#11

IN THE MATTER OF THE ARBITRATION	)	
	)	
	)	
Between	)	**FMCS Grievance Case No. 13-58250-6**
	)	**Grievant: Julie Whitney-Scott**
	)	**GRIEVANCE: Suspension**
OHIO CIVIL SERVICES EMPLOYEES ASSOCIATION, AFSCME LOCAL 11, AFL-CIO	)	
	)	
And	)	
	)	
THE FRANKLIN COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES	)	

OPINION AND AWARD

APPEARANCES:

On Behalf of the Union:

Tim Watson
Staff Representative
Ohio Civil Service
Employees Association
AFSCME - Local 11, AFL-CIO
390 Worthington Road – Suite A
Westerville, Ohio 43082-8331

On Behalf of the Employer:

Scott J. Gaugler
Assistant Prosecuting Attorney
Civil Division
Franklin County
Prosecutor's Office
373 South High Street
Columbus, Ohio 43215

ARBITRATOR: Jules I. Crystal

I. STATEMENT OF THE ISSUES

The parties stipulated that the issues to be resolved are as follows:

> Did the Franklin County Department of Jobs and Family Services have just cause to issue a five-day suspension to the Grievant, Julie Whitney-Scott, and if not what is the appropriate remedy?

II. RELEVANT CONTRACT TERMS

Section 7. MANAGEMENT RIGHTS

...[T]he Department retains the right to determine Departmental policies and procedures, and to manage the affairs of the Department in all respects.

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G. To direct and supervise employees and to establish and/or modify performance programs and standards, methods, rules and regulations, and policies and procedures applicable to Departmental Employees.

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I. To transfer, discharge, remove, demote, reduce, suspend, reprimand or otherwise discipline employees for just cause, except as specifically limited by the Contract.

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Section 10. WORK RULES

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10.02 - The parties recognize that it is the philosophy of the Employer that, to the extent possible, employees will be put on notice, in writing and in advance of any alleged violations of the conduct expected of them by the Employer and by their fellow workers...

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Section 16. CORRECTIVE ACTION

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16.01 - No classified employee member of the bargaining unit, shall be reduced in pay or position, suspended, discharged, or removed except for just cause.

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Section 37. ARBITRATION

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37.04 - ...It is expressly understood and agreed that the arbitrator shall be without jurisdiction and authority to detract from, alter, add to or otherwise amend in any respect any of the provisions of this Contract or any supplements of appendices thereto, nor shall the arbitrator find any grievance to be meritorious unless first finding that a specific provision of this Contract has been violated as alleged and that the arbitrator has jurisdiction over the matters grieved. It is expressly agreed and understood that the jurisdiction and authority of the

arbitrator shall be limited to the interpretation, application and determination of the provisions of this Contract and any supplements and appendices thereto, as limited by the provisions of this Contract…

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(Jt. Exh. No. 1).

III. RELEVANT EMPLOYEE HANDBOOK PROVISIONS

Policy Number: BOC-80.01 Discipline

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When an employee's conduct interferes with the orderly and efficient operation of the County, or when an employee's performance does not meet the expectations or requirements of the job, agency management may take corrective action. Generally, the Board of Commissioners' favors progressive discipline, which provides the opportunity for employees to improve unacceptable behavior and avoid the consequences of continued misconduct. However, the decision to use progressive discipline is solely within the discretion of agency management. Certain offenses, by their nature, may be severe enough to require immediate removal from employment without abiding by progressive discipline steps. Extenuating circumstances may moderate a supervisor's recommendation, resulting in less harsh disciplinary action.

When appropriate, supervisors are encouraged to use corrective counseling as the preliminary means of providing notice that conduct or performance does not meet expectations.

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Progressive Discipline Steps

Oral Reprimand (documented)

Written Warning

A Three (3) Day Suspension without pay

Your appointing authority may require you to report to work to serve the suspension. If so, you will continue to be compensated at your regular rate of pay for hours worked. The disciplinary action will be recorded in your personnel file as a suspension without pay for the purposes of recording progressive disciplinary actions.

