Exh. AIW-4
Docket UG-170929
Witness: Amy I. White

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, **Complainant,** **v.** **CASCADE NATURAL GAS CORPORATION,** **Respondent.**	**DOCKET UG-170929**

EXHIBIT TO
TESTIMONY OF

Amy I. White

ON BEHALF OF STAFF OF
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Cascade's Response to Public Counsel Data Request No. 97

February 15, 2018

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

**WUTC v. Cascade Natural Gas Corp.
Docket UG-170929
Public Counsel
UG-170929**

Request No. 97

Date prepared: January 4, 2018

Preparer: Linda Murray

Contact: Michael Parvinen

Telephone: 509-734-4593

PC-97 **Re: Expenses – Injuries and Damages**.
Please refer to the excel file provided in response to WUTC-71, specifically the tab for Account 925. The listing shows $280,000 ($210,756 Washington jurisdictional) booked in July 2016 with the explain "Litigation Claim 2014" and "To accrue 2014 Litigation."

a. Please explain, in detail, what this entry is for and what the litigation involves;
b. Identify the date of the occurrence this charge pertains to;
c. Provide a detailed description of the litigation status;
d. Provide a copy of any legal pleadings filed in the litigation;
e. If a settlement has been reached in the litigation, provide a copy of the settlement agreement;
f. If a decision has been rendered in the litigation, provide a copy of the decision;
g. Describe in detail how the $280,000 booked in the test year was determined; and
h. Explain why the amount was not accrued prior to 2016.

Response:

a. Please explain, in detail, what this entry is for and what the litigation involves;
   - This litigation is the result of a labor arbitration award made on July 7, 2016, regarding a July 11, 2013 termination of a union employee. The arbitrator in the underlying proceeding held in his award that the termination was not proper under the terms of the collective bargaining agreement between the company and the union, and ordered the company to reinstate the employee to his job and award him backpay from the time of his termination.

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Because the company disagreed that the arbitrator's award was legally valid under the terms of this specific collective bargaining agreement, it appealed the arbitrator's ruling to the district court. (In the meantime it did reinstate the employee on July 18, 2016 but did not pay the awarded backpay.) The district court issued a conflicting decision that remanded the decision back to the arbitrator, which resulted in the Union appealing the District Court's order to the Ninth Circuit Court of Appeals and the company cross-appealing the same order. The parties have been engaging in settlement negotiations with a Ninth Circuit Magistrate, but have yet to reach a settlement. The parties are simultaneously briefing the dispute to the Ninth Circuit and expect a decision within the next 18-24 months if a settlement is not reached at an earlier date.

b. Identify the date of the occurrence this charge pertains to;
   - Please see a. above

c. Provide a detailed description of the litigation status;
   - Please see a. above

d. Provide a copy of any legal pleadings filed in the litigation;
   - Attached are the following documents:
     - Arbitration Order
     - District Court Award
     - 8th Circuit Court Appeal

e. If a settlement has been reached in the litigation, provide a copy of the settlement agreement;
   - N/A

f. If a decision has been rendered in the litigation, provide a copy of the decision;
   - N/A

g. Describe in detail how the $280,000 booked in the test year was determined; and
   - In 12/2014 when the union requested arbitration the parties engaged in settlement negotiations and $110,000 was booked as the liability based on the current discussions. In 2015 an additional $10,000 was booked based on the settlement discussions. In 2016 the arbitrators ruling pursuant to a. above required a calculation of back wages and benefits since

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termination in 2013 which resulted in an additional $280,000 being booked.

h. Explain why the amount was not accrued prior to 2016.

