in this matter.⁷ In *Rockwell*, the grievant was fired for using profanity toward management staff. In upholding the discharge, the arbitrator held:
I do not find that the Grievant’s conduct was provoked or justified. The Grievant first told his supervisor to “go fuck himself” twice and then, after a cooling off period, he told the manager in the presence of his supervisor that he could “go fuck off” too. In my 20 years experience in industrial relations, this is the most egregious case of blatant insubordination that I am familiar with. In sum, it stands as “The Ultimo” of insubordination. Clearly, the Employer had just cause to terminate the Grievant based solely on his insubordination of [specific date]. (Id., p. 5)
23. Given the Grievant’s analogous misconduct, the Employer acted squarely within its management rights to discharge him. Indeed, Article II expressly provides that the Employer has the right to “require reasonable observance of reasonable Employer rules, regulations ... and other policies.” (Joint Ex. 1) The Grievant’s conduct directly implicated these reserved and fundamental management rights and multiple Employer policies. As detailed above in the Fact Section, the Grievant’s behavior violated multiple, published work rules including those related to Bullying, Workplace Violence, and Workplace Relations. These policies unambiguously prohibit exactly what happened in this case. Putting aside the fact that it is common sense that an employee cannot verbally abuse and direct profanity toward another employee (especially a supervisory employee), the Grievant knew what he did was against the rules. For example, he repeatedly acknowledged in writing that he read and understood the Workplace Relations Policy, (Exhibit 5), and he made numerous admissions at the hearing confirming the same. Consequently, this is not a case where the employe was somehow unaware of the workplace expectations; rather, it is the exact opposite.

⁶ Appended as Exhibit A.

⁷ Appended as Exhibit B.

24. Finally, the Arbitrator should decline the Union's invitation to upend the Employer's termination decision because: (1) the Grievant's conduct on August 3, 2023, was unquestionably over-the-top and wildly inappropriate; (2) the Grievant made a deliberate and calculated decision to confront Johnson in a resident area and he had no work-related reason to be there; (3) the Grievant's conduct falls squarely with U.S. OSHA's definition of workplace violence (Employer Ex. 1) and the Employer's termination decision is in accord with OSHA's recommendation to adopt a zero-tolerance approach to these incidents; and (4) as addressed above, the Grievant has proven unwilling, or incapable, of accepting any responsibility for what he did. All he has done is (unpersuasively) deny, deny, deny.
25. The Union will surely argue the Employer lacked cause to terminate the Grievant because he is a tenured employee (approximately 14 years) with a clean disciplinary record. Although an employee's length of service may be considered by arbitrators, it is by no means dispositive. *American Red Cross, infra* (upheld termination of 15-year employee with clean record); *George Koch Sons*, 102 LA 737, 742 (Brunner, 1994) (upholding a discharge of a 37-year employee); *Indiana Bell Telephone Co.*, 99 LA 756, 762 (Goldstein, 1992) (upholding the termination of a 22-year employee based upon a single incident, and noting that "length of service is but one factor which must be taken into the balance and considered"). In fact, it is well established that an employee's length of service will not save him from termination due to serious misconduct. *United States Steel Corp.*, 124 LA 1 (St. Antoine, 2007) (noting that "serious offenses . . . may warrant the penalty of termination even for a long-service employee with a good disciplinary record"); *Can-Tex Indus.*, 90 LA 1230, 1231 (Shearer, 1988) (discharge of 21-year employee with good record upheld where employee engaged in serious misconduct). Given the Grievant's intentional misconduct in this case, the seriousness of the behavior, and the location where it occurred, his length of service and history should not save him. And this is particularly true given his complete and utter lack of remorse.
26. Because of a lack of other viable options, it is predicted the Union will attempt to engage in deflection and misdirection in order to excuse or downplay the Grievant's conduct. For example, the Union elicited testimony from the Grievant suggesting that Johnson was the aggressor and/or intentionally provoked the confrontation. This argument goes nowhere. First, Johnson testified, credibly, he did no such thing. Rather, he went out of his way to avoid a conflict and to deescalate the situation. Second, and perhaps more importantly, the Union's theory is predicated entirely on the Grievant's own self-serving testimony. For all the reasons set forth above, he cannot be believed.
27. The Union may also point to the written statement provided by Sonnie Supoe, the housekeeper who was in the resident room for a portion of the exchange between the Grievant and Johnson. Supoe's statement indicates she heard "no yelling" between them. (Union Ex. 12) Importantly, Supoe also reported that "she

wasn't present the entire conversation as she left the room for a while to remove the linens" (Id.) Consequently, her statement establishes nothing.⁸

28. The Union may try to allege the Grievant's conduct does not fit into the category of offenses that warrant termination under the Employer's Coaching and Counseling Program. (Union Ex. 24). However, each and every one of the policies cited by the Employer in the Grievant's termination notice (Employer Ex. 15), explicitly state that employees will be held accountable to the expectations or that a violation of the policy may result in termination. (Employer Ex. 2, 3, 4)
29. The Union may focus on the Employer's Workplace Relations Policy and claim the Grievant was merely attempting to "[r]esolve conflict at the lowest level." (Employer Ex. 3, p. 2) The Union may have a point if the Grievant had a polite, respectful conversation with Johnson. The evidence at the hearing proved the exact opposite. And it would be most ironic for the Union to claim the Grievant's actions were somehow endorsed by the policy when it expressly defines unacceptable behaviors to include: "yelling, swearing, ... confronting in a non-supportive manner, ... intimidating or provoking comments or behaviors ... [,]" because this is exactly what the Grievant did. (Employer Ex. 3, p. 3).
30. Finally, it is quite possible the Union will conjure up other theories in an attempt to muddy the waters.⁹ However, based on the evidence from the hearing, nothing the Union can say excuses the Grievant's misconduct, rehabilitates his shattered credibility, or gives the Arbitrator an appropriate reason to disturb the termination decision.
31. For all the foregoing reasons, the Employer respectfully requests that the grievance be denied.

UNION'S POST-HEARING BRIEF

1. The Grievant grew up working at Saint Therese Home - New Hope ("St. Therese"). He started in 2008, when he was fifteen years old. He learned the facility well, worked multiple positions, and was always willing to pick up shifts when needed. He considered everyone at the organization family.
2. On August 3, 2023 Groce had a conversation with another employee, Emmanuel Johnson. Johnson had, he felt, disrespected or even bullied him earlier in the day, and he wanted to address the conflict. So, on his break, he sought out Johnson, had an approximately two-minute discussion, and left. He raised his voice to be heard over a

⁸ The Employer also notes that Supoe was a witness subpoenaed by the Union. She did not appear at the hearing. Unlike the witness subpoenaed by the Employer, Mary Zehn, there was no stipulation between the parties that Supoe's statement would have the force of live testimony. Therefore, Union Ex. 12 has limited evidentiary value.

⁹ By way of further example, the Union offered evidence that the Grievant intended to participate in the Union's contract negotiations bargaining committee. Insofar as the Union implies or suggests this motivated the Employer's termination decision, it is sorely mistaken and there is literally no evidence to establish such a serious allegation. Indeed, Rachel Schade, who was directly involved in the termination decision, had no knowledge of these *alleged* union activities.

running floor machine and through a face mask. Later that day, the two men ran into each other again and Groce apologized for any disrespect Johnson might have felt. Johnson forgave him, hugged him, and called him “my son.”

3. Despite the amicable conclusion, St. Therese discharged Mr. Groce a few days later. The disciplinary “Employee Counseling Report” alleged he had violated the organization’s “Violence in the Workplace,” “Workplace Bullying,” and “Respectful Workplace” policies when he sought out Johnson to resolve the initial disrespectful interaction.¹⁰ Apparently, a third-party witness had heard the conversation and misunderstood what was happening.
4. The discharge was without just cause for three primary reasons. First, St. Therese has not met its burden of proving Groce yelled, screamed, or swore, or otherwise violated any of the cited policies. Second, even if the allegations were accurate, discharge was too severe. St. Therese was obligated to follow progressive discipline because Groce had no prior disciplinary actions in his record. Third, Johnson also violated two of the policies cited in the discharge letter but received no discipline. Groce’s discharge was therefore disparate treatment.
5. Discharging Groce for having a nonviolent discussion, even a loud one, with another employee violated the just cause provision of the CBA. The SEIU therefore respectfully requests an award reinstating Di’Andre Groce, awarding him back pay, and making him whole.
6. Groce started at St. Therese in 2008. Over the years he held several positions, including Meal Companion, Receptionist, and Dining Server. At the time of his unjust termination he was a Dietary Aide, at Step 10 of the contract wage scale. He was earning \$23.00 per hour, having received raises above the 10-year maximum contemplated in the contract. Groce enjoyed working at St. Therese. He knew most other employees by sight, and considered everyone there family. He regularly picked up overtime shifts, one per weekend on average.
7. Groce began working another full-time job at Archways Marketing as a Warehouse Lead Worker about five years ago. He continued to do so after his discharge. Groce’s daughter had been born just before the discharge, and he was in the process of buying a house. Given his hectic life, his supervisors, despite recognizing that he knew the job well and treated his coworkers respectfully, noted he “lack[ed] the enthusiasm” he had when he began his job.¹¹
8. Groce had no formal disciplinary actions in his personnel file when he was wrongfully discharged. While there were four Employee Coaching Forms, at the bottom of each was written: “NOTE: This information is *not a disciplinary action* but documentation of our conversation today to help improve employee performance.”¹² Each was for an alleged violation of a different rule.