A Five (5) Day Suspension without pay
Removal

The above is an example how progressive discipline works. The Board of Commissioners may vary the discipline steps based upon the circumstances involved.

(Jt. Exh. No. 2).

IV. STATEMENT OF THE CASE

The Franklin County Department of Job and Family Services (hereinafter "FCDJFS," "Agency" or "Employer") and the Ohio Civil Services Employees Association, Local 11, AFSME, AFL-CIO (hereinafter "OCSEA" or "Union") are parties to a collective bargaining agreement (hereinafter "Contract" or "Agreement"), wherein the Employer recognizes the Union as the exclusive bargaining representative for all "full-time and regular part-time employees of Franklin County Department of Job and Family Services in the classifications listed in Appendixes A, B and C" of the parties' collective bargaining agreement (hereinafter "Agreement"). (Jt. Exh. No. 1).[1] One of these classifications is that of "Case Manager," the position occupied by Julie Whitney-Scott (hereinafter "Whitney-Scott" or "Grievant").

The instant arbitration results from a five-day suspension issued to the Grievant as a result of an altercation with a customer, Deonna Starks (hereinafter "customer"), on January 16, 2013.[2] On April 26, following the Employer's investigation of the incident, the Agency's Human Resources Officer, Mary Ann Brooks, sent the Grievant a "Disciplinary Suspension Letter" advising her of her suspension, which was served on May 6 through May 10. On May 9, the Union filed a grievance on behalf of Ms. Whitney-Scott seeking rescission of the suspension, asserting that the Employer did not have just cause to take this action. Upon review, the Employer sustained the suspension. (Jt. Exh. No. 3).

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[1] The parties agreed that the grievance herein arose under the terms of the Agreement, the effective dates of which were April 1, 2011, through March 31, 2014.

[2] Unless otherwise indicated, all dates herein refer to 2013.

As a result of the parties' respective positions, an arbitration hearing was conducted before the undersigned Arbitrator on January 21, 2014, in Columbus, Ohio. The parties were afforded the opportunity to present their evidence, including the examination and cross-examination of witnesses. No formal transcript of the proceedings was made. Although both parties were given the opportunity to submit written post-hearing briefs and/or statements, only the Union provided a written "Closing Statement." On April 11, 2014, the record was closed.

V. SUMMARY OF RELEVANT EVIDENCE

A. General Background and Summary of the Key Facts

The Employer is a county, state and federally-supported agency responsible for basic financial, medical and social services programs -- all of which are "made available to ensure that no one is forced to go without the basic essentials of food, clothing, shelter, medical care and necessary life sustaining services because of lack of resources."[3] In addition, the Agency "provides education and training for public assistance customers along with the necessary support services to help them find quality jobs and move from welfare to independence." *Id.*

The Grievant has been working for FCDJFS since August 2005. She was employed at the Agency's Northeast Center until August 2011, at which time she began work at the East Center under Supervisor Comfort Kenneh. In November 2012, she transferred from Ms. Kenneh's unit to Supervisor Pamela Ferguson Hall's unit, and has been working in this unit ever since.

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3 FCDJFS website @ jfc.franklinohio.gov/about

The instant grievance results from a single incident that took place on January 16 when the customer came to the Agency seeking assistance. After speaking with several FCDJFS representatives, the customer ultimately met with the Grievant in a conference room. It was there that the two individuals engaged in a discussion which led to heated words and eventually to physical contact. The Grievant called out to security, at which time security guards Alan Johnson and Joshua Wiggins entered the room. While the parties differ on who physically touched whom and what precipitated the contact, suffice it to say that the matter was diffused upon arrival of the security team. Although police were called per the Grievant's request, neither the Grievant nor the customer filed formal charges.