- See g. above

IN THE MATTER OF THE ARBITRATION

BETWEEN

INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL, UFCW LOCAL 121-C, UNION,	)	**OPINION AND ORDER**
and	)	Re: Grievance of Edward Marquard – Termination
CASCADE NATURAL GAS COMPANY, EMPLOYER.	)	FMCS Case No. 15-02939-6

BEFORE

ERIC B. LINDAUER

ARBITRATOR

July 7, 2016

REPRESENTATION

FOR THE UNION:

VINCENT DIAZ
Vice President & Regional Director
ICWU/UFCW Local 121-C
4504 69th Street Court, NW
Gig Harbor, WA 98335

FOR THE EMPLOYER:

KAMMI MENCKE SMITH
BENJAMIN H. RASCOFF
Winston & Cashatt
601 W. Riverside Avenue, Suite 1900
Spokane, WA 99201-0695

NATURE OF PROCEEDING

The International Chemical Workers Union Council, Local 121-C and Cascade Natural Gas Company are parties to a Collective Bargaining Agreement which provides the Company has the right to discipline employees for just cause as set forth in Article 7 of the Agreement. On June 11, 2013, the Company terminated the employment of Edward Marquard, a Service Mechanic, for unsatisfactory performance. On June 12, 2013, the Union filed this grievance contending the termination of Mr. Marquard was for unjust cause and requested as a remedy he be reinstated with full back pay and benefits. The Company denied the grievance and the issue was submitted to arbitration.

The arbitration hearing was held on March 3 and March 30, 2016, in Yakima, Washington. At the commencement of the hearing, the parties agreed the matter was properly before the Arbitrator and the Arbitrator would retain jurisdiction for a period of 60 days to resolve any disputes arising out of the Order should the Grievance be sustained. During the course of the hearing, each party had an opportunity to make opening statements, introduce exhibits, examine and cross-examine witnesses on all matters relevant to the issue in dispute. A court reporter was present during the hearing and prepared a transcript of the hearing, which was provided, to the parties and the Arbitrator. At the conclusion of the hearing, the parties agreed to submit their respective positions to the Arbitrator in the form of written post-hearing briefs. Upon receipt of the post-hearing briefs, the hearing record was closed. The Arbitrator now renders this decision in response to the issue in dispute.

ISSUE

At the commencement of the hearing, the parties stipulated the issue to be decided by the Arbitrator in this matter to be as follows:

> Did the Company have just cause to terminate the employment of Edward Marquard on June 11, 2013? If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

In the opinion of the Arbitrator, the following provisions of the Collective Bargaining Agreement and the Company Procedure are relevant to determine the issue in dispute.

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 5
Adjustment of Grievances

***

Section 4:

***

(a) An arbitrator shall have no authority to set aside, find too severe, or modify a warning, suspension, or discharge to any Employee except where the Employer has not satisfied the provisions of Article 7 Section 1.

(b) The arbitrator shall have no authority to modify this Agreement, whether by adding to or subtracting from the terms of this Agreement.

(c) Proof on any issue of fact before the arbitrator shall be decided on the basis of the preponderance of the evidence presented at the Hearing, not on any higher standard of proof.

(d) Each party shall bear the expenses of preparing and presenting its own case and the cost of its own arbitration. The costs, if any, of the neutral arbitrator and incidental expenses mutually agreed to in advance, shall be borne equally by the parties hereto.

ARTICLE 6
Management Rights

The right to hire, re-assign, promote, demote, lay-off and discipline Employees for just cause as specified in Article 7, and the management, disposition, and number of the working forces shall rest solely and exclusively in the Company, but each Employee covered by this Agreement shall possess the right to appeal through the grievance procedures as provided by the terms of this Agreement.

ARTICLE 7
Promotion, Demotion, Discharge

Section 1:

(a) No employee shall be warned or suffer suspension or discharge except in accord with the provisions of this Section and any warning, notice of suspension or notice of discharge must be in writing and dated. The right of the Employer to issue a written warning, suspension or discharge shall be determined solely by the provisions of this Article 7 and shall not be modified by any other part of this Agreement. The Employer and Union agree that the procedures and grounds for discipline set forth in this Section constitute their complete agreement on discipline

***

(d) Except as provided in €, there shall be no discharge unless the Employer has given the Employee at least one (1) written reminder (with a copy of the documentation delivered to the Shop Steward) followed by two written warning notices, or a written warning and a written suspension. An Employee may be suspended from employment for a period not to exceed ten (10) working days whenever a previous written warning has been given. The facts forming the grounds of Employer dissatisfaction must be clearly set forth in each warning notice, notice of suspension or notice of discharge. The facts set forth in the previous warnings or suspension must be of the same type, but need not be precisely the same, as those upon which the suspension or discharge is founded.