¹⁰ Un. Ex. 2, SEIU0049.

¹¹ See Un. Ex. 7, SEIU0056.

¹² Un. Ex. 3-6, SEIU0050-0053 (emphasis added).

9. St. Therese Home - New Hope is a branch of the greater St. Therese organization which owns and operates multiple facilities. The New Hope facility where Groce worked is a nursing home.
10. The Service Employees International Union - Healthcare Minnesota and Iowa ("SEIU") filed the current grievance on Mr. Groce's behalf on August 11, 2023. The SEIU represents all non-professional, non-administrative staff at St. Therese New Hope, Groce included.
11. At the time of Mr. Groce's wrongful discharge, the SEIU and St. Therese operated under a collective bargaining agreement ("CBA") effective from November 1, 2021 to October 31, 2023.¹³ Several Articles are relevant to the current dispute:
 Article 8, "Discipline and Discharge," allows St. Therese to discipline employees only "for just cause."¹⁴
 Article 9, "Probationary Period," provides that an employee may be discharged within their first 90 days of employment with or without just cause.¹⁵
 Article 12, "Grievance and Arbitration," sets forth the grievance procedure.¹⁶
 Article 17 sets starting wages.¹⁷ Wage scales are attached as Appendix A.¹⁸ Both Sections 17.2 and 17.5 provide that the employer may pay higher wages than the minimum listed in the Appendix.¹⁹ The highest step increase is for employees who have worked 20,800 hours or more, about ten years of service.
12. In the Employee Counseling Form discharging Mr. Groce, St. Therese - via Groce's former supervisor Rosie Murungi and HR Manager Rachel Schade - cited three policies he allegedly violated.²⁰ Specifically, the Violence in the Workplace, Workplace Bullying, and Workplace Relations policies.²¹ Also relevant is St. Therese's Employee Coaching and Counseling Policy.²²
13. The Violence in the Workplace policy prohibits, "threatening, intimidating or violent behavior or acts, verbal or physical abuse; weapons possession... or use; vandalism; arson or any other coercive act against person or property while on Saint Therese property or on working time which management believes is inappropriate in the workplace."²³ The policy defines "violence" as the, "Exertion of physical force so as to injure, intimidate, or otherwise abuse a person or property...."²⁴ It defines "threat" as, "A direct, indirect, verbal, or written expression, sign or warning of intent to do physical harm."²⁵ When violence is alleged, "[d]epending on the outcome of the

¹³ Union Exhibit 1, SEIU0001.

¹⁴ *Id.*, SEIU0016.

¹⁵ *Id.*

¹⁶ *Id.*, SEIU0019.

¹⁷ *Id.*, SEIU0024.

¹⁸ *Id.*, SEIU0028.

¹⁹ *Id.*, SEIU24.

²⁰ Un. Ex. 2, SEIU0049.

²¹ Un. Ex. 21, 22, 23, SEIU0085, 0092, 0095.

²² Un. Ex. 24, SEIU0103.

²³ Un. Ex.21, SEIU0085.

²⁴ *Id.*, SEIU0085.

²⁵ *Id.* at 0086.

investigation, disciplinary action up to and including termination, may be taken (see HR policy: Coaching and Counseling)."²⁶

14. The Workplace Bullying Policy prohibits "*repeated* inappropriate behavior, either direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment."²⁷ Examples of verbal bullying include "[s]landering or ridiculing a person or his or her family; persistent name calling that is hurtful, insulting or humiliating; using a person as the focus of a joke; abusive and offensive remarks."²⁸ "Gesture Bullying" is defined as, "Nonverbal threatening gestures; glances that can convey threatening messages."²⁹ The Workplace Relations policy states, "At Saint Therese, it is our policy, [sic] that all employees treat residents/clients/individuals and each other with courtesy, professionalism, dignity and respect."³⁰ It requires employees to "use respectful language in all interactions."³¹ Employees must also "treat all individuals with the same level of respect, regardless of job titles, levels of education, or seniority."³² Among the "Employee Expectations... With co-workers and others," it lists the following: "Employees are expected to address disrespectful interactions, including reporting an incident as required. Resolve conflict at the lowest level. Open, honest communication."³³
15. St. Therese has also promulgated a "Coaching and Counseling Policy" setting forth its employee discipline procedures.³⁴ It "articulate[s] factors and procedures that St. Therese believes are appropriate to govern employee's [sic] conduct and performance."³⁵ Employee Counseling Reports are designated as the written documentation of formal discipline.³⁶ The policy divides all "offenses" into two categories, Category 1 and Category 2.³⁷ Category 1 violations "are the most serious and are subject to the employee's immediate suspension, pending investigation for discharge."³⁸ Examples of Category 1 offenses include, "Resident abuses or neglect (physical, sexual, verbal or mental)... Theft or attempted theft... Verbal or physical threats against the facility, residents, visitors or other employees... Serious violation of safety rules... Other instances of serious misconduct not specifically listed."³⁹ Category 2 violations, unlike Category 1, are "[v]iolations of a less serious nature [and] will be cause for progressive discipline so the employee can take corrective action to

²⁶ *Id.*, SEIU0090.

²⁷ Un. Ex. 22, SEIU0092 (emphasis added).

²⁸ *Id.*, SEIU0093.

²⁹ *Id.*

³⁰ Un. Ex. 23, SEIU0095.

³¹ *Id.*, SEIU0096

³² *Id.*

³³ *Id.*

³⁴ Un. Ex. 24, SEIU0103.

³⁵ *Id.*

³⁶ *Id.*, SEIU0104.

³⁷ *Id.*, SEIU0104, 0108.

³⁸ *Id.*, SEIU0104.

³⁹ *Id.*, SEIU0106-0108.

change his/her behavior.”⁴⁰ Progressive discipline begins with an oral warning, followed by a written warning, suspension, and finally termination.⁴¹ Examples of Category 2 violations include, “Failure to maintain acceptable standards of respect for others... Creating or contributing to disorderly... conditions... Other instances of improper conduct of a less serious nature not specifically listed.”⁴²

16. Mr. Groce’s discharge was related to a water spill and three subsequent conversations between himself and Emmanuel Johnson on August 3, 2023. After clocking in, Groce left the kitchen around 8:00 a.m. to deliver pitchers of water. The cart carrying the pitchers hit a bump and the six of the pitchers spilled several gallons of water. He ran to a nearby closet but there were no clean towels. He ran back to the kitchen, found a few, and returned to start cleaning up the mess. Another dining services employee, Preston Roberts, found him and started helping.
17. While they worked, Groce joked with Roberts, saying they should find Mr. Johnson and his floor machine, because he could quickly clean up the spill. Two or three months earlier, before Johnson’s promotion to supervisor, he had helped Groce clean up when a steam table overflowed, making short work of the mess with his floor machine. Roberts soon told Groce he would finish the cleanup, so Groce could get on with his deliveries. Roberts saw Johnson soon after and told him Groce was looking for him.⁴³
18. The first conversation between Mr. Groce and Mr. Johnson occurred soon after, near the elevator on the first floor. The elevator has two doors at opposite ends. Both opened at the same time, and both men approached, each from a different side. Johnson was pushing a floor machine, Groce a cart full of dirty dishes. When the doors opened, Johnson shook a finger at him and said, “I’m mad at you.” He testified that he told Groce he was not allowed to tell him what to do because he had been promoted to supervisor. He raised his badge and waved it at Groce. Groce testified that when he tried to speak, Johnson talked over him.
19. According to his testimony, Johnson believed Groce had been looking for him to clean up broken glass on the elevator. Groce tried to explain he could not have broken the glass because his dishes were all on the cart which he was at that very moment trying to push onto the elevator. Johnson would not listen to his explanation. Groce then said, “Well, even though you are mad at me, can you take this cart up to the second floor since you are going up there anyway?” Johnson, per his own testimony, obstructed Groce’s access to the elevator by pushing the “door close” button, leaving him on the first floor.
20. Mr. Groce felt very disrespected by the conversation with Mr. Johnson. He felt Johnson was using his new position as a supervisor to belittle him. The insult was worse because he thought he and Johnson were friends. So, on his morning break, Groce went to

⁴⁰ *Id.*, SEIU0108.

⁴¹ *Id.*, SEIU0109.

⁴² *Id.*, SEIU0109-0111.

⁴³ Un. Ex. 15, SEIU0079. At the hearing, the parties discussed the admissibility of statements from witnesses who were not present. The statement of Mary Zehn was admitted despite her failure to appear pursuant to a subpoena. The statements of other witnesses who were not present were also accepted into the record, and the SEIU therefore relies on them here, trusting that the arbitrator will give all such statements the weight they are due under the circumstances.

Johnson to talk through the dispute. Groce found Johnson on the second floor in an unoccupied patient room. He knew the nearby rooms were empty because his duties included delivering food and retrieving dishes on that floor. There are no allegations that any patient heard the alleged yelling and swearing or submitted a complaint about it.