Immediately following the incident management personnel spoke with the customer, and also later interviewed Mr. Johnson and Mr. Wiggins, as well as other Agency personnel who were involved with the customer on the date of the incident. Based on its investigation, the Agency determined that in addition to being discourteous to the customer, as evidenced by the Grievant's remarks and raised voice, the Grievant also initiated the physical contact with the customer. Management determined that this conduct warranted a five-day suspension. Although the original discipline imposed (per a January 29 memo from Center Director Michelle Lindeboom to Assistant Director Kathy Hoeffer) consisted of a *reprimand* to the Grievant for "Discourteous Treatment of Public and/or Fellow Employees" and "Immoral Conduct," *and* a "five day in-house suspension" (*i.e.*, *with* pay) (Jt. Exh. No. 4, pp 39-42), this discipline was modified (per a February 7 memo) such that the Grievant's suspension became one *without* pay. (Jt. Exh.

No. 4, pp. 35-37).[4] The revised discipline also required that the Grievant contact the United Behavioral Health Employee Assistance Program "to engage in active participation and complete the program designed by the EAP as well as successfully complete an anger management class through EAP." (Jt. Exh. No. 4, pp. 36-37).

B. The Parties' Contentions[5]

1. The Contentions of the Employer

During the afternoon of January 16, the customer came to the Agency's East Center and spoke with Customer Support Specialist Kimberly Williams. During her discussion with Ms. Williams, the customer became frustrated with the responses to her questions and asked to see someone who could answer her inquiries and provide her with assistance on her case. Ms. Williams thereafter contacted Unit supervisor Kenneh and asked her to review the customer's case. As a result of her review, Ms. Kenneh determined that the Grievant was the last Agency representative to have "worked the case," and she therefore sent the Grievant an email directing her to meet with the customer. Although Ms. Kenneh initially indicated to the Grievant that the customer had "cussed out" Ms. Williams, she thereafter corrected herself and said that the customer had in fact not sworn at Ms. Williams.

Unaware that Ms. Williams had retracted her comments about the customer having "cussed" her out, the Grievant told her immediate supervisor, Ms. Hall, that she

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[4] The Union noted that the "Immoral Conduct" *charge* was removed following the 3rd step grievance discussion. This finding, however, was still noted as a reason for the suspension on the revised (second) disciplinary notice.

[5] The parties introduced a number of documents consisting of the grievance data and internal administrative reports. Neither party objected to the introduction of these documents, all of which appear to have been a part of the Agency's personnel and investigative files. Although the undersigned views the best evidence as that which would be presented by live witnesses, he will treat the submitted documents as *business records* and assume that the information set forth therein was introduced for the purpose of proving the truth of the matters asserted therein.

did not want to meet with the customer for that reason. After Ms. Hall made clear to the Grievant that the customer had in fact not sworn at Ms. Williams, she directed the Grievant to speak with the customer. The Grievant thereafter met the customer in the lobby and escorted her to the conference room to discuss her (the customer's) case.

Security guards Johnson and Wiggins were on duty that afternoon and were stationed at the guard podium in the lobby area near the conference room. Mr. Johnson indicated in his report to management that on the afternoon of January 16 he saw the Grievant take a customer into the conference room. Shortly thereafter, through the partially-opened door, he heard the two women arguing. When he heard the Grievant tell the customer "if you would be quiet and listen," he walked closer to the conference room door and looked in on the two individuals. When the voice level decreased, Mr. Johnson returned to his regular podium post in the hallway. Shortly thereafter, however, Mr. Johnson once again took notice of loud voices coming from the conference room, after which he heard the Grievant call out for a security guard. When Mr. Johnson entered the room, he saw the Grievant with her hands clenched on the customer in what he termed an aggressive position." Mr. Johnson pulled the two women apart and heard the Grievant yell "get her out of the building," followed by a request to file a police report.[6]