***

Section 3:

In the matter of suspension, demotion, or discharge, if after hearing witnesses, the charges are not sustained, the Employee shall have the record cleared of such charges, and in the case of loss of wages, shall

receive reimbursement for such loss. No discipline by temporary suspension shall be administered to any Employee which shall permanently impair his or her seniority rights.

COMPANY PROCEDURE

TITLE: CUSTOMER SERVICE POLICY

***

.03 SERVICE WORK

.031 Service Mechanics can create and maintain customer goodwill as they go to the home at the customer's request. The manner in which service calls are handled determines whether the customer is satisfied or dissatisfied.

***

.09 POTENTIALLY HAZARDOUS CONDITIONS

.091 Whenever a potentially hazardous condition is encountered and the condition is judged to be immediately dangerous and cannot be corrected, red-tag the affected condition with a "DO NOT USE" CNG form 334.

***

e. Complete the Customer Service Order providing full detail of the conditions. Note what equipment was red-tagged and turned off. Also state that a copy of the Customer Referral Receipt was left with the customer.

.092 The following is a list of potentially hazardous conditions:

***

e. Inoperative controls affecting safe operation of an appliance.

.093 Whenever a potentially hazardous condition is encountered and it **is not** immediately dangerous and cannot be corrected:

a. Notify the customer in writing of the potential hazard and advise him/her to have the condition corrected within ten working days.

.094 When a potential hazard **is** considered immediately dangerous:

***

b. Red-tag the appliance with a "DO NOT USE" tag (CNG form 334)

.095 When a non-hazardous condition is encountered which should be called to the attention of the customer, the Service Mechanic will:

a. Give oral notice.

b. Note any oral instruction or issuance of referral on the Customer Service Order.

TITLE: METER AND REGULATOR WORK

.012 When entering a customer's premises to performing [sic] maintenance, repairs, testing, installation, or removal of company property, always present photo identification upon request. Customers have the right to see the utility-provided identification before allowing entry to their property. (Ref: WAC 480-90-168)

SUMMARY OF FACTS

1. Background

Cascade Natural Gas Corporation ("Company") supplies natural gas and provides related services to commercial and residential customers in the Yakima Valley Region of Central Washington, as well as other regions in Washington, Oregon and Idaho. At all times relevant to these proceedings, Greg Miller was the District Operations Manager, and Chris Divas was the District Manager. Linda Murray was the Company's Director of Human Resources. The approximately 31 Service Mechanics, who provide a wide variety of services, are represented by the International Chemical Workers Union Council, UFCW Local 121-C ("Union"), and their rights and responsibilities are governed by the terms of a Collective Bargaining Agreement ("Agreement"). Article 6, *Management Rights*, of the Agreement states the right to discipline employees for just cause rests with the Company subject to the employee's right to appeal through the grievance procedure. (Jt. Exh. 1)

The Company has adopted "Company Procedures" ("Procedures") setting forth rules and procedures for conducting customer service work by Service Mechanics. (Co. Exhs. 2-5) The Customer Service Policy, Section .031 *Service Work*, states that Service Mechanics must "maintain customer goodwill as they go to the home at the customer's request." (Co. Exh. 5)

On June 11, 2013 (all references to dates are in 2013 unless otherwise indicated), the Company terminated the employment of Jeff Marquard ("Grievant"), a Service Mechanic A, for violating the Procedures relating to the manner in which he performed a service call at a customer's residence on May 29.

2. The May 29 Customer Service Call

On May 29, the Grievant, a 34-year employee of the Company, was assigned as a Service Mechanic to perform a "Gas Turn On" service call at a duplex rental unit at 6610 Summit View Avenue in Yakima. Mr. and Mrs. Bruce Thobois and their 18-year-old daughter were moving into the unit and called the Company to connect the gas service for their water heater and furnace. The Grievant responded to the service call and arrived at approximately 12:50 PM. On arrival, the Grievant indicated to Amanda, the Thobois' daughter, that he was there to connect the gas service. The Grievant then proceeded to turn on the gas meter and light the water heater and the pilot light for the furnace. However, due to a faulty thermostat, the Grievant could not get the furnace to operate properly. As a matter of Company policy, Service Mechanics are not authorized to perform repairs on the thermostat. The Grievant informed Amanda they needed to contact their landlord to repair the thermostat in order to get

the furnace to operate properly. When the Grievant left the residence, he placed the summer fan switch on the furnace in the "on" position.