21. When Groce arrived, Johnson was running a floor shampooing machine. Another environmental services employee, Sonnie Supoe, was in the room at the time. Groce remembers her running a floor machine, but Johnson testified she was not. According to Supoe's statement during the investigation, and consistent with Groce's testimony, Groce approached Johnson and asked, "Are you mad at me?" Johnson told him he was not.⁴⁴ While Supoe was only present for the beginning of the interaction, neither man yelled at the other while she was present.⁴⁵
22. Groce told Johnson he felt disrespected by the elevator incident. He had to raise his voice to be heard over the floor machine and through the mask he was wearing to protect his newborn daughter from the lingering COVID-19 pandemic. He testified he did not yell, scream, or swear, however. Johnson again replied that he was now a supervisor and Groce could not tell him what to do. The conversation took about two minutes, and Groce then left to finish his break and get back to work. Contrary to Johnson's testimony, Groce left first, and did not follow Johnson.
23. Johnson testified he was worried about the conversation while it was happening, but not for his own safety. Rather, he said he was worried about Groce losing his job. He claims he pulled Groce into the room and closed the door to prevent others from hearing. Groce did not threaten him or do anything violent other than making broad gestures with his hands.
24. After the conversation with Mr. Johnson, Mr. Groce returned to the kitchen to dump his dirty dishes. He remembers telling another employee who was across the kitchen, likely his friend Van Tran, about the conversation.
25. Rosie Murungi, Groce's supervisor, was in her office, which opens onto the kitchen. She testified she heard him telling his story in a loud voice, and came out to investigate. Groce finished dumping his dishes and turned to leave the kitchen just as she was entering. She asked what had happened. He said something about Johnson repeatedly telling him, "I'm a supervisor," as he walked past. Murungi testified the exchange lasted one or two seconds, while Groce was leaving the kitchen.
26. The final encounter between Groce and Johnson occurred near the employee lockers, as Groce was leaving the facility. The two happened to cross paths; neither sought out the other this time. Johnson told Groce he had talked to fellow supervisor Alice Reilly about the issue and asked her not to report it. Groce asked Johnson why he had reported the incident to her. Groce then apologized. He testified that he did not believe he had wronged Johnson, but had been raised to apologize whenever he had an argument with someone, regardless of who was at fault. Johnson forgave him, said, "you are my son,"

⁴⁴ Un. Ex. 12, SEIU 0076.

⁴⁵ *Id.*

and hugged him. Johnson did not appear to be afraid. Groce then left the building for the day, believing the conflict was resolved.

27. The investigation of the patient-room conversation between Mr. Groce and Mr. Johnson began when Mary Zehn, a nursing assistant, reported the incident to Director of Nursing Heidi McCormick.⁴⁶ McCormick emailed HR specialist Rachel Schade about it the same day.⁴⁷
28. Johnson also told then-Environmental Services Supervisor Alice Reilly about the incident, but asked her not to report it.⁴⁸ According to her statement to Schade, she responded saying she was required to do so.
29. Investigatory interviews took place on August 4, 8, and 9.⁴⁹ Reilly and Schade conducted the interviews on behalf of St. Therese, Schade taking notes on paper which she then converted to the typed documents included as exhibits at the hearing.
30. Groce's interview matched his testimony at the hearing. He confirmed the water spill and his joking conversation with Mr. Roberts. He described the incident at the elevator, and the disrespect Johnson showed him. He admitted he went to the second floor to attempt to resolve the conflict with Johnson. He denied yelling, screaming, or swearing. Several witnesses for the employer testified that Groce grew agitated during the termination meeting on August 11. His behavior in the meeting should not be considered as evidence supporting the discharge, however. It was long after the incident and, according to the witnesses, did not play a part in the decision.
31. The testimony of each of the witnesses called or otherwise cited by St. Therese lacks credibility. Hearsay crops up in several witnesses' testimony. Personal bias also seems to play a part. Ultimately, the unifying feature is a misunderstanding by each of what happened that day.
32. Emmanuel Johnson was the only testifying witness for the employer who actually observed Mr. Groce's alleged yelling. His credibility was inconsistent, however, for several reasons.

First, Johnson was a newly promoted supervisor at the time of the incident. He no longer had the protection afforded by the CBA, and was likely in a probationary period. According to Groce's testimony, he treated Groce disrespectfully and participated in the argument. He therefore could have been disciplined for violations of both the Workplace Bullying and Workplace Relations policies. He had reason to misconstrue the incident to protect his new position and, having done so during the investigation, has reason to maintain his original, skewed version now.

Second, Johnson's testimony matches Groce's in many of the surrounding details. He acknowledged that another employee told him Groce was looking for him, though apparently forgot it was Mr. Roberts. He acknowledges he told Groce, "You can't tell me what to do, I am a supervisor." Johnson admits he went so far as to warn Groce that

⁴⁶ Un. Ex. 14, SEIU0078.

⁴⁷ Un. Ex. 20, SEIU0084.

⁴⁸ Un. Ex. 13, SEIU0077.

⁴⁹ See Un. Ex. 10-20, SEIU0074-0083.

Ms. Reilly had reported the incident despite Johnson having asked her not to. Both he and Groce testified he forgave Groce later that day.

Third, Johnson's actions and testimony are inconsistent with the suggestion that he feared Groce. He testified, repeatedly, that he was concerned for Groce's job, even though he alleges Groce was yelling, screaming, swearing, and gesturing wildly. Johnson testified he asked Reilly not to report the incident because he wanted to protect Groce. He admits he and Groce resolved the issue at their third meeting that day. He admits he forgave Groce, and called him "my son."

Johnson did not say he feared for his own safety during the incident. His implication that he later "realized" Groce might come to his house to do violence lacked credibility. When asked directly whether he was afraid of Groce, Johnson made vague statements about Groce knowing his home address, or being acquainted with someone who did. He could not point to anything Groce did or said that was explicitly threatening. Fourth, Johnson's testimony suggests that he incorrectly believed the spill Groce spoke with Roberts about was the broken glass on the elevator. He contradicted himself, saying first that it is generally environmental services' job to clean up dangerous spills, and then that it was Groce's responsibility. In any case, he clearly was not aware, even at the time of the hearing, that two spills had occurred or that Groce referred to the pitcher spill near the kitchen when talking to Roberts and had nothing to do with the glass in the elevator.

Fifth, Johnson's testimony that he did not speak to Roberts is not credible. He admitted that someone told him Groce was looking for him to clean up a spill but did not say who it was. In his interview Roberts said he told Johnson Groce was looking for him.⁵⁰ While Johnson may not remember speaking to Roberts, between Groce's testimony about joking with Roberts, Roberts' own statement, and Johnson's testimony, it is clear Johnson's memory is faulty on this point.

Johnson also seems to have mistakenly believed Groce was serious when he told Roberts that Johnson should clean up the water. Groce knew Johnson was running a floor machine and had seen Johnson make short work of a similar spill two or three months earlier, before Johnson's promotion to supervisor. The humor apparently did not make it through to Johnson when Roberts spoke to him.

In any case, Johnson apparently thought Groce was disrespecting his authority. Johnson testified adamantly, albeit contradictorily, that if Groce broke the glass he should have been the one to clean it up. He believed Groce had asked him to do something that was not his responsibility and was incensed by the request.

Johnson's testimony is also inconsistent with Sonnie Supoe's description of the event to Reilly and Schade. Supoe, the only other person in the room when the conversation started, said Groce entered the room and asked, "Are you mad at me?" Her statement contradicts Johnson's testimony that Groce started yelling from the hallway, and that he pulled Groce into the room and shut the door.

⁵⁰ Un. Ex. 15, SEIU0079.

33. The investigatory statement of Nursing Assistant Mary Zehn is also flawed for several reasons. First, she was subpoenaed to testify but failed to come to the hearing. Her refusal to honor the subpoena calls her entire statement into question. Second, without her direct testimony, her statement is hearsay. While the rules of evidence are relaxed in arbitration, arbitrators are reluctant or outright unwilling to sustain a discharge decision solely on the basis of hearsay.⁵¹ Zehn's testimony should not, therefore, be used to justify the discharge. Third, her testimony contradicts Supoe's and Groce's. She says she stuck her head around the lounge and saw Groce, already yelling. Groce and Supoe both remember Groce entering and immediately addressing Johnson. Supoe heard no yelling, despite being in the room; Zehn allegedly heard screaming and swearing from down a hall and around the lounge. Fourth, her testimony actually supports Groce's version in two important ways. She acknowledges Johnson was running a floor machine and she noted that no patients were present. Fifth, when she felt "uncomfortable" she went to the Director of Nursing to report the incident. She did not speak to Rosie Murungi, Groce's supervisor, or her own supervisor. Nothing in the record, whether testimony or policy, suggests that reporting directly to a facility Director was the recommended course of action. It seems likely that Zehn heard Groce speaking loudly over the floor machine and through his mask and misinterpreted the words she thought she heard from down the hallway, past the lounge. In any case, she was not present to be cross-examined as to her experience of the incident, so her ability to perceive and remember what happened could not be tested. Her statement should not receive any weight.
34. Campus HR Manager Rachel Schade provided testimony about both St. Therese policy and the details of the incident as relayed by the witnesses she interviewed. Inasmuch as she provided information about the incident itself, it should be heavily discounted. First, Schade acknowledged that her information was all hearsay. Mr. Groce and Mr. Johnson were both present and testified, and others who heard the conversation either were not called or, in Zehn's case, refused to show up. Schade had no direct knowledge of the incident. Second, in her testimony, Schade exhibited a clear, personal bias in favor of Johnson. She said she "know[s] for a fact that he is someone who doesn't like conflict." She expressed the belief that he was telling the truth and Groce was not. More importantly, her testimony that Johnson seemed to be afraid of Groce is directly contradicted by Johnson's own statements that he did not fear Groce, was more afraid for Groce's job, and forgave him after the incident.

⁵¹ *Discipline and Discharge*, Ch. 12.4, p. 12-12; see also *In re Arbitration Between: SEIU Health Care Minnesota And Park Nicollet Methodist Hospital*, FMCS Case # 230118-02680, p. 23 (Jeffrey W. Jacobs, October 12, 2023) (ruling that hearsay statements from a witness who was unavailable because she had flown overseas due to a family emergency could not be used to discharge an employee accused of slapping a patient) (attached below).