Security Guard Wiggins also reported to management his recollection of the events that afternoon, which were similar to what Mr. Johnson recalled, at least with respect to the conversation that led the guards to look in on the two individuals. He also heard the Grievant call for a guard. He followed Mr. Johnson into the room, at which time he watched as Mr. Johnson pulled the two individuals apart. While Mr. Wiggins was unable to identify which individual grabbed the other first, he did hear the Grievant

[6] As it turned out, neither the Grievant nor the customer chose to file charges.

say that the police should be called. When he spoke with the customer afterwards, she acknowledged that she was upset about her case and admitted swearing at the Grievant and "getting in her face," but she asserted that it was the Grievant who grabbed her first and that she was merely defending herself.

The Agency's Administrative Officer, Denise Hughes-Curtis, spoke with the customer following the incident and saw that she was emotionally shaken. The customer, who admitted to Hughes-Curtis that she called the Grievant a "bitch," reported that she was upset because the Grievant had repeatedly interrupted her as she was talking. According to the customer, the Grievant made the initial physical contact.

Based on the documentation and the information provided to management, the Agency determined that the Grievant did in fact show discourteous treatment toward the customer. Moreover, the Grievant, who admitted to raising her voice, went against the Agency's policy by engaging in physical contact with the customer. In addition, Center Director Lindeboom had made it known to the staff of the East Center that no one was to interview customers in the conference room. Management thus determined that in light of the Grievant's conduct and her failure to follow the Agency's procedures, the Employer had just cause to discipline the Grievant with a five-day suspension.

2. The Contentions of the Union

The Grievant is a long-term employee who serves a difficult public clientele and is under stress on a regular basis. Notwithstanding the Agency's reliance on testimony indicating that co-workers found the Grievant difficult to get along with, there is nothing in the Grievant's personnel record indicating that she was ever disciplined for her work performance or in her dealings with fellow employees.

Security Guards Alan Johnson and Joshua Wiggins provided written statements, with Mr. Wiggins indicating that Mr. Johnson entered the conference room first and that he had to separate the customer from the Grievant. He heard the Grievant shout out that "she [the customer] needs to go, she put her hands on me." Before the customer told the guards that the Grievant had grabbed her, the customer admitted that she "got in her [the Grievant's] face and called her a bitch." (Jt. Exh. No. 4, pp. 2-4), and that she was "cussing" at the Grievant just prior to the altercation. (Jt. Exh. No. 4, p. 29).

The Grievant's testimony as to the incident was unwavering. While standing in the conference room the customer was becoming increasing angry, finally asserting to the Grievant, "Bitch, you don't have to help me," thereupon pushing her chest up against the Grievant, causing the Grievant to fall against the door frame. Moreover, the customer grabbed the Grievant's wrist, causing red marks that required medical attention, resulting in an *approved* Workers Compensation claim (Union Exh. No. 2). Because neither of the security officers testified in the instant proceeding, the Union was not afforded an opportunity to question them about the incident or the inconsistencies in their statements. Ms. Lindeboom's testimony provides no explanation as to the basis of management's reliance on the two statements. Also, the fact that it was the Grievant who called out for help supports the Grievant's testimony that she felt threatened by the customer.

It is significant that the Agency failed to follow progressive discipline. Initially the Agency's discipline was to be a five-day suspension *with* pay. This course of action was memorialized on a document dated January 28 and signed by the Union's president, Lynn Morris, the Grievant, and Center Director Lindeboom. ((Jt. Exh. No. 4, pp. 37-38). A little more than a week later, on February 7, for no reason that is set forth in the record,

the Grievant was asked to sign a new document that called for a suspension of five days, but *without* pay -- the discipline eventually imposed on the Grievant.

In light of the consistent testimony of the Grievant, the absence of testimony from any of the witnesses that were directly involved in what took place, the positive work record of the Grievant and the Agency's failure to apply progressive discipline, the discipline imposed on the Grievant should be rescinded and the Grievant made whole for any lost wages and benefits.

