IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION AND AWARD
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OREGON PUBLIC EMPLOYEES UNION	)	
	)	
"LOCAL 503" OR "THE UNION"	)	
	)	
AND	)	
	)	
STATE OF OREGON, BUREAU OF LABOR AND INDUSTRIES -(BOLI)	)	
	)	Savita Bijlani
"BOLI" OR "THE EMPLOYER"	)	GRIEVANCE

HEARING:
September 12, 13, 14, 2011
Portland, Oregon

HEARING CLOSED:
November 8, 2011

ARBITRATOR:
Timothy D.W. Williams
830 NE Cesar Chavez Blvd.
Portland, OR 97232

REPRESENTING THE EMPLOYER:
Linda Kessell, Attorney
Gabriela Downey, BOLI, Manager Employee Services

REPRESENTING THE UNION:
Giles Gibson, Attorney
Savita Bijlani, Grievant
Debbie Sluyter, President Sub Local 839
Kerry Johnson, Steward
David Roth, Steward

APPEARING AS WITNESSES FOR THE EMPLOYER:
Amy Klare, BOLI Administrator
Leticia Ellis, Manager Intake and Support
Stan Backner, Acting Network Facilitator

Donald DeMont, admin Specialist 2
Stefanie Plebanek, Investigator Civil Rights Div.
Anne Lewis, Private Para-legal
Gabriela Downey, BOLI, Manger Employee Services
Deb Bogart, DAS
Doug McKean, BOLI, Deputy Administrator

APPEARING AS WITNESSES FOR THE UNION:
Savita Bijlani, Grievant
Debbie Sluyter, President Sub Local 839
Kerry Johnson, Involved Steward
David Roth, Involved Steward
Mac Bijlani, Fact witness, Grievant's husband

EXHIBITS

Joint

1. Collective Bargaining agreement, June 30, 2011

EMPLOYER

1. Collective Bargaining Agreement Excerpt.
2. Grievance Documents.
3. Dismissal from State Service, 10-19-10.
4. Office Specialist 2 Position Description.
5. All Staff Meeting Records, 10-29-08 and 12-11-09.
6. Work Plan, 5-3-07.
7. Training Plan – Work Plan, 2-25-08.
8. Training Plan – Work Plan, 3-11-08.
9. Letter of Instruction, 6-1-08.
10. Training Update, 3-17-08.
11. BOLI Code of Conduct signed 3-17-06.
12. BOLI Code of Conduct signed 9-26-08.
13. Discrimination and Harassment Free Workplace Signed Acknowledgment.
14. DAS Maintaining a Professional Workplace Policy.
15. BOLI Respectful and Professional Workplace Policy.
16. Performance Evaluation, 9-26-08.
17. Written Reprimand, 10-15-08.
18. Three Month, One Step Pay Reduction Letter, 4-6-09.
19. Final Written Reprimand, 4-20-10.
20. Mail from Ellis re Grievant's Cubicle Set UP, 4-6-10.

21. Memo from Ellis to CRD Support Staff re Cubicle Reassignment, 8-25-10.
22. Ellis' Email re Grievant's Cubicle Reassignment, 8-27-10.
23. Witness Statement re Cubicle Reassignment, 10-6-10.
24. Notes from Ergonomic Assessment, 9-1-10.
25. Letter to Grievant From Ellis re Cubicle Adjustments, 9-8-10.
26. Ellis Response to Grievant Re Ergonomic Assessment, 9-8-10.
27. Notes from Investigatory Meeting with Grievant, 9-16-10.
28. Statements of Events from Donald DeMond and Grievant's 2-25-10 Assessment.
29. Statement of Events from Stan Backner, 9-28-10.
30. Meeting Notes re Incident Grievant did not Send Out Closure Letters, 9-23-10.
31. Emails re Contact with Complainant's Attorney about Closure Letters, 9-23-10.
32. Statement of Events from Stephanie Plebanek about Closure Letters and SunTrack printout, 9-24-10.
33. Statement of Events from Anne Lewis, 9-16-10.
34. Documentation re Break Schedules, 2008-2010.
35. Letter re Initiation of Pre-dismissal Process, 10-1-10.
36. Memo from Larry Williams to Amy Klare re Pre-dismissal Notice, 10-13-10.
37. BOLI Mission Statement from Website.
38. Workers Compensation, 5/5/08.
39. Court Complaint, 0910-15244.

UNION

1. Settlement Agreement, 7-23-07.
2. Report, Ergonomics workstation evaluation, 11-9-06.
3. K. Johnson to G. Downey, email, 1-13-09.
4. Circuit Court Findings & Conclusions, 1-11-11.
5. S. Bijlani "Hi Team" sign,1-15-09.
6. Cubicle Photo 1.
7. MacWilliamson-Bijlani emails, 11-03-07 thru 11-28-07.
8. MacWilliamson-Bijlani emails,7-23-07.
9. MacWilliamson-Bijlani emails,11-01-07.
10. Cubicle work surface sketch.
11. Cubicle photo 2.
12. Cubicle photo 3.
13. Excerpt, Steelcase Brochure, Adjustable Worksurfaces.
14. Excerpt, Steelcase Product Specs, Adjustable Worksurfaces.
15. Sample work emails.
16. Cubicle Photo 3.
17. L Ellis 1-15-10 email.