Third, the investigatory statements were drafted by Schade based on her handwritten notes and include her interpretations of the witnesses' verbal statements. While the statements made by many of the witnesses were signed, Groce's was not. Any discrepancies between his testimony and the written statement should therefore be considered irrelevant.

35. The interview statement from Rosie Murungi, Groce's supervisor at the time of the discharge, was mischaracterized by Schade in the typed version. In the statement recorded by Schade, Groce was yelling and "wasn't finishing a sentence." The statement lacks context.
Groce admits he likely raised his voice in the kitchen, because he was telling his friend Van Tran about the incident, and Tran was across the kitchen from him. More importantly, when cross-examined, Murungi admitted she only spoke with Groce for one or two seconds. He did not finish the one sentence he began because he only spoke to her in passing, as he left the kitchen. He was not incoherently furious, as presented in the statement; he was just on his way out.
36. The discharge of Di'Andre Groce by St. Therese lacks just cause for three reasons. First, the evidence does not prove he violated the policies cited in his discharge letter. Second, even if St. Therese's version of the story is accurate, the organization was obligated to use progressive discipline. Third, Emmanuel Johnson engaged in similar behavior but was not disciplined.
37. "Just cause," the primary concept in discipline arbitration, is an extremely fact specific inquiry.⁵² There are two primary components within just cause. First, "industrial due process," requires employers disciplining employees to "do so in a manner that is not unreasonable, arbitrary, capricious or discriminatory."⁵³ Second is "progressive discipline," a system that addresses employee rule violations over time by imposing gradually escalating penalties.⁵⁴
38. St. Therese has not presented clear and convincing evidence that Groce violated any of the policies cited in the discharge notice.⁵⁵ Even if he had, the violations would not justify discharge because the Home ignored progressive discipline and discharge was generally too severe, especially considering the abundant mitigating factors. His discharge was arbitrary and capricious and therefore without just cause. His employment must be reinstated.
39. Groce Did Not Yell, Scream, or Swear; He Did Not Follow Johnson. St. Therese has not met its burden of proving by clear and convincing evidence that Mr. Groce violated the policies cited by yelling, screaming, or swearing.⁵⁶ According to Elkouri & Elkouri, "Arbitrators have consistently ruled that the burden of proof in such cases rests with

⁵² Discipline and Discharge in Arbitration, Ch. 2, p. 2-2 (Norman Brand & Melissa Biren, eds., 2015).

⁵³ *See id.*, p. 2-3 (citing *Indiana Convention Ctr. & Hoosier Dome*, 98 LA 713, 719 (Wolff, 1992), *Department of Veterans Affairs*, 133 LA 1688 (McReynolds, 2014)).

⁵⁴ *Id.*

⁵⁵ Un. Ex. 2, SEIU0049.

⁵⁶ *See* Discipline and Discharge, Ch. 12.II.A., p. 12-4.

the employer....”⁵⁷ In discharge cases, many arbitrators apply a “clear and convincing evidence” standard.⁵⁸ Additionally, “[a]n employer’s decision to rely solely on hearsay evidence in a case where it has the burden of proof has been deemed insufficient to sustain its case.”⁵⁹

Johnson was the only witness who testified Groce yelled and swore. His testimony was not credible. The only other employees who said they heard the alleged argument were not present to testify. The discharge should not be sustained on the basis of Ms. Zehn’s hearsay.

Although Groce acknowledges he went to speak to Johnson during his break, he was adamant that he did not yell, scream, or swear when doing so. He asked Johnson if he was angry, and expressed feeling disrespected and belittled. He only raised his voice to be heard over the floor machine and through his mask.

Contrary to Ms. Schade’s framing of the witness statements, there is no evidence that Groce followed Johnson around, harassing him. While he did approach Johnson to resolve a conflict, Johnson was the initial aggressor. Nor did he follow Johnson out of the unoccupied patient room; he testified he was on break, and needed to return to work. He also testified, and Johnson did not deny, that their third meeting was happenstance. Groce did not follow Johnson into the locker room and the conversation there was conciliatory.

40. Nor did Groce lie when interviewed about the incident. Groce’s testimony was consistent with his statements in the investigatory interview. He was honest when he said he sought out Johnson on the second floor during his break. He admitted they talked about an interpersonal conflict. He never denied venting about the conversation after his return to the kitchen. Only the casting of the argument as a screaming fit and him as incoherent in the kitchen differs from Groce’s experience, and the difference should be seen as one of perception rather than deception.

Groce felt that he had a conversation with Johnson about a perceived slight, and that is what he told Schade. Schade simply believed Johnson and not Groce. There is no evidence Groce lied about how he experienced the incident.

41. Groce Did Not Violate the Violence in the Workplace Policy. Neither the testimony presented nor the written statements suggest that Mr. Groce violated the Violence in the Workplace policy.⁶⁰ The policy’s definition of “violence” requires actual physical force. No such physical force is alleged by any of the witnesses, and when asked directly, each acknowledged that Groce had not done anything meeting the definition. Nor did any witness allege Groce made any threats. The implication that “aggressive” gesturing might qualify as violence is absurd. None of the witnesses actually described the gestures. Nor did they say the gestures appeared to be threats or attempts to strike anyone.

⁵⁷ Elkouri & Elkouri: How Arbitration Works, Chapter 8.3.B.

⁵⁸ See Discipline and Discharge, Ch. 12.II.A., p. 12-4.

⁵⁹ Elkouri & Elkouri: How Arbitration Works, Chapter 8.3.B.

⁶⁰ See Un. Ex. 21, SEIU0085.

Now, the violence policy contains a catch-all clause prohibiting “any other coercive act against person or property while on Saint Therese property or on working time which management believes is inappropriate in the workplace.”⁶¹ It is defective for two reasons.

First, there is no evidence Groce did anything “coercive.” Even if, for the sake of argument, he vented his anger at Johnson, there are no allegations he did so to coerce Johnson to do anything.⁶² In his testimony Johnson said Groce asked why he had reported him but he did not allege Groce asked him to withdraw his complaint or do anything else.

Second, the provision is unenforceably vague. An employer’s policy or rule must “clearly and unambiguously establish the scope of prohibited conduct, as well as the consequences of violations. . .” to be enforceable.⁶³

The catch-all provision’s overbroad language allows management to call any behavior it dislikes “violence” and then punish employees accordingly. It expressly allows management to punish employees for behavior management *believes* is inappropriate. Employees have no way of knowing what kind of actions would violate the clause. In essence, it asks them to read the minds of their managers. It is unenforceably vague and cannot be used to discipline Mr. Groce.⁶⁴

Finally, the testimony of Christine DeLander regarding the dangers posed by workplace violence and its “red flags” is irrelevant.⁶⁵ No witness testified that Groce committed actual violence. Exhibiting “red flags” is not prohibited by the violence policy. Nor are yelling, screaming, or swearing by themselves. Unless they independently meet the definition of violence they are not policy violations.

42. Groce Did Not Violate the Workplace Bullying Policy. Although workplace bullying is, like workplace violence, an important issue, it differs in that it requires repeated actions. The Workplace Bullying policy at St. Therese specifically prohibits “*repeated* inappropriate behavior....”⁶⁶

There is no evidence Groce repeatedly treated Johnson inappropriately. Even accepting *arguendo* that the conversation was inappropriate, the argument raised by St. Therese that the later apology escalates the situation to “bullying” is absurd. Johnson himself testified that he was concerned for Groce’s employment, that he forgave him and called him “my son.” Nothing described by either of the two witnesses to the resolution could be described as “inappropriate.” If anything, it represented two employees using open and honest communication to resolve a conflict at the lowest level, complying with the Workplace Relations policy.

⁶¹ *Id.*

⁶² See “Coerce.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/coerce>. Accessed 23 May. 2024.

⁶³ Discipline And Discharge, Ch. 2.IV.A.3.b., p. 2-73 to 2-74.

⁶⁴ *See id.*

⁶⁵ *See* Emp. Ex. 1.

⁶⁶ Un. Ex. 22, SEIU0092 (emphasis added).

43. Groce Did Not Violate the Workplace Relations Policy. Mr. Groce acknowledged in his testimony that there was a conflict between himself and Mr. Johnson, but his attempt to resolve it did not violate the Workplace Relations policy.

Groce did not yell, swear, or scream at Johnson. Ms. Supoe told Ms. Schade that his first words to Johnson were, "Are you mad at me?" He felt Johnson had disrespected him because of a misunderstanding and so he sought to address the issue through conversation.

In trying to settle the earlier conflict at the elevator door Groce was complying with St. Therese's Workplace Relations policy by addressing the conflict at the lowest level possible using open and honest communication.⁶⁷ When a conflict arose because Johnson misinterpreted a statement from Mr. Kelly, he said things Groce found disrespectful and belittling. Groce then sought out Johnson to find out why he had mistreated him. As such, the policy, though cited as a basis for discharging him, was actively fulfilled.

At the hearing, several witnesses were asked whether it was appropriate for Groce to yell, specifically, at a supervisor. Schade in particular used the fact that one of his performance evaluations mentioned he was "argumentative" when redirected by managers to support her statement that he knew he could be punished for any negative behavior toward any supervisor.⁶⁸

Schade's testimony that Groce "knew" he was required by policy to respect supervisors is incorrect. The Workplace Relations policy explicitly requires employees to treat all coworkers equally, regardless of rank.⁶⁹ If Groce had disrespected a non-supervisory employee he should have expected the same level of discipline. Nowhere in St. Therese's policies is a non-management employee prohibited from disagreeing with a supervisor.