Following the service call, the Grievant completed the repair order indicating, "Meter on. Kit [sic] furnace and water heater on. RD3003 meter read." (Co. Exh. 12)

3. Customer Complaint Regarding Grievant's Service Call

At approximately 3:30 PM, Mr. Thobois contacted the Company's customer service department to register a complaint regarding the manner in which the Grievant conducted the service call at their residence earlier that day. Mr. Thobois reported his daughter called him at work because the house was too hot and complained about the rude and disrespectful manner in which the Service Mechanic conducted the service call. Because the temperature in the residence was 95 degrees, Amanda waited outside in the yard until her parents returned home. Upon receiving a call from his daughter, Mr. Thobois left work, returned home, found the furnace too hot to touch and engaged the breaker switch to turn off the furnace. Mr. Thobois then called his landlord and reported the thermostat problem. Mr. Thobois also called the Company to register his complaint regarding the manner in which the service call was performed. The same day Chris Rivas, the Company's District Manager, called Mr. Thobois regarding the complaint he had filed with the Company. Mr. Rivas listened to Mr. Thobois' complaints regarding problems with the furnace and the disrespectful manner in which the Service Mechanic conducted the service call. Given the serious nature of the customer's complaint, Mr. Rivas indicated he would set a time to meet with Mr. Thobois and his daughter Amanda regarding the service call.

On June 3, Mr. Rivas and Roy Klein, District Operations Manager, met with Mrs. Thobois and Amanda at their residence to discuss their complaint. Amanda described the circumstances of the service call and indicated the Service Mechanic was "rude and uncommunicative." Following the visit, Mr. Rivas prepared a summary of the meeting with the Thoboises. (Co. Exh. 15) At the Company's request, on June 10 the Thobois' submitted a written statement of their complaints regarding the Grievant's conduct during the service call. (Co. Exh. 10)

4. The Company's Investigation

On June 4, the Company met with the Grievant to hear his version of the May 29 service call at the Thobois residence. Present at the meeting were the Grievant, Conrad Castro, Jr., Shop Steward, Chris Rivas and Roy Klein. Roy Klein took notes of the meeting. (Co. Exh. 16) At the meeting, the Grievant indicated there was "nothing unusual" about the service call other than the furnace didn't operate due to a faulty thermostat switch. The Grievant described the service call and the exchange with the Thobois' daughter, as being "very pleasant call – no contention – and 5 to 10 minutes in duration." (Co. Exh. 16) The Grievant indicated the furnace was off when he left the residence. In the Grievant's view, the tenants were "looking for someone to blame/fix the thermostat – they knew there was a problem with the thermostat." (Co. Exh. 16) Following the June 4 meeting, the Grievant was placed on administrative leave pending further investigation of the service call by the Company. (Co. Exh. 15)

5. The Company's Decision to Discharge the Grievant

Following the June 4 meeting with the Grievant, the Company reviewed the circumstances of the May 29 customer complaint and the Grievant's past disciplinary record, which is summarized as follows:

DATE	ACTION	CONDUCT
3/8/11	Written Reminder	Not answering phone while on standby; not responding to call from manager. (Co. Exh. 40)
7/12/11	Written Reminder	Disconnecting wrong service; leaving equipment on site; installing an ERT at wrong address. (Co. Exhs. 37 and 39)
7/18/11	Written Warning	Not answering company phone while on standby. (Co. Exh. 36)
3/16/12	Written Warning	Turning off service to wrong address. (Co. Exh. 34)
3/16/12	Written Reminder	Dropping tools and equipment. (Co. Exh. 34)
3/29/12	Written Reminder	Turning off service to wrong address. (Co. Exh. 33 and 35
7/12/12	Written Warning	Unprofessional conduct towards customers and providing service to wrong address. (Co. Exh. 31)