VI. DISCUSSION AND FINDINGS

At the outset, the undersigned notes that of all the witnesses who testified in the instant case, only one of them -- the Grievant -- presented first-hand testimony regarding what took place inside the conference room. During the Agency's case, in addition to presenting witnesses who testified about the Grievant's overall work performance and the Employer's investigation of the January 16 incident, the Agency introduced into the record handwritten notes and typed summary reports describing the concluding moments of the altercation as reported by the two security guards. Although the information regarding the latter has probative value, one cannot discount the fact that the Union was unable to question either of the guards as to exactly what was heard and observed. The Grievant, on the other hand, presented live testimony regarding what took place in the conference room on this day, and accordingly, was subject to cross-examination by the Employer's counsel. In evaluating the parties' respective arguments, this consideration is one of several that bear on the ultimate decision of the undersigned.

While security guard Johnson's report indicates, among other things, that he observed the Grievant's hands "clenched" on the customer, and described the customer as

being in a "defensive" position, his statement indicates that he walked in on the two individuals as they already were in a "tussle." Security guard Wiggins's statement includes an acknowledgement that he could not identify who grabbed whom first. He also notes that he heard the Grievant call out to the guard, and that the customer later admitted to having "cussed" at the Grievant. Thus, while both guards observed two individuals in a heated discussion, as well as physically touching and grabbing one another, neither saw what precipitated the altercation, or who placed her hands, or any other portion of her body, on the other first. Other evidence establishes that the customer, while denying that she grabbed the Grievant -- asserting that it was the Grievant who grabbed her and pulled her out of the doorway -- admitted to Agency personnel, including Ms. Lindeboom and Ms. Hughes-Curtis, that she (the customer) *got into the face* of the Grievant and that she called the Grievant a "bitch."

The Grievant, who as indicated earlier was the only witness to what happened in the conference room, provided a clear and steadfast account of the events, consistent with the statement she had provided to the Agency on January 16. (Jt. Exh. No. 4, pp. 43-44). The Grievant testified as to her earlier reluctance to meet with the customer in light of the information the Grievant had been given about the customer being angry and "cussing out" Ms. Williams. After talking with Ms. Kenneh and the Grievant's direct supervisor, Ms. Ferguson-Hall, the Grievant agreed to meet with the customer. The Grievant escorted her to the conference room where the customer complained that she had been "given the run around for six months." The Grievant credibly testified that when she explained to the customer the additional information that she (the customer) was required

to provide -- including data pertaining to the customer's new baby, of whom the Grievant had been unaware -- the customer became even angrier and began to curse.

Although the Grievant tried to explain to the customer what additional information was needed, the undisputed evidence indicates that the customer's increased frustration and anger led her to say in a loud voice, "Bitch you don't have to help me," after which the customer pressed her chest up again that of the Grievant. This resulted in the Grievant being pushed against the door frame and thereafter calling out for security. Other evidence establishes that the customer called the Grievant a "bitch" a second time, and thereafter, according to the Grievant, grabbed the Grievant's wrists.[7] While the evidence in the record does not establish with certainty whether the Grievant broke free on her own or whether the security personnel were required to physically disengage the two individuals from one another, the end result was the conclusion of the meeting and security escorting the customer from the conference room.