Arbitral precedent regarding insubordination supports this conclusion.⁷⁰ While an employee may be disciplined for directly refusing an assignment, merely disagreeing with a supervisor, even strenuously, is not insubordination.⁷¹ While disrespect may be subject to discipline under other policies, the identity of its target is not relevant.

44. Even if, for the sake of argument, Mr. Groce did yell, scream, and swear at Mr. Johnson, discharge was not an appropriate response, for several reasons. The employer was required by the CBA, arbitral precedent, and its own policies to use progressive discipline. Given Groce's long tenure with the Home, his history of hard work and good reviews, and his lack of any formal disciplinary actions, he should not have been discharged over the incident.

St. Therese Was Required to Employ Progressive Discipline. Several St. Therese witnesses admitted that they did not use progressive discipline in this case and that

⁶⁷ See Un. Ex. 23, SEIU0095.

⁶⁸ See Un. Ex. 7, SEIU0056.

⁶⁹ Un. Ex. 23, SEIU0096

⁷⁰ Discipline And Discharge In Arbitration, Ch. 5.II., p. 5-4 to 5-5.

⁷¹ *Id.*

Groce's record lacks any prior formal discipline. Progressive discipline is an important factor in just cause determinations. It is meant to allow employees the opportunity to improve their behavior.⁷² For most policy violations the doctrine requires employers to begin with relatively minor discipline, usually verbal warnings, and then progress through written warnings and suspensions before discharging employees.⁷³ Because Mr. Groce had no prior disciplinary actions, he should not have been terminated under even the most jaundiced reading of the evidence.

The coaching forms in Groce's file demonstrate that when he receives correction for a perceived policy violation he improves his performance. All of the forms are for alleged violations of different policies. Groce never received coaching, much less formal disciplinary action, for the same issue twice. The notes in his performance reviews bear this out as well. Though the coachings were mentioned in the reviews for the years in which they happened, there are no notes about those issues in later reviews.

As such, the purposes of progressive discipline would be met by reducing the discharge to a lower level. Groce's history suggests that if he had received a lower level of discipline he would not have committed the same offense in the future. By immediately discharging him, St. Therese denied him the opportunity to improve his performance. Because he had no previous formal disciplinary actions in his file, Groce should have received a lower level of discipline than discharge.

45. While general principles of labor arbitration support the use of progressive discipline in Mr. Groce's case, the disciplinary policies published by St. Therese itself also require it. The Coaching and Counseling policy places Groce's alleged actions firmly among the violations it deems "Category 2" which "will be cause for progressive discipline...."⁷⁴ Among the examples of listed are: "Leaving the immediate work area... for purposes of performing activities not directly related to job duties...."; "Failure to maintain acceptable standards of respect for others..."; and "Creating or contributing to disorderly... conditions...."⁷⁵

If Groce did, as alleged, yell and swear at Johnson, his actions would inhabit the three examples above. He is, in essence, accused of leaving his assigned work area to disrespectfully contribute to a disorderly condition. His alleged violation should therefore be seen as a Category 2 violation and thus be eligible for progressive discipline. Since he had no formal disciplinary actions in his record, he should have received a lower level of discipline.

Even the Violence in the Workplace policy does not require discharge for all violations. It allows a range of actions: "[D]isciplinary action up to and including termination, may be taken...."⁷⁶ It then refers to the Coaching and Counseling policy.⁷⁷ The latter policy

⁷² *Id.*, p. 2-42.

⁷³ *Id.*, Ch. 2.III.C, p. 2-47.

⁷⁴ *See* Un. Ex. 24, SEIU0108, *et seq.* While it allows discharge for a first Category 2 offense in certain circumstances, yelling at a coworker is not among them.

⁷⁵ *Id.*, SEIU 0109-0110.

⁷⁶ Un. Ex. 21, SEIU0090.

⁷⁷ *Id.*

does not refer to other specific policy violations, but instead describes the types of actions which would qualify for each category. While actual, physical violence or threats would be a Category 1 violation, there are no allegations that Groce did anything similar. Thus, even if his alleged argument with Johnson qualifies as a violation of the Violence in the Workplace policy, it nevertheless falls into Category 2 and is eligible for progressive discipline.

If discharge is imposed for a violation of the Workplace Violence policy that does not meet the definition of “violence” or “threat”, the purpose of the policy and of progressive discipline is frustrated. The degree of punishment must fit the severity of the “crime.”⁷⁸ It is indisputable that there are degrees of “Violence in the Workplace” far above the worst acts Groce is accused of, for which immediate discharge would be appropriate.⁷⁹ Having a public argument should not qualify for the same treatment. Given how much worse workplace violence can be, it was arbitrary and capricious to jump to discharge in Groce’s case.

46. Regardless of the Coaching and Counseling policy’s formal discipline steps, discharging Mr. Groce for the alleged argument is inherently too harsh. When formulating remedies, “[i]t is said to be axiomatic that the degree of penalty should be in keeping with the seriousness of the offense.”⁸⁰ Discipline is excessive if it is disproportionate to the rule violation, if it violates progressive discipline, if it is punitive rather than corrective, or if management ignores mitigating circumstances that are reflected in the record.⁸¹ Mitigating factors include the employee's length of service, performance, prior disciplinary history, provocation of the grievant, and unusual circumstances in the grievant’s life.⁸²

Groce’s history at St. Therese provides ample mitigating factors. He was a fifteen-year employee with a good work record. While his performance reviews declined in the years immediately before his discharge, the change is accounted for by the events in his personal life. He was working another full-time job, while picking up overtime hours. More importantly, his daughter had just been born, adding another level of stress and sleepless nights. It should be no wonder that he “lacked the enthusiasm” he had once shown.⁸³ Even when his scores were lower, though, supervisors acknowledged that he did the job well and treated coworkers with respect.⁸⁴ Moreover, the disrespect shown by Johnson at the elevator was provocation. Groce denies yelling, but under the circumstances should be forgiven if he did.

While arbitrators generally prefer not to substitute their own judgment for that of management, rescinding the discharge would not cause such a substitution in this

⁷⁸ How Arbitration Works at Ch. 15.3.F.I.

⁷⁹ *See* Emp. Ex. 1.

⁸⁰ How Arbitration Works at Ch. 15.3.F.I, (quoting *Capital Airlines*, 25 BNA LA 13, 16 (Stowe, 1955)).

⁸¹ Discipline and Discharge, Ch. 2.III, p. 2-41.

⁸² *Id.* Ch. 2.III, p. 2-41, 2.IV.C; Ch. 13.I.B, p. 13-8 (citing *General Mills*, 112 BNA LA 152 (Bailey, 1998); *Norshipco*, 105 LA 529 (Hockenberry, 1995).

⁸³ *See* Un. Ex. 7, SEIU0056.

⁸⁴ *Id.*, SEIU0054-0056.

case.⁸⁵ The various policies cited above illustrate the company's own conclusion that what Groce allegedly did is not serious enough to require discharge. When considering whether a particular level of discipline is appropriate, the punishment must fit the violation. If lower levels of discipline are allowable for violations of even the Violence in the Workplace policy, then Groce should not have been discharged.

47. The discharge of Mr. Groce also constituted disparate treatment. When applying disciplinary policies employers must do so evenly.⁸⁶ Two employees in similar situations should be disciplined similarly.

Here, Mr. Johnson admits that he belittled Groce, lording his supervisory position over him and closing the elevator door to prevent Groce from embarking. He, too, was part of the alleged yelling match; several witnesses said they heard more than one voice.⁸⁷ He could have been disciplined for the day's incidents but was not. St. Therese treated the two men differently despite their similar situations, and Groce's discharge therefore constitutes disparate treatment and should be rescinded.

48. Nor is the allegedly similar discipline of Enock Okemwa enlightening in this regard.⁸⁸ While he was discharged for violating the Workplace Relations policy by being "argumentative and combative when approached by leadership," he was, at the time, in his 90-day probationary period. He was essentially an at-will employee and not entitled to just cause. If anything, the comparison demonstrates that by discharging Groce St. Therese treated a loyal fifteen-year employee like a new, probationary hire.

49. Given the above, the Union respectfully requests that the arbitrator make Mr. Groce whole, as follows:

First, his employment should be reinstated, including his seniority status, pay rate, and preferred schedule.

Second, he should be awarded back pay from August 11, 2023 to the date of his reinstatement. While he was working a full time job during that period, he had been doing so while working at St. Therese, and he would have continued working both jobs if not discharged.

Based on his uncontroverted testimony, Groce's back pay award should be calculated at a rate of \$23.00 per hour for forty hours of normal work per week and \$34.50 per hour for eight hours of overtime per week, based on his testimony that he picked up one overtime shift per weekend, on average.

Third, his PTO balance of 200 hours should be reinstated.

Fourth, Groce should be awarded all contributions St. Therese would have made to his Social Security and retirement accounts which would have been made had his

⁸⁵ *How Arbitration Works*, Ch. 15.3.F.I, (quoting *Capital Airlines*, 25 BNA LA 13, 16 (Stowe, 1955)); *see also Capital Airlines*, 25 BNA LA 13, 16 (Stowe, 1955) (stating "Even absent the specific contract language in the instant labor agreement affording an arbitrator the latitude to mitigate a disciplinary discharge, the ability to modify disciplinary penalties is well within the arbitrator's wheelhouse. When formulating remedies, 'it is said to be axiomatic that the degree of penalty should be in keeping with the seriousness of the offense.'").