18. L. Williams, Union Response to Proposed Discipline, 4-6-10.
19. Excerpt L. Ellis Deposition, 7-29-10.
20. Letter of Recommendation, 12-20-02.
21. Letter to Da Gardner, 5/21/07.

BACKGROUND

The State of Oregon, Bureau of Labor and Industries (hereafter "the State" or "the Employer") and SEIU Local 503, OPEU (hereafter "SEIU" or "the Union") scheduled a labor contract grievance dispute for hearing. Prior to the hearing, the State moved to dismiss the case and moved to bifurcate. By a letter decision issued on August 31, 2011 the Arbitrator denied both motions and affirmed the start of the hearing for Monday, September 12, 2011.

A hearing was held before Arbitrator Timothy Williams in Portland, Oregon on September 12, 13 and 14, 2011. At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made an audio recording of the hearing in a digital format as a part of his notes. A copy of the recording was sent to each Party as an attachment to an e-mail message.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties

chose to submit written briefs and the briefs were timely received by the Arbitrator. Thus the award, in this case, is based on the evidence and arguments presented during the hearing and on the arguments found in the written briefs.

SUMMARY OF THE FACTS

The grievance in this case is between SEIU Local 503 OPEU and the State of Oregon, Bureau of Labor and Industries. The Parties were bound by a Collective Bargaining Agreement, under which the present grievance arose. The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

The Grievant, an Office Specialist 2, worked for BOLI for 24 years, from 1986 until her termination on October 19, 2010. At the time of her discharge, the Grievant was or had been responsible for assorted administrative duties for the Division's Administration office, such as maintaining administrative files and records, including personnel and contract records, scheduling appointments and arranging travel and lodging for management staff.

Her essential duties involved processing civil rights complaints and other duties of the Civil Rights Division of BOLI.

All of her essential duties required her to provide internal and external customer service.

By letter dated October 19, 2011 (S 3) the Employer terminated the Grievant's employment based on what it claimed were four different incidents including insubordination and unprofessional behavior, refusal to follow instructions, failure to perform her duties, and refusal to work in a safe manner, all in violation of BOLl's policies and reasonable expectations. These four incidents occurred within a month of each other and all happened after the Employer had previously issued to her a letter of instruction (S 9), an annual performance evaluation informing her that her performance was not satisfactory (S 16), a letter of reprimand (S 17), a disciplinary pay reduction (S 18), and a final letter of reprimand dealing with similarly deficient behaviors (S 19).

Following an investigation, the Grievant was issued a pre-dismissal letter and provided the opportunity for a pre-dismissal meeting. A written response to the pre-dismissal letter was provided on behalf of the Grievant by the Union (S 36). Ultimately, the Employer was not persuaded by Union arguments and BOLl terminated the Grievant's employment on Oct. 19, 2010.

On October 29, 2010 the Union filed a grievance on behalf of Ms. Bijlani. The grievance claimed that Article 20 had

been violated by the Employer's decision to terminate the employment of the Grievant. The Employer denied the grievance by notice dated October 29, 2010 and the matter proceeded through the remaining steps of the Parties grievance procedure.

The Parties were ultimately unable to settle the matter and the grievance came to be heard by Arbitrator Timothy Williams to be decided on its merits.

STATEMENT OF THE ISSUE

The Parties were able to agree on the following statement of the issue:

1. Did the Employer have just cause for the dismissal of the Grievant, Savita Bijlani?
2. If not, what shall the remedy be?

The Parties stipulated that in the event that the Arbitrator provides a remedy he will retain jurisdiction for sixty (60) days following issuance of his Award to resolve any issues over the implementation of that remedy.

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, 2008 – 2011

ARTICLE 19.1, Personnel records, Section 5, provides in pertinent part that

Material reflecting caution consultation, warning, admonishment, and reprimand shall be retained for a maximum of three (3)

years. Such material may however be removed after twenty-four (24) months, provided there has been no recurrence of the problem or a related problem in that time. Earlier removal will be permitted when requested by an employee and if approved by the Appointing Authority.

ARTICLE 20 – INVESTIGATIONS, DISCIPLINE, AND DISCHARGE

Section 1. The principles of progressive discipline shall be used when appropriate. Discipline shall include, but not be limited to: written reprimands; denial of an annual performance pay increase; reduction in pay*; demotion; suspension without pay*; and dismissal. Discipline shall be imposed only for just cause.

*For FLSA-exempt employees, except for penalties imposed for infractions of safety rules of major significance, no reduction in pay and only suspensions without pay in one (1) or more full work week increments unless or until FLSA restrictions on economic sanctions for exempt employees are eliminated by statute or a court decision the State determines dispositive. Safety rules of major significance include only those relating to the prevention of serious danger to the Agency, or other employee.

ARTICLE 21 – GRIEVANCE AND ARBITRATION PROCEDURE

Section 6.

(f) The Parties agree that the decision or award of the arbitrator shall be final and binding on each of the parties. The arbitrator shall issue his/her decision or award within thirty (30) calendar days of the closing of the hearing record. The arbitrator shall have no authority to rule contrary to, to amend, add to, subtract from, change or eliminate any of the terms of this Agreement. The arbitration will be handled in accordance with the rules of the American Arbitration Association.

(h) The Parties shall split the arbitrator’s charges equally.