On June, 11, the Company terminated the Grievant's employment based on his "rude and disrespectful behavior and other related performance issues" in violation of the Procedures. (Co. Exh. 10)

On June 12, the Union, on behalf of Mr. Marquard, filed a grievance contending the termination was issued without just cause. (Co. Exh. 17) In accordance with the Grievance Procedure of the Agreement, a Board of Review hearing was held on August 21, 2013, at which time the Union's contentions regarding the Grievant's unjust

termination were considered. (Co. Exh. 18) Following the hearing, the Board of Review concluded the Grievant was terminated for just cause. Therefore, the Union's grievance was denied. (Co. Exh. 18) Thereafter, the parties being unable to resolve the grievance submitted the issue to arbitration.

OPINION

The issue in this case is whether the Company had just cause to terminate the employment of Ed Marquard on June 11, 2013, for unacceptable performance as a Service Mechanic. In the termination letter, the Company set forth the basis for the Grievant's discharge:

> Due to your rude and disrespectful behavior towards customers, failure to follow Company procedures and inability to perform your job responsibilities, the Company has elected to end the working relationship with you effective immediately. The Company took into consideration that you previously received a written reminder and were suspended without pay for similar disrespectful behavior and have been informed that any further action on your part that demonstrates disrespectful and rude behavior when performing your job responsibilities will result in your termination. The Company also considered that you have violated Company Procedure (CP) 225 and 695 which addresses the expected behavior and performance of a Service Mechanic performing service work. (Co. Exh. 10)

During the hearing, and in their post-hearing briefs, the Company and Union articulated their respective contentions on whether or not the Company had just cause to discharge the Grievant.

The Company contends it had just cause to discharge the Grievant based on his rude and disrespectful behavior toward a customer during a service call on May 29. Further, the Company contends the Grievant was dishonest in his reporting of the incident to management. The Company argued this incident was similar to other

incidents involving the Grievant's failure to comply with the Company's policies and procedures for which he received numerous Written Warnings and Written Reminders, none of which were grieved. The Company contends it complied with Article 7, Section 1 of the Agreement in administering the disciplinary action. Finally, the Company asserts the Union's contention the Grievant was being discriminated against by the Company is unsupported by the evidence. For these reasons, the Company argues the Grievant's discharge be upheld and the Union's grievance denied.

The Union contends the Grievant's discharge is disproportionate to his conduct and should be set aside. In the Union's view, the evidence failed to establish the Grievant acted in a rude and disrespectful manner during the May 29 service call. The customers were upset their thermostat didn't work and felt the Grievant should have fixed it as part of his service call, which he could not do under Company policy. Further, the Union argues the previous disciplinary warnings were not of the same type as the May 29 incident, and therefore fall outside of the Article 7, Section 1(d) requirement and should not have been considered as a basis for discharge. The Union also contends the Company has engaged in disparate treatment of the Grievant in that he has been singled out for discipline, whereas other employees who have engaged in similar conduct have not been disciplined. Finally, the Union submits the Company failed to consider the Grievant's 34-year record of employment as a mitigating factor in determining the reasonableness of the penalty. For these reasons, the Union argues the discharge should be set aside and the Grievant be reinstated with back pay and benefits.

The arbitrator's responsibility in discipline and discharge cases is to resolve three underlying issues. First, whether the evidence of the employee's misconduct was sufficient to establish just cause for the employer to initiate disciplinary action. Second, whether the employer complied with the principles of due process in administering the disciplinary action. Third, whether the penalty imposed by the employer was reasonable, appropriate, and not discriminatory in nature.

In reaching a determination on each of these issues in this case, the Arbitrator has considered the testimony of witnesses, reviewed the exhibits, and has considered the arguments of the parties as set forth in their post-hearing briefs. Based on this record, the Arbitrator has reached the following findings and conclusions.

A. The Company had Just Cause to Discipline the Grievant for Violating Its Policies and Procedures

Pursuant to Article 6, *Management Rights*, the Company has the right to impose disciplinary action against employees for just cause. The Company contends the Grievant's conduct in connection with the May 29 service call established proper cause for disciplinary action.