⁸⁶ *Id.*, Ch. 15.3.F.xii.

⁸⁷ *See, e.g.*, Un. Ex. 17-19, SEIU0081-0083.

⁸⁸ *See* Un. Ex. 26, SEIU0123.

employment continued throughout the period between his discharge and reinstatement.

Fifth, St. Therese should be ordered to reimburse Mr. Groce for any out of pocket medical expenses incurred or insurance premium payments made because of the discharge.

50. Di' Andre Groce was discharged without just cause. A conversation between himself and another employee was taken out of context by other uninvolved coworkers, and his interlocutor exaggerated to protect his recent promotion. Even if the conversation was as disorderly as alleged, it does not justify discharge.

At worst, Groce, a dedicated employee with an extraordinarily busy life, is accused of trying to resolve a perceived slight with a coworker, as required by the Workplace Relations policy. He did no violence, made no threats. He raised his voice over a floor machine while wearing a mask, but did not scream or swear. Even Johnson, the alleged "victim" of the yelling, claims he was more concerned about Groce's job than his own safety after the event. He forgave Groce and called him "my son." By the end of the day the conflict between them was resolved. An uninvolved Director of Nursing, Heidi McCormick, and an overzealous HR Manager, Rachel Schade, misconstrued the conversation as a screaming fit and discharged a loyal, knowledgeable employee. The decision was arbitrary and capricious, and therefore fails the test of just cause. Furthermore, even if Groce had yelled at Johnson, he was entitled to progressive discipline, due to his otherwise clean disciplinary record.

Finally, despite the fact that both he and Johnson were involved in the incident, and the fact that Johnson had spoken disrespectfully earlier in the day, only Groce was disciplined. Johnson was subject to the same policies despite being a supervisor. The two men were treated disparately and the discharge therefore lacked just cause. For the above reasons the discharge should be rescinded and Groce should be reinstated, awarded back pay, and otherwise made whole.

ANALYSIS

It is axiomatic in arbitration that an arbitrator should not substitute his judgment for that of management unless there are valid reasons. The arbitrator must thus fashion an award which is appropriate and reasonable and in keeping with the standard for that particular case. To uphold the discipline issued here the undersigned must find that the discipline meted out by the Employer to the Grievant was with Just Cause.

There are generally two areas of proof involving the discipline of an employee. The first involves proof of actual employee wrongdoing. The second area of proof, once actual wrongdoing is established, is the propriety of the penalty assessed by the Employer.

Several factors will be analyzed:

1. What notice of Employer policies was provided to employees generally and Grievant specifically, and was Grievant aware violations of these policies could lead to discipline, including termination;

2. Are the alleged violated policies arguably related to the Employer's business needs;
3. Under what standard of proof is the evidence to be analyzed, and did the Grievant commit the alleged violations; and
4. Finally, is the severe penalty of termination supportable or are there aggravating or mitigating circumstances to consider?

This analysis will help determine whether the Employer's discipline has just cause to support the imposed discipline of termination.

1. What notice of Employer policies was provided to employees in general and this employee specifically? Was Grievant aware of potential discipline including termination for any violation of these policies?

Evidence shows employees receive copies of policies and sign their acknowledgement of receipt and understanding thereof. Employees also receive substantial and frequent training based on these policies throughout their tenure. Grievant had a long, impressive tenure with the Employer and an equally long and impressive array of trainings, including fairly recent ones in April 2023 on the Workplace Relations Policy and a training on July 27, 2023 on Basics of Workplace Safety. This latter training was just seven days prior to the incident. The cited policies do reference potential discipline including termination. Grievant was clearly aware and knowledgeable regarding the cited policies and their expectations.

2. Did Employer's cited policies arguably relate to its business needs?

Most Employers have similar policies and expectations. This Employer, maintaining a living facility where all residents are vulnerable adults has these policies which are mandatory requirements for their business needs. Violations of these policies or lack of maintaining them may lead to their loss of licensure, and various other legal actions. These policies are clearly reasonably related to the Employer's business needs.

3. Under what standard of proof is the evidence to be analyzed, and did the Grievant commit the alleged violations?

The Union submitted an argument regarding the need for "*clear and convincing evidence*" of policy violations. Arbitral caselaw, partially covered by the Union's cited arbitration decision involving SEIU and Park Nicollet Methodist Hospital, (Arbitrator Jeff Jacobs, 10-12-23) quoting from Professor St. Antoine's *The Common Law of the Workplace*, BNA Books 2D. Ed. 2005 Section 6:10 at page 192 stating "*When the employee's alleged offense would constitute a serious breach of law or would be viewed as moral turpitude sufficient to damage an employee's reputation, most arbitrators require a higher prequantum of proof, expressed as 'clear and convincing evidence.'*" [Union Brief pg. 22]

This '*clear and convincing evidence*' standard is adopted for this matter given the nature of the allegation and the discipline imposed. Here, the Employer has alleged the Grievant violated three separate policies: Violence in the Workplace, Workplace Bullying, and Workplace Relations. The Employer argues each of these policies was violated within the resident area of a vulnerable adult nursing home, a heavily regulated environment. Further, the Employer

argues these violations are contrary to federal OSHA law and the National Safety Council recommendations of 'zero tolerance.' The Employer's arguments are that this matter concerns serious breaches of law. Further, upholding such a termination would lead to Grievant's significant tarnishing of reputation and an inability to receive an employment position with a different employer in a related health care field result in elevating this burden of proof from traditional '*preponderance of the evidence standard.*'

What the Employer charged the Grievant with is within the Employer's Exhibit 2, their termination notice to Grievant of August 11, 2023 citing his Conduct/Behavior as "*dEE [sic] violated the Saint Therese Workplace Violence, Workplace Bullying and Workplace Relations policy. EE engage in swearing, intimidating and behaving in an aggressive behavior towards another employee.*" Noted on the form is Grievant's refusal to sign an acknowledgement of receiving it as he "*walked out before able to.*"

Grievant's History with the Employer

Grievant's Performance Evaluations [Award pages 5-7] and Coachings and Counselings (which the forms and witness testimony assures us they are not discipline) [Award pages 4-5] reveal a very interesting employee. He started with the Employer while very young, 15 (he's 31 now) and has worked a variety of jobs for them and overtime at every opportunity, recently a father and continuing to work another job for his family. The Employer's Hearing offering of Grievant, and particularly the Brief makes it appear Grievant's performance was getting worse. Until a reader realizes the data is being presented in reverse chronological order. If corrected to an appropriate chronological order you see Grievant was even being appraised as management potential. Witnesses testified that when items of concern were raised with him in Counselings he did not repeat that concern. Except a few Employer witnesses who tried to stretch the termination incident to an "argumentative" Counseling to workplace violence concern.

The Investigation [relevant analysis portions highlighted]

It is clear from normal business practice that once a supervisor or manager hears of an incident involving a yelling dispute between coworkers that some type of investigation is warranted.

This first incident report of August 3, 2023 noted the allegation of:

- "2 employees shouting at each other in a resident room"
- "thankfully there was not a resident present"
- "two witnesses" -Mary Zehn, and Justine, Mary said they were "fighting and yelling," Justine confirmed that she was "several rooms down with a patient and heard the staff yelling at each other." [Union Exhibit 20, Employer Ex n/a]

Mary Zehn's subsequent investigatory interview on August 4 by Schade, HR Manager, but not signed until August 9, stated: she heard Grievant yelling at Emmanuel "fuck you fuck you" over and over, no residents were around, a lot of yelling and swearing and she didn't want to be around. She said Jessica Mattys [sic] also "heard the interaction." [Union Exhibit 14,

Employer Exhibit 17] Despite a subpoena commanding her presence at the Hearing Zehn was a no show and did not testify.

Justine Ahmann's subsequent investigatory interview on August 4 by Schade, HR Manager interview stated: "Heard two raised voices talking about the elevator being down, the voices were a male and female, she didn't know whose voices she heard, the conversation seemed disgruntled and loud but sounded angered." [Union Exhibit 19, Employer Exhibit n/a] Was not called as a witness at the Hearing.

In these first two reports from eyewitnesses there was: an argument with two voices, one male one female. One witness cited Grievant as more vocal than the other identified male, Emmanuel. The other witness appeared to cite both as equal in loudness and anger, yelling at each other. One witness added the description of "fighting" to "yelling" without an explanation. To be clear there was never an allegation by any witness of physical threats or contact by either arguing party. One witness said no residents were present, the other witness said she heard the argument while with a resident. Only one witness said she heard a reason for the argument that the elevator was down. Lastly, Zehn's statement contradicts Grievant's, Johnson's and Supoe's statement.

The next person interviewed on August 4 was Grievant's **Supervisor Rosie Murungi** who added:

- She heard from Preston Robert that there was an issue between Emmanuel and Grievant the day before
- Grievant came into the kitchen screaming and yelling – very loudly, that Emmanuel told him he "is a supervisor" but Grievant was so mad he couldn't finish his sentence
- Murungi allowed him to calm down but didn't get chance to talk with him as he was gone for the day. [Union Exhibit 16, Employer Exhibit 11]

Interviewed on August 8 was **Jessica Matty** who said:

- "she heard about the disagreement, but heard from Mary Zehn, NAR, told her they were disagreeing. She said she heard yelling down hallway 2 from two males and sounded like employees not residents." [Union Exhibit 18, Employer Exhibit n/a]

Although the Employer had subpoenaed her for the Hearing, she was not called as a witness at the Hearing.