Article 85

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Section 2:

All written comments provided by the employee within sixth (60) days of the evaluation shall be attached to the performance evaluation. Performance evaluations are not grievable nor arbitrable under this Agreement *nor shall they be used for purposes of disciplinary action*, layoff an annual eligibility date performance pay increases. *If an employee receives less than a satisfactory evaluation, the Employer agrees to meet with the employee within thirty (30) days of the evaluation to review, in detail, the alleged deficiencies.*

POSITION OF THE EMPLOYER

On October 19, 2010, Grievant was terminated from her employment based on four incidents including insubordinate and unprofessional behavior, refusal to follow instructions, failure to perform her duties, and refusal to work in a safe manner, all in what the Employer views as a violation of BOLl's policies and reasonable workplace expectations.

These four incidents occurred within a month of each other, and after she had first received a letter of instruction, a performance evaluation, a letter of reprimand, a disciplinary pay reduction, and a final letter of reprimand dealing with similar behaviors. In the Employer’s view, the Grievant's conduct demonstrated a continuing disregard for her duties and the individuals who depend on the agency's professionalism in enforcing civil rights laws.

The Employer asserts the conduct demonstrated continued flaunting of her supervisor's directions, the agency's code of conduct, and its basic safety principles. Such conduct was

disruptive to the agency and inconsistent with its mission and responsibilities as a civil rights agency. The Employer believes it has just cause to terminate the Grievant's employment, and that her grievance should be denied. In support of its claim that it had just cause for the discharge, the Employer sets forth a number of different arguments.

First, the Employer references the CBA, which provides that "discipline shall be imposed only for just cause.” The CBA ddoes not define "just cause," the Employers, says, but reminds that when there is no contractual definition, arbitrators typically imply that in general terms, the applicable standard is one of reasonableness. That is, whether a reasonable person, taking into account all relevant circumstances, would find sufficient justification in the conduct of the employee to warrant discharge or some level of discipline.

In applying the "just cause" concepts, the Employer reiterates that arbitrators frequently use a test using the following seven criteria (the seven tests of just cause):

- Notice (of whether the grievant knew or had notice of the employer's rules/standards);
- Nexus (whether the employer's expectations were reasonably related to the job);
- Full Investigation (whether the employer made an effort to discover whether the employee did violate or disobey a rule or order of management);

- Fair Investigation (whether the employer's investigation was conducted fairly and objectively);

- Substantial Evidence of Guilt (whether the grievant engaged in the misconduct);

- Reasonable Under the Circumstances (whether the level of discipline is appropriate to the level of misconduct);

- Comparative Discipline (whether the employer has been consistent in its imposition of discipline on bargaining unit employees).

All of it should be assessed pragmatically, the Employer asserts: "The question must always be asked whether any failures by the employer in this regard made a difference in the action it likely would have taken in the first instance."

Here, the Employer complied fully with Article 20 of the CBA in making its decision to terminate the Grievant's employment. All of the just cause standards were met, and there is no dispute about this element of just cause. Without question, BOLl repeatedly provided Grievant with notice that her behavior was inappropriate and could lead to dismissal. In addition to training on the State and BOLl professional workplace policies and code of conduct, Grievant, as mentioned above, had been given a letter of instruction, a performance evaluation, a letter of reprimand, a pay reduction discipline, and a final letter of reprimand all providing her with notice about expectations for her behavior.

She was also warned that she was not meeting those expectations, and faced the likelihood of progressively severe discipline. The final letter of reprimand, in fact, specifically notified her that "although such continued noncompliant conduct would warrant dismissal from employment as the next step in the disciplinary process, we have decided to give you one last opportunity to demonstrate your suitability for continued employment."

Second, the employer conducted a full and fair investigation. No question has been raised about this element of just cause. The documents and testimony showed that BOLl investigated the incidents fully and fairly including interviewing and gathering statements from witnesses and the Grievant. The Grievant and the Union provided information during the investigation and at the pre-dismissal meeting, which BOLl considered in making its decision. There was no bias in the investigation. As the Union explained in its opening argument, this is not a case about discrimination or retaliation and Grievant put on no evidence of discrimination or retaliation. The only evidence was that BOLl did not take any action against her for discriminatory or retaliatory reasons.

Third, there is substantial evidence the grievant engaged in misconduct. For each incident cited by the Employer, there

are witnesses and evidence supporting BOLl's determination of the facts underlying the dismissal letter. Indeed, the Grievant put on no witnesses other than herself and provided no credible contradiction to BOLl's evidence. The primary thrust of Grievant's case is not that she did not engage in the subject behaviors. Instead, she contends her actions and communications were misunderstood and that she was really just anxious about having her new cubicle set up with the same ergonomic accommodations that she had in her former cubicle. Her own testimony fails to support that contention, however. Her concern was not about ergonomic accommodations – all of her ergonomic accommodations were moved to the new cubicle.

Her concern was about having more files and more shelves than the other cubicles, not for ergonomic reasons but just because she had them before and wanted them now. Grievant's attempt to portray her actions as a simple misunderstanding by someone for whom English is a second language is equally unconvincing. Her own testimony shows that she began learning English at age six. She is college educated with a degree in management and psychology, and was given numerous trainings during her employment at BOLI. She could not begin to do the duties of her job as an Office Specialist without a competent understanding of the English language, and yet she performed those duties for 24 years.