1. The Company's Burden of Proof

In discipline and discharge cases, the employer bears the burden of proof in establishing it had just cause to discipline an employee and the penalty imposed was reasonable. Article 5, Section 4(c) of the parties' Agreement establishes the standard of proof in deciding discipline cases by stating:

> Proof on any issue of fact before the arbitrator shall be decided on the basis of the preponderance of the evidence presented at the Hearing, not on any higher standard of proof.

Therefore, in order for the Company to prevail in this proceeding, it must prove by a preponderance of the evidence the Grievant engaged in the conduct alleged in the letter of termination, that it conducted an appropriate investigation before imposing disciplinary action, and imposed a penalty that was reasonable and appropriate under the circumstances of the case.

2. The Grievant's Alleged Violations of Company Procedures

The facts of this case are basically not in dispute. On May 29, the Grievant performed a "Gas Turn On" service call at a customer's duplex residence in Yakima. Following the service call, the customer filed a complaint with the Company contending the Grievant was rude and disrespectful in the manner in which the service call was performed by the Grievant. The Company investigated the complaint and concluded the Grievant violated the Customer Service Policy in four specific instances. First, the Grievant was rude, disrespectful and unresponsive during the service call. Second, the Grievant left the residence in an unsafe condition. Third, the Grievant failed to properly document the service call. Fourth, the Grievant was dishonest during the Company's investigation regarding the service call. The Grievant denies these allegations contending there was nothing unusual about the service call, except that he could not get the furnace to operate properly due to a faulty thermostat. The Grievant suggested the resident contact their landlord to fix the thermostat. The Grievant denies he left the residence in an unsafe condition or that he was dishonest during the Company's investigation of the service call.

The Arbitrator has reviewed the evidence as to each of the Company allegations of Customer Service Policy violations by the Grievant in connection with the May 29 customer service call. Based on this review, the Arbitrator concludes the evidence established the Grievant violated the Procedures when he left the residence in an unsafe condition and when he failed to properly document the service call. However, the Arbitrator also concluded there was insufficient evidence to establish the Grievant was rude, disrespectful and unresponsive during the service call or that he was dishonest with the Company during the investigation. The Arbitrator has reached these conclusions based on the following findings.

a. The Grievant Left the Residence in an Unsafe Condition

The Company contends the Grievant failed to take appropriate safety precautions to either red-tag the furnace or disconnect the power to the furnace before he left the Thobois residence on May 29. The Customer Service Policy of the Company Procedures, Section #225.091 states:

> Whenever a potentially hazardous condition is encountered and the condition is judged to be immediately dangerous and cannot be corrected, red-tag the affected condition with a "DO NOT USE" CNG form 334. (Jt. Exh. 3)

In accordance with Section .092, among the conditions listed as a "potentially hazardous" is (e) "Inoperative controls affecting safe operation of an appliance." (Jt. Exh. 3) The Grievant left the Thobois residence with the furnace continuously running without a method to turn it off. In accordance with the Procedures, the Grievant should have "red-tagged" the furnace or notified the resident of the potential

hazard in writing. The Grievant did neither and therefore violated the Procedures relating to potentially hazardous conditions.

b. The Grievant Failed to Properly Document the Service Call

Following the May 29 service call at the Thobois residence, the Grievant completed an on line work order report of the service call. In the "Comments" section, the Grievant entered the following:

> FSR: METER ON. KIT (sic) FURNANCE AND WATER HEATER-OK. RD-3003. (Jt. Exh. 12)

The Grievant's report made no mention of the continuous running of the furnace fan. Section 225.091 of the Customer Service Policy states that when a potentially hazardous condition is encountered, the Service Mechanic shall:

> Complete the Customer Service Order providing full detail of the conditions. Note what equipment was red-tagged and turned off. Also state that a copy of the Customer Referral Receipt was left with the customer. (Jt. Exh. 3)

Even if the Grievant did not consider the continuous running of the furnace fan a "potentially hazardous condition" requiring a red-tag notice, he still violated the Procedures under Section .095 which state that when a "non-hazardous condition" is encountered, the Service Mechanic will "Note any oral instructions or issuance of referral on the Customer Service Order." (Jt. Exh. 3) Although the Grievant claims he advised Amanda Thobois the thermostat was faulty, his work order gives no indication that he could not get the furnace to operate properly, that there was a faulty thermostat, or that he discussed either of these issues with Amanda.