Preston Roberts was interviewed on August 8 and added:

- A description of spilled water started the incident, he offered to clean up water but Grievant asked for and went to look for Emmanuel, witness saw Emmanuel, told him he would clean up the water and that Grievant was looking for him
- He said Grievant came back to the kitchen and told about Emmanuel confronting him, he declined being present during any argument. [Union Exhibit 15, Employer Exhibit n/a]

Although the Employer had subpoenaed him for the Hearing, he was not called as a witness.

Joetta Dayway was interviewed on August 9 and said she was not working that day and was not aware of any arguments between two employees. [Union Exhibit 17, Employer Exhibit n/a]

Was not called as a witness at the Hearing.

Analysis of Murungi, Matty, Roberts, and Dayway is:

- Murungi doesn't know the details of the argument,
- Matty only heard of the argument from Zehn,
- Roberts seems to have been a connection of keeping the dispute going by telling Murungi of the problem and telling Johnson that Grievant had broken dishes in an elevator was "looking for him" yet declines being present during any argument; and
- Dayway was not working that day and was not aware of any arguments.

Continuing on with witness statements we have:

Alice Reilly, Environmental Services Supervisor, was interviewed on August 9 and offered:

- Emmanuel came to her because Diandre came to speak with him. Diandre went to him and said why did you report me. Emmanuel said he did not and it was reported by someone else. Alice said that they should come talk to me about this. Emmanuel requested Alice to not tell anyone. She said that he said he doesn't want anyone to get into trouble. Alice came to speak with me regarding this anyways due to how Emmanuel was talking and prior statements of saying he is scared. [Union Exhibit 13, Employer Exhibit 10]

Sonnie Supoe, Housekeeping Aide, signed an August 9 statement which:

- At first declined hearing anyone argue this past Thursday
- State she and Johnson were cleaning a room when a person from dining came into the room. The dining employee said to Emmanuel "Are you mad at me?" Emmanuel told him "No I am not."
- Witness focused on her work, was not present the entire time but there was no yelling between them. [Union Exhibit 12, Employer Exhibit n/a]

Although the Union had subpoenaed her for the Hearing, she did not show.

Emmanuel Johnson's August 9 statement stated:

- Sonnie Supoe, Housekeeping Aide was present as well when Diandre entered the room. Diandre came in and said that he is a grown freaking man and I ask you for help and you tell I am a supervisor. Then Diandre said this is bull shit. During this time, he said that Diandre was yelling and swore many times. He said a resident wasn't in the the room, but the rooms across the hall were occupied. Due to Diandre yelling and screaming at Emmanuel he shut the door because it is in a resident area. He told Diandre that this is a residents home and we can talk about this. Then later Diandre came down to his office and apologized and said that he has anger management issues. Emmanuel said that Ruth Melchor, RN, and Joetta Dayway, NAR, asked him what

happened. Emmanuel said that he felt scared so this is why he did not report it because of how he followed him to different areas in the building and due to the incident. He said they have never had any issues in the past and now today they are okay. Emmanuel denied raising his voice at him and attempted to calm him down.
[Union Exhibit 11, Employer Exhibit 8]

Analysis of Reilly, Supoe, and Johnson's investigatory interviews:

Alice Reilly's statement of Johnson coming to her and saying, "he doesn't want anyone to get into trouble" but she talked with Schade anyway about "prior statements of saying he is scared." No alleged prior statements were introduced into the record about Johnson being scared. His statement was signed after Grievant's investigatory interview.

Supoe clearly did not want to get involved, gave statement that sounded like the two coworkers had resolved the matter, and did not hear any yelling while she was present with them. Her statement was signed after Grievant's investigatory interview.

Johnson's statement argued only Grievant was yelling and swearing, but Johnson was receptive to "talking about his," and Johnson closed the door to quiet down their talk, that Grievant came and apologized to him, that he and Grievant never had issues before and now today they are okay. Johnson would not have closed the door if he felt in danger of Grievant, and Johnson's apparent acceptance of Grievant's apology, even if it was just the two of them, cannot be viewed as Grievant following him around the building. Johnson was clear with Grievant "that someone else already reported." Johnson had not reported the incident. Johnson's statement ended with "now today they are okay." "Today" in Johnson's statement was August 9, six days after the incident.

From this mixture of investigatory interviews, the Employer terminated the Grievant citing a slew of policy violations. There are a number of issues with the Employer's termination. First, the statements do not show what order they were taken, and whether all were completed and presented to the Grievant and his Union representative during the investigatory interview of him. This is necessary for a full understanding for the Grievant and the Union in knowing what is being investigated and to allow for a knowledgeable response. Second, two witness statements, Supoe and Reilly, were signed the day after the Grievant was interviewed. This is of concern as to whether the Union was apprised of these statements during Grievant's investigatory interview the day before, particularly of Reilly's who asserts Johnson was scared of Grievant. Third, reading Grievant's and Johnson's statements they read very close to the same pattern of facts about what the incident was about, the stages of it, the interchange between them, although both deny yelling, screaming or swearing, and that the matter was resolved, they were okay now.

Further, multiple witnesses testified they heard two people "shouting, yelling, swearing, arguing." While most witnesses who heard the argument said two men were engaged in the yelling, one witness said it was a male and a female. And while both Grievant and Johnson

denied they had done so, only Grievant was disciplined. Which raises a due process issue of similarly situated disciplines.

Witnesses said Johnson was running a floor cleaning machine, Grievant was wearing a mask to protect himself and his family from the ongoing COVID illness. When the arguing started Johnson said he closed the door to the room they were in, and there was no testimony the machine was shut off, and conflicting testimony as to the machine's loudness. This diminishes the length of time with an open door for any potential hearing by anyone else. Further, there were no threats or physical actions used by either disputant, only words. Loud words. But not words rising to the level of workplace violence.

Testimony at the Hearing

Whereas witness statements showed a running argument at best, witness testimony at the Hearing presented a much harsher picture aligned against the Grievant. Certainly, investigatory witness statements need a careful review and consideration before discipline is leveled. However, later enhancement at the Hearing necessarily calls into question their credibility, as at the Hearing they are subject to Union cross-examination and their veracity challenged.

Employer witnesses, particularly Mr. Johnson who's first statement ended with "now today they are okay" to his testimonial statements of being "scared for myself, my home, my family." This is a delayed sensitivity enhancement after eight months' time. Other witnesses' statements versus their investigatory statements:

The Employer Brief at #12 correctly offers this testimony:

"**Alice Reilly**, Johnson's supervisor at the time, testified that Johnson talked with her after the incident. Based on his body language and demeanor, it was evident to Reilly that Johnson was shaken and upset."

The problem is the testimony was a significant enhancement of Reilly's statement at the time. Her August investigatory statement stated she came to talk with Schade "regarding this anyways due to how Emmanuel was talking and prior statements of saying he is scared." No reference to body language or demeanor, and she ignored Johnson's statement of "he doesn't want anyone to get into trouble." But her testimony acknowledged Johnson's view of Grievant was "cordial and work together."

Mary Zehn was subpoenaed but did not show for the Hearing. We are unable to ascertain what portions of her written statement would be maintained or modified if the Union had an opportunity to cross-examine this absent witness. Her written statement said only Grievant was yelling and swearing, but she was incorrect in her identification of another eyewitness, Matty, who stated in her statement that she was not present. Further Zehn's statement said there were no residents present, which countered a factor in the Employer's discipline of the Grievant.

Rosie Murungi's testimony did not substantially change from her earlier written statement, other than her interaction in the kitchen with Grievant was "only a few seconds" and Preston told her "[Grievant] spilled water." She acknowledged her last performance review of Grievant on April 13, 2023 note his potential to become a supervisory employee.

Rachel Schade's testimony described Grievant's Performance Evaluations as showing "a lot of areas need improvement," she believed the unacceptable behavior from the termination incident was multiple incidents because Grievant's actions were "repeated within a day and followed Johnson around the campus repeatedly yelling and using swear words." She did not believe Grievant followed and talked with Johnson again for the purpose of apologizing. She testified about a termination exhibit of a probationary employee for workplace violence but acknowledged as this person was probationary just cause was not required for the termination.

Schade's testimony is largely repetitious of the strongest elements of the Employer's case, yet one factor was her focus on Grievant "following Johnson around the campus" and she did not believe Grievant did so with the intent of apologizing. Yet both Grievant and Johnson agreed Grievant had apologized to Johnson, and both thought the matter was resolved between themselves when they talked without others present, and Johnson to his credit reported the same to investigating management personnel.

Grievant's investigatory interview statement was largely ignored by management and used to aver that he "lied, lied, lied." Yet his testimony stayed consistent with his investigatory interview. He reiterated he started working there at age 15-for over 16 years he's been an employee and has worked many different positions, takes on a lot of overtime every weekend, has received no formal disciplines, has never repeated coached behavior comments, and believes he only had maybe 4 absences or tardies. Grievant felt, and feels to this day the incident was a case of mistaken identity, he felt blamed for Johnson believing he broke dishes in the elevator, he did not break dishes, but he did spill water. But he felt Johnson with his carpet machine could have helped clean up the water damage. Johnson said, "someone told him that he [Grievant] had broken dishes in the elevator." Grievant felt "whole Employer was family, felt close, but he cannot be blamed for what he did not do." Later the same day at the end of the shift about 2:30 p.m. he met Johnson by the storeroom and locker room and said, "Mr. Johnson I apologize for anything I said," and Johnson did the same and we hugged. Grievant said Johnson called him "son," but Grievant felt disrespected "I'm 31, have my own son." But he did not want to report Johnson to HR as did not want to escalate this incident was not a big day, was squashed that day. Johnson was trying to save my job, Johnson was not scared, he approached me later in other days and offered me advice Grievant said he does not know Johnson's home address, does not even know what city he lives in. He sought out Johnson to talk to him on the second floor while on his break. Felt Johnson's testimony changed a lot, and acknowledged anyone in his [Grievant's] position would be worried about their job.