Fourth, the Employer's expectations were reasonably related to the job. Likewise, there is no dispute about this element of just cause. There is no question that the State and BOLl rules and orders were reasonably related to the job– especially for an agency like BOLl with mission that requires a focus on a professional workplace. Additionally, internal and external customer service *is* part of the Grievant's job, and there is no question that the expectation is for professional level interaction with managers, coworkers and clients.

Fifth, the Grievant was treated comparably to other individuals, as the evidence has shown. She was not the only administrative staff being moved in the cubicle reorganization. She was not the only administrative staff for whom an ergonomic assessment was done. Gabriela Downey testified about other employees disciplined for unprofessional or inappropriate behaviors. Unlike the Grievant, however, these other individuals generally improved their behavior after receiving discipline or resigned in lieu of going forward with the disciplinary process. And, unlike those individuals, Grievant repeatedly engaged in unacceptable conduct and received progressive discipline to the point of dismissal.

The Grievant's continued insubordinate, disrespectful, rude and uncooperative behavior that made her unsuitable to

effectively and responsibly carry out her duties with the Civil Rights Division of BOLI. Her actions repeatedly violated Agency and State policies and fell below the minimum standards the Agency reasonably expects from staff. The Agency needs to rely on staff to remain courteous, respectful, professional and able to follow instructions in the performance of job duties crucial to the operation of the Civil Rights Division and BOLI.

Despite the progressive discipline, she never gave an indication that she was willing or able to change her behaviors. She never acknowledged the inappropriateness of her behavior; she blamed any and all errors on other people, and she continued to repeat unprofessional, obstructive and unsafe behaviors. Dismissal was not unwarranted or unjust. It was not based on a single isolated incident, but four separate incidents, which themselves followed a number of incidents of similar conduct occurring during the previous two years. Her termination should therefore be upheld.

POSITION OF THE UNION

This case arises from the Oregon Bureau of Labor's ("BOLI") ill-informed decision to dismiss Ms. Savita Bijlani, a 24-year agency employee, based on a series of incidents of alleged insubordination and/or disrespectful conduct that have been

grossly distorted, mischaracterized, and exaggerated. As explained in arguments below, the BOLI's allegations do not withstand scrutiny and are not supported by the evidence, and it has not proven that it had just cause for Ms. Bijlani's dismissal.

On these grounds and the others presented at hearing and supported by the evidence, the Union requests that the Arbitrator issue an award sustaining the grievance and ordering BOLI to reinstate Ms. Bijlani to her position with no loss of pay, benefits, or status.

First, BOLI did not have just cause to terminate Savita Bijlani. The Employer has the burden of proof, and should be required to prove its charges of insubordination and dishonesty by clear and convincing evidence, which it has not done here.

As in any discharge case, the Employer has the burden of proving just cause for the termination. And although the "preponderance of the evidence" standard applies in other contexts, BOLI should be required to prove its most serious charges – those of insubordination and dishonesty – by the more exacting "clear and convincing evidence" standard. BOLI has not proven the pattern of prior insubordination alleged in the dismissal letter's disciplinary history section alleged in the "Disciplinary History" section of the dismissal letter. In fact, as explained below, the evidence at hearing actually

disproves some of those charges, and in doing so, calls into question both the alleged progressivity and credibility of the numerous other charges asserted through the dismissal letter and BOLI's exhibits. The evidence also shows that some of the prior misconduct allegations are exaggerated and based solely on flimsy, uncorroborated, evidence that falls well short of a clear and convincing standard.

In one instance, BOLI alleges Ms. Bijlani improperly returned to work without correctly notifying the Employer. In a statement of fact, Ms. Bijlani did not return to work "unannounced" or "Without Proper Documentation" on January 15, 2009, as alleged by the Employer. Although her dismissal letter recounts that BOLI reduced Ms. Bijlani's pay on April 9, 2009 based on her alleged "failure to follow management's . . . instructions . . . to notify [her] supervisor and provide a full release . . . before returning" to work, to the contrary, it was undisputed at hearing she gave notice of her intent to return two days earlier. The first came on January 13, through two emails that Local 503 Steward Kerry Johnson sent to Ms. Ellis, Ms. Downey, Ms. Klare, and Mr. McKean as well. It should be noted Mr. Johnson's first email advised the BOLI managers that Ms. Bijlani's doctor had released her from her temporary restrictions to return to her regular job.

Nor did Ms. Bijlani return without proper documentation. It was also undisputed at hearing that Mr. Johnson delivered her medical release to BOLI on January 14. And while the BOLI managers promptly determined that in their view, the release was inadequate, they did not communicate that to Ms. Bijlani until she arrived for work the next morning. As Ms. Ellis acknowledged at hearing, as soon as she told Ms. Bijlani of that concern and that she had tried to reach her the night before to tell her not to come in, Ms. Bijlani offered to go home. But Ms. Ellis declined her offer, and instead told Ms. Bijlani to stay and start going through her emails.

In light of Ms. Ellis' having told to her to stay, the "return without proper documentation" charge is false, regardless of whether the release was valid. It is indisputable that Ms. Bijlani went into work that morning knowing that she'd provided BOLI advance notice of her return, and that she'd also provided a medical release, which she had every reason to believe was done promptly and correctly.

In the end, the charge that Ms. Bijlani returned without proper documentation is doubly false, for as the Oregon Circuit court later determined, her medical release was valid, and that release obligated BOLI to reinstate her. Indeed, the Court held that by not allowing her to remain at work after she'd provided

it that release, BOLI violated Ms. Bijlani's rights under the Oregon Medical Family Leave Act.