Both Company and Union witnesses gave compelling testimony on the importance of accurately documenting the work performed during a service call. (Tr. 338, 358) The work order the Grievant completed in connection with his service call at the Thobois residence on May 29 failed to document the unresolved issues encountered during the service call and therefore violated the Procedures.

Based on these findings, the Arbitrator concludes the Company had just cause to initiate disciplinary action against the Grievant for violations of its Procedures when he failed to properly document the service call at the Thobois residence on May 29.

c. There was Insufficient Evidence to Establish the Grievant was Rude and Disrespectful During the May 29 Service Call

In the letter of termination, the Company alleged the Grievant was "rude and disrespectful" during the May 29 service call at the Thobois residence. In reaching this determination, the Company relied on the statements provided by Amanda Thobois, age 18, the only person who was present during the service call. At the hearing, Ms. Thobois testified telephonically that she became upset when the Grievant would not give her his name when he arrived for the service call and that he could not fix the furnace due a faulty thermostat stating that "it wasn't his job." (Tr. 22) At the Company's request, Ms. Thobois also provided a written statement of her interaction with the Grievant during the service call in which she indicated the Grievant could have handled the service call "...better and more politely." (Jt. Exh. 11)

The Grievant denied he was rude or disrespectful during the May 29 service call at the Thobois residence. The Grievant testified he explained to Ms. Thobois he could not get the furnace to operate properly due to a faulty thermostat switch and she should contact her landlord and have them fix the thermostat.

> Q. Did you have discussion with the tenant, Amanda, when you left, other than instructing her to contact the landlord?
>
> A. Well, no other than just being polite. You know, I pretty well explained to her that the steps she needed to take was to contact her landlord, you know. And she acted like she wanted me to make the repair and fix it. But I explained to her that we really don't do that. It's not part of what we do. (Tr. 131)

The Grievant testified it is not unusual for residents to become upset when informed the problem with their furnace is the thermostat. The evidence established Company policy prohibits service mechanics from performing repair work on low voltage equipment, which includes faulty thermostats, because they are not licensed to do so.

Following the customer complaint regarding the May 29 service call, the Company met with the Grievant on June 4 to get his version of the events regarding the service call at the Thobois rental unit. The Company took notes which reflect, in relevant part, the Grievant's account of the service call:

> "nice gal – talk a little about thermostat."
>
> "Nothing unusual – typical order"
>
> "very pleasant call – no contention – 5-10 minute duration."
>
> "furnace did not fire"
>
> "admitted he did not give name – did identify as a Cascade Employee"
>
> "felt that the tenant was looking for someone to blame/fix the thermostat – they knew there was a problem with the thermostat." (Jt. Exh. 16)

Based on this record, the Arbitrator concludes the evidence was insufficient to establish the Grievant acted in a rude and disrespectful manner in performing the service call at the Thobois residence on May 29. It is understandable that Ms. Thobois may have been upset with the Grievant when he could not fix the thermostat, which ultimately resulted in overheating the residence. However, her frustration was misplaced since Company Policy prohibits Service Mechanics from working on low voltage equipment, such as thermostats. Although the Grievant should have given Ms. Thobois his name, it was obvious he was a Service Mechanic from Cascade Natural, since he arrived in a Cascade vehicle, with a Cascade uniform and hat. The Grievant also was wearing his name badge and photo ID, which was prominently displayed on the outside of his safety vest. (Jt. Exh. 43) Further, the meeting notes indicate the Grievant informed Ms. Thobois he was a "Cascade Employee" and was there to perform a service call. (Jt. Exh. 16) Union witnesses testified they often do not provide customers with their last name during a service call.

Given the conflicting accounts of the brief encounter between the Grievant and Ms. Thobois during the service call, the Arbitrator does not find sufficient evidence to support a finding the Grievant was rude or disrespectful. Therefore, the Company did not have just cause to discipline the Grievant based on this allegation.