Individuals whose investigatory statements were taken into consideration on the termination decision but not called as witnesses include:

- Ahmann who heard two voices-a male and a female arguing;
- Roberts who seemed to be in the middle of Grievant's and Johnson's interaction that day, passing along negative information to Johnson and Murungi;
- Matty who disputed Zehn's assertion she was there and only knew details from Zehn;
- Dayway who was not working that day and didn't know about any argument; and
- Supoe who didn't want to get involved and was in room with Grievant and Johnson some of the time but heard no yelling.

Both Grievant's and Johnson's investigatory statements attempted to paint the other as more aggressive, disrespectful or argumentative, yet each tried in their statement and their testimony to acknowledge their long standing friendship between each other, one similar to a son, the other a father, with a desire of others to acknowledge this matter was over.

4. If the above factors support the Company disciplining the Grievant for these rules infractions, is the severe penalty of termination supportable?

The arbitral concern is that a termination was issued to a very experienced employee, without any prior discipline, based at the facility for a very long time, whose work performance had been increasingly satisfactory, was recently cited as having supervisory potential, had a loud argument with a recently promoted supervisor engaging in the same actions. Clearly, and not to minimize the allegations, Grievant and Johnson both "had a bad day."

Clearly, with this above information, the Employer's decision to terminate Grievant was excessive.

DUE PROCESS CONSIDERATIONS

Given all factors particularly his long tenure, no prior discipline, no threats/physical acts, no proof residents near or heard the incident, with a standard burden of clear and convincing evidence necessary to uphold the discipline, the totality of the evidence shows this burden has not been met. The termination will be overturned.

But having overturned the termination and returning Grievant to work does not mean no discipline at all is warranted. This is particularly so with a work location being a residence for multiple vulnerable adults. A 16 year employee who has worked a variety of tough jobs for a company in a very tough business for half of his life has earned a thoughtful consideration of the entirety of his record to be considered when discipline is imposed. Particularly here when it seems to the selected neutral outsider than it was a verbal argument which others may have escalated into more. Grievant had in the past received coachable incidents to which he responded positively, without repetition and which increasing showed his increased value to the Employer and coworkers, even with the potential of being raised to management due to his increasing positive performance. This is evident in the Grievant's logic in seeking out Johnson in the first place: Grievant spilled a number of water pitchers on some carpet, while a coworker offered to aid with the cleanup with towels, Grievant thought of Johnson with his

carpet machine would be a better way of cleaning up the spill. This makes sense and Grievant's intent in seeking out Johnson initially would have lessened the damage to the Employer's carpet better than towels.

On August 3, 2023 Grievant engaged in an incident of loud yelling and arguing with a coworker, a longtime coworker/friend. It likely could have just been allowed to blow over.

Employer decided after reviewing the investigatory interviews to charge Grievant with a variety of policy violations, but not Johnson despite numerous witnesses stating two individuals were yelling and arguing, of apparent equal volume. The differential from the evidence is the Employer basis that Johnson, a recently promoted supervisor, was victimized, scared by Grievant's behavior.

Johnson's testimony was more astute in asserting he "didn't want to get anyone in trouble" when referencing Grievant, but it was clear in his testimony that a primary concern was himself. At the time of his statement, he made it clear Grievant was the aggressor, however, his Hearing testimony was louder, more vehement, assertive and aggressive than Grievant's silent and more brooding responses to questions. However, Johnson repeatedly testified he was concerned that Grievant might lose his job, that they knew each other for about 19 years, never saw him angry or behave like this before, and it all happened so fast, and Grievant did apologize but someone else had already reported him. Only near the end of his direct examination did Johnson, upon prompting, testify nominally about feeling "scared" about Grievant. This came across not as a present concern but a reminder of what others had said he said. As previously pointed out Johnson closed the door to quiet down their talk, that Grievant came and apologized to him, that he and Grievant never had issues before and now today they are okay. Johnson would not have closed the door if he felt in danger of Grievant. Johnson being "worried" about Grievant losing his job is very close to being "scared" Grievant would lose his job.

When Grievant testified Johnson had "disrespected" him, as Grievant is "a 31-year old man with a child of his own," the sense of his anger was transparent, a sense of his feeling at that time was palpable. Which ties in with the next analysis, both individuals denied yelling and swearing. Neither was believable. Sufficient witness statements and testimony support the conclusion that both individuals were yelling and very likely swearing at each other. No Employer rationale was offered up as to why Johnson also was not disciplined and that nonaction leaves a due process consideration. If the same actions warranted discipline (after dismissing the "scared" aspect) both individuals should have received some discipline.

It is also troubling that no other witnesses testified on Grievant's behalf, however, the preliminary review in cases like this is a careful examination of the Employer's evidence and witnesses and they helped Grievant as much as if he had other individuals testifying on his behalf.

All of this boils down to a final analysis that the Employer does not have sufficient clear and convincing evidence to justify the Grievant's termination. Perhaps some discipline is warranted, but when compared with an equivalent very loud yelling argument action by a supposed role-model supervisor not receiving any discipline this presents a challenge. Nothing can be done about Johnson's lack of discipline; only Grievant's discipline can be considered in the light of receiving dissimilar and excessive discipline. As the Hearing progressed I was watching for some apology from the Grievant, some contriteness, some awareness that regardless of Johnson's yelling or alleged "disrespectful" behavior toward Grievant that he was or is now aware that his actions were wrong, should not have occurred and would not be repeated. Grievant's testimony maintained his denials of yelling and swearing but he did add that if reinstated, he "would not yell, scream or swear no matter how tired" he might be; and having been "raised as a Christian person would apologize if the other person felt wronged, felt that way."

Is there support for a lower level of progressive discipline than discharge such as a Category 2 charge?

The Union argues:

51. "While general principles of labor arbitration support the use of progressive discipline in Mr. Groce's case, the disciplinary policies published by St. Therese itself also require it.

The Coaching and Counseling policy places Groce's alleged actions firmly among the violations it deems "Category 2" which "will be cause for progressive discipline...."⁸⁹ Among the examples of listed are: "Leaving the immediate work area... for purposes of performing activities not directly related to job duties...."; "Failure to maintain acceptable standards of respect for others..."; and "Creating or contributing to disorderly... conditions...."⁹⁰

If Groce did, as alleged, yell and swear at Johnson, his actions would inhabit the three examples above. He is, in essence, accused of leaving his assigned work area to disrespectfully contribute to a disorderly condition. His alleged violation should therefore be seen as a Category 2 violation and thus be eligible for progressive discipline. Since he had no formal disciplinary actions in his record, he should have received a lower level of discipline. "

The tolerance the Employer has shown with lesser matters in Grievant's record, the restraint shown to use a coaching/counseling to address areas needing correction for Grievant's behavior have been successful in the past, and there is no reason to believe all parties will not be equally successful with restraint for this matter. Grievant has shown the ability to listen to management's desire to improve his work performance, be a valuable member of the

⁸⁹ See Un. Ex. 24, SEIU0108, *et seq.* While it allows discharge for a first Category 2 offense in certain circumstances, yelling at a coworker is not among them.

⁹⁰ *Id.*, SEIU 0109-0110.

workforce, and do high quantity and quality of work, and Grievant will be given this chance again. His record will be modified to remove the termination, order reinstatement and have a one week Suspension imposed.

Therefore, based on the entire record, including the above analysis, I find:

ORDER AND AWARD

The Union Grievance is partially **SUSTAINED**, the termination is overturned; Grievant's record will be cleared of that action. Grievant's record will show a One Week Unpaid Suspension for a Category 2 violation of:

- Leaving the immediate work area for purposes of performing activities not directly related to job duties;
- Failure to maintain acceptable standards of respect for others; and
- Creating or contributing to disorderly conditions.

The Suspension will be noted as served from the week of August 11, 2023 through August 17, 2023.

The Employer, Grievant with his Union shall undertake the following actions:

First, his employment will reinstated, including his seniority status, pay rate (including any newly negotiated rates of pay), and preferred schedule;

Second, he shall be awarded back pay from August 11, 2023 to the date of his reinstatement, which shall occur within ten business days from the date of this order.

Grievant's back pay award should be calculated at a rate of \$23.00 per hour for forty hours of normal work per week. No overtime back pay will be awarded.

Third, his PTO balance of 200 hours should be reinstated.

Fourth, Grievant shall be awarded all contributions St. Therese would have made to his Social Security and retirement accounts which would have been made had his employment continued throughout the period between his discharge and reinstatement.

Fifth, on Grievant's first day of return to work he shall review all Employer policies and resign acknowledgements for each policy. He will also review his last Performance Evaluation with Rosie Murungi, Dining Room Manager.

Sixth, during his first days of return to work the Employer shall schedule and Grievant shall undertake any missed trainings during his absence.

Finally, if the Employer has an Employee Assistance Program the Employer shall provide Grievant with its contact information, copying the Union.

Jurisdiction is retained to oversee the full accomplishment of this Award and Order.

Dated this 16th day of June 2024 at Plymouth, Minnesota.



STEVEN G. HOFFMEYER
ARBITRATOR