Second, BOLI has failed to demonstrate that Ms. Bijlani was insubordinate in the January 8, 2010 meeting with Ms. Ellis. The dismissal letter next recounts that the April 20, 2010 final written warning was issued for "behaviors which included [Ms. Bijlani allegedly] interrupting and talking over [her] supervisor and refusing to leave her office after three requests, [and] leaving only after she left her own office." This charge refers to the meeting Ms. Ellis called her on January 8, 2010 to tell her of the planned cubicle move. Ms. Ellis testified that Ms. Bijlani's conduct in that meeting constituted insubordination.

By Ms. Ellis's account, the meeting lasted twenty minutes. Also by her account, when Ms. Ellis told Ms. Bijlani of the planned cubicle move, Ms. Bijlani expressed a concern that her cubicle was an accommodation, and mentioned that Amy Klare, the Administrator of the Civil Rights Division, was aware of this. In response, Ms. Ellis told Ms. Bijlani, in sum, that she wasn't entitled to any accommodations other than an ergonomic chair, and that if she felt she needed any, she would need to get medical certification and talk with Ms. Downey, the Employee Services Manager.

Ms. Ellis also told Ms. Bijlani that one of her physicians had written a letter about her that Ms. Bijlani had never seen or

heard of. Ms. Ellis apparently found it exasperating that, rather than expressing support for her office reorganization plan, Ms. Bijlani was concerned about its implications for her workstation, and that she asked for a copy of the letter she'd mentioned. Ms. Ellis appears to have had no patience for listening to Ms. Bijlani's concerns.

In addition, there is no corroboration for Ms. Ellis's claim that Ms. Bijlani "began talking over her," or raised her voice during the January 8 meeting, or refused to listen, or that Ms. Ellis asked Ms. Bijlani to leave her office but Ms. Bijlani consciously refused to do so, as well as defiantly continuing to write notes.

Ms. Bijlani recalled that it was a much shorter meeting, less than five minutes, and that some issues were unresolved; but she did not recall hearing Ms. Ellis instruct her to leave. And by Ms. Ellis's own account, Ms. Bijlani left her office promptly after she did. In light of these considerations, it is far from clear that Ms. Ellis' (alleged) instruction that Ms. Bijlani leave her office on January 8 was either reasonable or work related. Nor is it clear that Ms. Bijlani's (alleged) failure to immediately comply was knowingly, willful and deliberate, or that it detrimentally affected the employer's business in anyway. It therefore follows that BOLI has failed to show that Ms. Bijlani was insubordinate.

Third, the evidence also fails to support Ms. Ellis's claims that Ms. Bijlani was insubordinate, i.e. that she "kept trying to argue the point," that Ms. Ellis had to tell Ms. Bijlani to stop talking three times and then just walk away; that Ms. Bijlani "tried to speak over [her] as she [had allegedly] done before." Ms. Klare testified that although she'd been in the office that day, the only raised voice she heard from her office was Ms. Ellis's. The October 6 memo that Mr. Stone of Smith CFI prepared just confirms that the work surface leveling vision could not be reconciled with Ms. Ellis's prior assurance to Ms. Bijlani that her cubicle would be reassembled in its new location just as before. Among other reasons, the memo fails to support Ms. Ellis's charges by noting that Mr. Stone and his colleague left the area when Ms. Ellis appeared, leaving she and Ms. Bijlani by themselves.

Deb Bogart, a Senior Risk Control Analyst with the Department of Administrative Services, testified for BOLI regarding Ms. Bijlani's alleged failure to cooperate satisfactorily with the ergonomic assessment Ms. Bogart undertook to conduct on September 1, 2010. In doing so, she disclosed that she had previously attempted an assessment with Ms. Bijlani in mid-2008, but asserted that Ms. Bijlani had not sufficiently cooperated with that one, either. Donald Demont also testified

for BOLI that Ms. Bijlani didn't satisfactorily cooperate with the ergonomic assessment he conducted on February 28, 2010.

Yet until it terminated her, BOLI had never disciplined Ms. Bijlani or warned Ms. Bijlani regarding any of her prior alleged failures to sufficiently cooperate with ergonomic assessments.

Indeed, although as Mr. Demont testified, Ms. Ellis was present and observed the assessment he performed in February, 2010. Although BOLI had already initiated the discipline regarding Ms. Bijlani's alleged misconduct during her January 8, 2010 meeting with Ms. Ellis, BOLI management did not even warn her that it expected greater cooperation. It follows in light of BOLI's long running past condemnation of Ms. Bijlani's allegedly unsatisfactory cooperation with ergonomic assessments, that her allegedly unsatisfactory cooperation with the February and September 2010 assessments do not provide support for the termination. In light of these facts, and those above, we therefore request the Arbitrator overturn Ms. Bijlani's termination and reinstate her to her position.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' Collective Bargaining Agreement (CBA) and the issue that is presented to him. The issue before the Arbitrator is whether the Grievant was discharged for just

cause. The pertinent language is found in Article 20 Section 1 and it states:

> The principles of progressive discipline shall be used when appropriate. Discipline shall include, but not be limited to: written reprimands; denial of an annual performance pay increase; reduction in pay; demotion; suspension without pay; and dismissal. Discipline shall be imposed only for just cause.