As for the Agency's evidence that co-workers did not find the Grievant easy to work with, and that she often agued with customers, co-workers and supervisors, there is nothing in the record indicating that the Grievant was in any way disciplined by the Agency for her past conduct or work performance, or that any supervisor even talked with her about *improving* her interpersonal skills. Thus, although the Agency's notes (Jt. Exhibit No. 4, pp. 45-55) describe a number of perceived inadequacies -- case manager Church believed that the Grievant's "actions and combative attitude are causing problems," supervisor Ferguson-Hall felt that the Grievant "does not always listen well

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[7] The Grievant asserts that the customer's actions caused a bruise to her left wrist, resulting in a claim before the Ohio Industrial Commission. (Union Exh. No. 2). While the form submitted indicates that the claim was "allowed," inasmuch as the evidence in the instant record is not totally clear that the injury for which benefits were claimed resulted from the customer's "grabbing" of the Grievant's wrist, the undersigned is not relying on this claim as a basis for his decision herein.

and often talks to others inappropriately," Center Director Lindeboom indicated that the Grievant "is vocal, outspoken, and often speaks to others in an unprofessional tone," and administrative officer Hughes-Curtis noted that the Grievant has had "repeated issues" with her former supervisor and other case managers -- there is no evidence that the Grievant was disciplined or spoken to as a result of any of these purported shortcomings. Moreover, the record herein indicates that notwithstanding their negative assessment of her interpersonal skills, Ms. Church, Ms. Ferguson-Hall, and Ms. Lindeboom, all were of the opinion that the Grievant was a "good" case manager.

As for the Agency's position that the staff had been told not to use the lobby conference room, the evidence does not establish that this prohibition was disseminated and/or made clear to all of the case workers. The fact that Clerical Support Supervisor Henrietta Fields issued an email on January 15 to all East Supervisors, with a separate "Cc" addressed to Ms. Lindeboom and Ms.Hughes-Curtis, stating that the conference room was one of two *preferred* areas in which to meet with customers, supports a finding that the Grievant's actions in escorting the customer to the more private setting of the conference room was a reasonable course of action under the circumstances.[8] The undersigned finds unpersuasive the Agency's contention that the directive contained in the January 15 email was ineffective. Thus, in the absence of evidence that there was clearly stated and promulgated prohibition on the use of the conference room by case managers, and in light of the Grievant's credible denial as to being advised of such

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[8] The pertinent email communication, among the various string emails messages contained on the unmarked exhibit, reads: "Please remind your staff that customers should not be addressed at the front desk and neither should they be in the work area of the front desk staff while doing so. They should either go to the conference room or take them through the double doors. This includes **all** staff. Thank you in advance for your cooperation in this matter." (Emphasis in original).

prohibition, the undersigned finds it reasonable that the Grievant assumed that meeting with the customer in the conference room was appropriate.

Key provisions of the parties' Agreement and the Agency's Employee Handbook also bear on the actions of the Agency in this matter. The undersigned cannot ignore provisions of both documents which make clear the understanding of the parties -- *and* the reasonable expectation of employees -- that in matters where job performance and/or employee conduct is in question, the Agency should provide *notice* to the employee of the work or conduct deficiency; and if punishment is necessary, the Agency should utilize *progressive discipline*, or have a sound reason for doing otherwise. The undersigned must give consideration to the clear language that is set forth in both the Contract and the Employee Handbook. The Agreement's provision pertaining to *Work Rules* provides, *inter alia*, "that *to the extent possible*, employees will be put on notice, in writing and in advance of any alleged violations of the conduct expected of them by the Employer and by their fellow workers." (Emphasis added.) (Jt. Exh. No. 1, Section 10.02). Moreover, the Employee Handbook notes that it is the *preferred* course of action -- "provid[ing] the opportunity for employees to improve unacceptable behavior and avoid the consequences of continued misconduct." (Jt. Exh. No. 2, BOC-80.01, p. 97). The undersigned notes that no evidence was presented as to the reason the Agency did not feel the need in this instance to follow through and take action consistent with the intention of these provisions. The record in this case contains no evidence explaining or otherwise supporting a decision to reject progressive discipline.