The Arbitrator begins his analysis by noting that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters, the union is assigned the burden of proof. The instant grievance does involve the issue of discharge and the burden of proof, therefore, lies with the Employer.

In the Arbitrator's view, where the circumstances of a disciplinary action involve charges sufficiently serious to cause a permanent stain on the Grievant's employment record, the applicable standard of proof must be clear and convincing evidence. Charges requiring the higher standard of proof include such matters as dishonesty, insubordination, or sexual harassment. The reason for requiring the higher standard of proof is that, should the arbitrator sustain the disciplinary action, the employee's record would be so affected that the individual is likely to encounter substantial difficulties obtaining subsequent employment.

In the instant case, the Union strongly argues that since the charges involve accusations of dishonesty and insubordination a higher standard of proof ought be applied. Thus the Employer, in order to sustain the discharge, should be held to the standard of clear and convincing. The Arbitrator agrees with the Union's analysis and will hold the Employer to that standard. Basically, therefore, to prevail the Employer must support by clear and convincing evidence the charges against the Grievant and must show that the charges are sufficiently serious as to warrant the termination of the Grievant's employment.

The State contends that it has provided sufficient evidence of charges sufficiently serious to warrant the Grievant's discharge. The Union sees the matter quite differently arguing that there are substantial deficiencies in the Employer's case; deficiencies sufficient to violate the just cause standard.

The Arbitrator reviewed the Parties briefs, relistened to the audio recording of the hearing, read the various documents that are in exhibit and gave substantial effort to weigh and consider all aspects of the case. Based on this analysis he concludes that the Employer has met its burden of proof and that it has presented a case for the discharge of the Grievant sufficient to meet the just cause standard. The following

multipoint analysis sets forth the Arbitrator's primary points of consideration in arriving at the above conclusion.

First, Employer exhibit #16 consists of the Grievant's written performance evaluation dated September 26, 2008. Part III of the evaluation is titled *Narrative* and contains the following paragraph:

> Her communication with coworkers and management is combative and confrontational. She confronts her coworkers and many of her coworkers do not want to have any work related interactions nor help her in any operational problems that she may need help in. When written communications are provided by the unit manager, on operational issues, procedures, etc., she does not open those emails for many days, despite being directed to do so, multiple times. When she does respond to email written on instructions, she will spend time responding by informing the unit manager that it was the manager's fault, or the coworker's fault or that she is being interrupted by too many emails that are sent to her.

The Union urges the Arbitrator to give minimum weight to the above statement because it comes from a supervisor that was substantially criticized for poor supervisory skills by the Grievant and her Union colleagues. The Arbitrator, however, thinks differently. While the tone of the above statement might be excessively harsh, the document is not in evidence to provide support for the primary charges against the Grievant. Thus there is no reason for the Arbitrator to determine its degree of accuracy in assessing problems with the Grievant's performance. On the other hand, its value is that it clearly establishes that the Grievant was specifically informed as of September of 2008

that the Employer had concerns about her interaction with management and her ability to work effectively with fellow employees. Additionally, the statement should have provided the Grievant with insight into the Employer's expectations regarding her on the job interactions. She was expected to fully comply with BOLI's code of conduct particularly with regard to how she interacted with her supervisors, her colleagues and BOLI's clients. In short, the Grievant was on notice to conform her behavior with BOLI workplace policies.

Second, the letter of discharge indicates that the case to terminate the Grievant's employment was based on four specific allegations. The letter is constructed such that the Employer specifies, for each of the four allegations, the exact charge against the Grievant in a header and then proceeds to provide a written description of the event that lead to the charge. The exact charges are listed below:

> Incident #1: Violation of BOLI Code of Conduct; Violation of BOLI Respectful and Professional Workplace Policy: Obstruction of Workplace Safety Procedure and Refusal to Perform Duties in safe Manner; Insubordination; Untruthfulness During Investigation.
>
> Incident #2: Violation of BOLI Code of Conduct: Violation of BOLI Respectful and Professional Workplace Policy: Obstruction of Workplace Safety Procedure and Refusal to Perform Duties in safe Manner; Insubordination; Untruthfulness During Investigation.
>
> Incident #3: Failure to Perform Job Duties; Violation of BOLI Code of Conduct; Violation of Respectful and

Professional Workplace Policy; Untruthfulness During Investigation.

Incident #4: Failure to Perform Job Duties; Violation of BOLI Code of Conduct; Violation of Respectful and Professional Workplace Policy; Untruthfulness During Investigation.

What is immediately apparent to the Arbitrator in reviewing the charges is that there are three recurring themes to the accusations: 1) Violation of BOLI Code of Conduct -- violation of Respectful and Professional Workplace Policy; 2) insubordination; 3) untruthfulness.

Third, the Arbitrator finds the charge of untruthfulness the most significant as it speaks both to a matter of serious misconduct and to the problem of the Grievant's credibility in denying most of the accusations against her. The Employer's brief and the Union's brief both acknowledge the basic fact that much of the Employer's case for discharge comes from the statements of Lety Ellis the Grievant's immediate supervisor. And, most of the Union's defense is predicated on the statements of the Grievant. The basic question comes down to which person is believable.

The Arbitrator's review of the testimony of both Ms. Ellis and the Grievant, and his review of the documents related to the Grievant's extensive disciplinary history leads him to conclude that there is sufficient evidence to establish the charge of against the Grievant of untruthfulness. For one thing, with the

exception that the Grievant acknowledges failing to properly mail two letters (Incident #3), the Grievant denies to the most part the other allegations that led to her prior discipline and led to her discharge. In the Arbitrator's view, this blanket denial casts a shadow over all her statements. Was the Employer always wrong in raising concerns about her performance and her behavior? The Grievant asserts so but the Arbitrator finds substantial reason to conclude otherwise which casts doubt on most if not all of the Grievant's denials.

More specifically, on October 15, 2008 the Grievant was given a written reprimand which in part stated:

> You have consistently denied engaging in the types of behavior described. You claim you are always polite and respectful. However, there are at least four individuals who have reported on your conduct. Some of the behaviors were observed by more than one person. There is corroborating evidence concerning your entries in Suntrack. There is corroborating evidence regarding the request for notary services. There is no basis to conclude that the witnesses have all provided false information or worked in unison to harm you for some ulterior reason.
>
> * * * * *
>
> Your lack of forthrightness is also a factor in this decision. (E 17)

Likewise, on April 20, 2010 the Grievant was given a Final Written Reprimand. In that reprimand the Grievant is charged with refusing to take responsibility for her misconduct and repeating the same mistakes for which she had been previously

disciplined. The basis of the discipline is summarized in the following paragraph:

> I asked you to leave my office and you stated, "No" and continued writing notes. I stood up and opened my office door and stated "I need you to leave my office now." Again, you refused to leave and did not move continuing to sit and write notes. (E 19)

The Arbitrator finds two points of interest in the above statement. In her testimony, the Grievant denied most of what is contained in this paragraph. However, the Arbitrator found Ms. Ellis' very specific testimony and the fact that ultimately there was a written record created far more persuasive than the Grievant's testimony denying that she had refused a direct order to leave the office. Moreover, the failure to leave the office incident further reinforces the Arbitrator's general conclusion with regard to the Grievant's lack of credibility. Also, the fact that the Grievant refused the directive to leave the office is a clear example of the insubordination theme referenced above.

The problem of insubordinate behavior is further outlined in an earlier portion of the Final Written Warning document. Specifically the warning provides the following summary of prior problematic behavior:

> On April 6, 2009, you received a one-step pay reduction for three months as the result of your failure to follow management repeated oral and written instructions and your failure to acknowledge that your actions were inappropriate.

> You were notified at that time that your continued inability or unwillingness to follow management's directions is in violation of the above policies and is not immunized by your personal belief that the directions are ill-founded, not communicated well or your continued assertion that a former supervisor was incompetent.

Fourth, the Arbitrator has reference prior disciplinary actions for the purpose of showing continuity between the assertions made in the performance review of September, 2008, a written reprimand of October, 2008, a one step pay reduction of April 2009, a final reprimand of April 2010 and the four allegations that form the basis of the Employer's ultimate determination to discharge the Grievant. The Arbitrator emphasizes his conclusion that none of the new allegations are of themself nor in combination sufficient to warrant termination. The case for discharge relies on the finding that the primary elements of misconduct have remained unchanged through the Grievant's extensive disciplinary history.

Fifth, ultimately the Arbitrator concludes that the four new incidents did contain elements of misconduct that almost exactly mirrored actions for which the Grievant had been previously disciplined. The following are taken from the very lengthy notice of dismissal (E 3) sent to the Grievant on October 19, 2010:

> Witnesses stated your comments to Lety Ellis were inappropriate and rude in an open area and you made no attempt to keep your voice low. (p 4)

> When asked about this incident during the investigatory meeting, you stated you had received no prior notice of the move, except an e-mail from Ms. Ellis that week and no meeting took place. You stated no discussion concerning the layout of the move had taken place. You stated nothing happened as Ms. Ellis had described. Asked if you received an ergonomic assessment in preparation for the move you said, "no." Reminded that Mr. DeMont attempted to complete an ergonomic assessment for your work area you stated "He told me he is just practicing." Ms. Ellis again repeated her memory of the events to which you responded, "Not true, didn't happen." (p 4)
>
> Mr. Ellis repeatedly asked you to step inside of Gabriela Downey's office to talk, but you refused, disrupting employees working in the reception area. Further, the argument that the Human Resources/Safety Manager should be excluded from observing an ergonomic assessment is nonsensical. The person responsible for ergonomics and safety at BOLI was appropriately present. (p 10)
>
> The error of failing to mail the letter was not as egregious as your behavior. You had multiple opportunities to assist in locate the missing letters. You were described as unhelpful and indifferent and at no time did you assist the investigator. (p 10)
>
> The final incident, when you hung up on a caller inquiring about the status of a civil rights file demonstrated a continuing pattern of unacceptable behavior and would have remained unknown to the agency except for the report by the caller who is from a large law firm. The fact is you were not on a break. You were planning to leave early that day, about 40 minutes following the call. You failed to perform one of the essential functions of a public employee which is assisting the members of public we come into contact with during the course of our work. And, you were disrespectful and rude to a customer. Further, you were untruthful during the investigatory meeting, stating you couldn't remember when you took your break the previous day and stated the caller commented you were "most helpful." (p 10)

The evidence, to this Arbitrator's satisfaction, establishes the truth of the above assertions. Contained in this set of instances of misconduct are clear examples of the

three primary themes that the Arbitrator has previously discussed; themes including insubordination, dishonesty and failure to act professionally in compliance with BOLI standards. As noted above, none of these are sufficient in and of themself to warrant discharge but when the large picture going back several years is viewed a pattern is exposed showing repeated instances of similar behavior, that picture is sufficient to warrant the termination of employment.