While the *Discipline* policy (Policy Number: BOC-80.01) states that the "decision to use progressive discipline is solely within the discretion of agency

management," this provision cannot be considered in isolation. Not only must it be considered in conjunction with the other above-noted terms of the Agreement and the Employee Handbook, it must be viewed in conjunction with the limiting language contained in Policy Provision BOC-80.01: "When appropriate, supervisors are encouraged to use corrective counseling as the *preliminary* means of providing notice that conduct or performance does not meet expectations." (Emphasis added).[9]

Finally, and most significantly, the undersigned cannot ignore the *just cause* language that appears in the very first paragraph of the Agreement's "Corrective Action" provision. (Jt. Exh. No.1, Section 16.01). This provision makes clear that no employee will be suspended "*except* for just cause." (Emphasis added.) Even if there were no other limiting language in the Contract or the Employee Handbook, this provision effectively places cautionary brakes on the Agency taking discretionary action with respect to imposing discipline on an employee.

In the instant case, while the documentation and the testimony presented at hearing suggest that the Grievant had shortcomings with her interpersonal skills, the

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[9] Arbitrator Harold Curry confronted considerations similar to those at issue here in *American Federation of State, County, and Municipal Employees, AFL-CIO, Local No. 3766 and Indianapolis Housing Agency*, 2003-AAA-381-007, 2004 BNA LA Supp. 101045 (2004). The employer in that case argued that it had reserved in its employee policy handbook the right to impose, "in its sole discretion," discipline on an employee that it deemed appropriate. The arbitrator refused to accept the employer's argument that it could rely on the handbook's *sole discretion* language to take whatever action it deemed appropriate against an employee. Arbitrator Curry remarked as follows:

> While this language is contained in the policy, it provide[d] no objective standard for the Employer to use when determining the appropriate penalty for an incident. To be sure, this language is in conflict with the progressive discipline policy because it has the potential to defeat every-thing progressive discipline stands for. Moreover, not utilizing a progressive discipline opportunity could be inconsistent with the principle of just cause.

In reassessing (and thereupon reducing) the penalty imposed by the agency, Arbitrator Curry included in his rationale his finding that "[t]here existed no reasonable objective basis for the Employer to discipline the Grievant based on its 'sole discretion' as opposed to applying progressive discipline." *Id* at pp. 8-12.

evidence does not support a finding that just cause existed for the Agency to by-pass progressive discipline and suspend the Grievant without pay. Moreover, the record does not set forth an adequate rationale as to why the facts of what took place between the customer and the Grievant, as presented by an 8½ year employee, who does not appear to have received any discipline during her tenure with the Agency, were discounted.

Although reliance was placed on the reports of the two security guards who witnessed at least the conclusion of the incident, neither was called as a witness. The inability of the Union to cross-examine these individuals on such an important aspect of the Employer's case, and the inability of the undersigned to make true credibility determinations and comparisons, does in fact have a bearing on the merits of the instant grievance. Thus, notwithstanding all the reported shortcomings in the performance of the Grievant's duties over the years, there is nothing in the record that convinces the undersigned that the incident in the conference room did not happen in the manner described by the Grievant.

In the instant case, the Employer is saddled with the initial burden of proof. That is to say, it must come forward and make a showing with good and sufficient evidence to support its decision to mete out a five-day suspension to the Grievant. The undersigned finds that the record does not contain such a showing.[10]

VII. AWARD

The grievance is sustained. The undersigned finds that in contravention of the Agreement, the Employer did not have just cause when it issued a five-day suspension

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[10] In light of the undersigned's findings herein, and the absence of any claim by the Agency that the Grievant engaged in *other* conduct warranting discipline (other than its contention that the Grievant should not have used the conference room to meet with the customer), there is no basis to consider whether reduced discipline (per the progressive disciplinary steps appearing in the Employee Handbook) would have been appropriate.

without pay to the Grievant as result of the incident with the customer on January 16. Accordingly, the undersigned directs the Agency to remove the discipline from the Grievant's file and make her whole for all losses resulting from this action.

DATED: May 23, 2014

/s/ Jules I. Crystal

Jules I. Crystal, Arbitrator