Sixth, the Union raises a number of what might be considered mitigating factors to the Grievant's unacceptable misconduct. The Arbitrator gave careful consideration to each and ultimately did not find any of them sufficient to provide a basis for overturning the discharge. The following is a summary of the Arbitrator's considerations with regard to those factors emphasized by the Union.

The Union notes the fact that the Grievant's primary language is not English. This fact was also obvious from her testimony. While she speaks with considerable fluency in English, it is still clear that it is not her native language. However, the limitation that the Arbitrator found in this fact was the absence of any specific connection to a problem area for which she received discipline. The Union does not assert that the Grievant had trouble understanding instructions that were given her, or that she misunderstood a key directive. Moreover,

the Arbitrator did not see any relationship between the acts of misconduct and English as a second language.

The Union also provided a substantial amount of testimonial and documentary evidence to establish that the Grievant was at times an excellent employee. The evidence was sufficient to convince the Arbitrator that this was factually true. While this fact is important in determining the appropriateness of reinstatement, it does not in and of itself undermine the Employer's just cause case for discharge. The essential question remains whether the acts of misconduct were sufficient to warrant the termination of employment under a just cause standard. The conclusion from the analysis above is that the Employer prevailed on that question.

A key concern of the Employer centered on the Grievant's obstructionist and uncooperative behavior when it came to ergonomic assessments. The Union takes the position that the Grievant had a history of uncooperative acts with these assessments and that the Employer had a just cause responsibility to provide notice to her of its intent to impose discipline if she continued with this behavior; prior leniency cannot be replaced with discipline without notice. The Arbitrator notes his agreement with the Union's general analysis but concludes that in this case the focus is too narrow. The BOLI Code of Conduct requires that employees "contribute to a

positive and productive work environment. We support teamwork and cooperation through open and honest communication that is respectfully shared" (E 12). The Grievant's failure to comply with this requirement was often brought to her attention and was the subject of prior discipline. That the discipline did not involve fellow employees who were doing the ergonomic assessments does not alter the fact that it was frequently a point of concern for the Employer; a concern that was clearly communicated to the Grievant.

Finally, the Union raises an issue that this Arbitrator finds to be the most serious of the deficiencies in the Employer's response to the Grievant's problematic behavior: the moving of the cubicles. No question, the employer did not handle this very well. Primarily, it appears from the evidence, the poor response occurred because the Grievant's supervisor and other management personnel were unaware of what had been an out of court settlement involving a lawsuit filed by the Grievant. The settlement required modifications to her work space made to accommodate a physical limitations.

Frankly, if the discharge had been predicated solely on the Grievant's emotional reactions to what she considered to be improper changes in the set-up of her work space, the Arbitrator would have found the Employer's case significantly deficient. The Arbitrator is puzzled as to why the State would purchase an

expensive movable desk to accommodate the Grievant's physical disability and then install it so that it could not be moved. Moreover, there appears to be a serious misunderstanding between the Grievant and the supervisor over her need to have her workspace recreated in its new location precisely as it had existed in the old.

But, there are three other incidents that make up the case for discharge and, even though the Grievant had cause to challenge the Employer's lack of understanding the problem, her response still stands outside the range of acceptable behavior under the BOLI Code of Conduct.

In summary, while the Union raises some valid concerns regarding deficiencies in the Employer's supervision of the Grievant, overall the Arbitrator does not find any of these concerns sufficient to arrive at the conclusion that the termination of the Grievant's employment violated the just cause requirement found in the CBA.

CONCLUSION

The issue before the Arbitrator is whether the State had just cause to terminate the Grievant's employment. The Arbitrator determined that the State has established by clear and convincing evidence that truth of the four primary charges that led to the Grievant's dismissal. More importantly, the

Arbitrator found three recurring themes of misconduct that permeated the four allegations on which the discharge was predicated and the three prior disciplinary actions imposed on the Grievant. The three themes included continuing acts of insubordination, dishonesty and repeated instances where she failed to act consistent with standards of professionalism that are part of BOLI's code of conduct. Ultimately the Arbitrator determined that there is sufficient evidence to establish the truth of the charges. Thus, the case put forward by the State is sufficient to meet the just cause standard for discharge. As a result he denied the grievance

An award is entered consistent with these findings and conclusions.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	AWARD
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OREGON PUBLIC EMPLOYEES UNION	)	
	)	
"LOCAL 503" OR "THE UNION"	)	
AND	)	
	)	
STATE OF OREGON, BUREAU OF LABOR AND INDUSTRIES -(BOLI)	)	
	)	Savita Bijlani
"BOLI" OR "THE EMPLOYER"	)	GRIEVANCE

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Employer did have just cause for the dismissal of the Grievant, Savita Bijlani.

2. The grievance is denied.

3. Article 21 Section 6(h) provides that "The Parties shall split the arbitrator's charges equally." Additionally, the personal services agreement that the Arbitrator has with the two Parties calls for a splitting of the Arbitrator's fees. Accordingly, the Arbitrator assigns his fees 50% to the Union and 50% to the Employer.

Respectfully submitted on this, the 9th of January, 2011 by

Timothy D.W. Williams
Arbitrator