3. <u>There was Insufficient Evidence to Establish the Grievant was Dishonest During the Course of the Company's Investigation</u>

The final allegation that formed the basis for the decision to terminate the Grievant's employment was that he was dishonest during the investigation. Specifically, the Company contends the Grievant was dishonest in the work order documentation

when he reported nothing unusual occurred during the service call when in fact there were problems with both the furnace and the thermostat.

Although the Company argues the Grievant's dishonesty during the investigation was a "key point" in the decision to terminate, it was not among the reasons listed in the termination letter. (Jt. Exh. 10) In an internal memorandum recommending termination, Bob Harris, Human Resource Manager, states:

> The third concern is Ed's (Grievant) truthfulness during the investigation. He reported that this was normal call there were no issues other than the tenant asking a question on the thermostat. He left the home with the meter turned on but reported to his supervisor during the investigation there were problems with both the heater and thermostat. He made no record of the problems on the service order. (Jt. Exh. 44)

The act of "dishonesty' requires an evidentiary finding of an employee's intentional, willful act to deceive. The Company argues the Grievant was dishonest when he initially reported during the June 4 investigation interview that the May 29 service call was a normal call, other than the tenant asking questions regarding the faulty thermostat. The Arbitrator has previously concluded the Grievant failed to comply with Procedures when he did not adequately reflect his findings during the May 29 service call at the Thobois residence and therefore the Company had just cause to initiate disciplinary action. However, the Grievant's conduct did not rise to the level of dishonesty. The Company's notes of the investigation meeting indicate the Grievant stated the "thermostat – computerized wasn't on"; the "furnace did not fire" and the "fan didn't come on." (Jt. Exh. 16) The Grievant's failure to mention the faulty thermostat and problems with the furnace in his work report was an act of unintentional omission, not commission. Although such conduct constitutes unsatisfactory

performance, it does not constitute dishonesty. The Union's evidence established that Service Managers complete 20 to 40 service calls a day. The record established that Service Managers do not, as a matter of practice, complete a work order form after every service call. Most of the time, they do not accurately complete the work order following a service call and failing to do so does not result in disciplinary action.

Based on this record, the Arbitrator concludes the Company's evidence failed to establish the Grievant was dishonest during the investigation and therefore dishonesty was not considered as a basis for disciplinary action.

B. The Company Complied with the Due Process Requirements Prior to Administering Disciplinary Action Against the Grievant

The principles of just cause require the employer provide the disciplined employee with their basic due process rights. Due process in the context of just cause requires the employer to provide the disciplined employee with notice of the allegations being asserted and an opportunity to respond to those allegations before any disciplinary action is imposed. An employer's failure to afford the disciplined employee with due process is grounds for setting aside or modifying the disciplinary action.

The evidence in this case established the Company conducted a fair investigation of the Grievant's conduct prior to imposing any disciplinary action. Following the customer's complaint, Roy Klein, Operations Manager for the Yakima District, and Chris Rivas, Yakima District Manager, met with Amanda Thobois on June 3 regarding the circumstances surrounding the May 29 service call and later obtained her written statement. (Jt. Exh. 11) On June 4, Rivas and Klein met with the Grievant, and his Union Representative, to get his side of the story regarding the May 29 service call.

Notes were taken of the meeting. (Jt. Exh. 16) During the meeting the Grievant was given an opportunity to explain all of the circumstances surrounding the service call at the Thobois residence. Following the meeting, Chris Rivas prepared a written report of the findings. (Jt. Exh. 15) Thereafter, the Company reviewed the Grievant's past disciplinary record. Based on the Grievant's conduct during the May 29 service call, his subsequent work order report, and considering his extensive disciplinary record, Mr. Harris, as Human Resources Manager, recommended termination. The Company's HR Department, Vice President, General Manager and CEO were all part of the review process before a final decision was made to terminate.

Based on this record, the Arbitrator concludes the Company conducted a full and fair investigation before imposing the Grievant's termination. The Grievant was provided with notice of the allegations and a fair opportunity to respond to those allegations. Accordingly, the Arbitrator finds no basis to modify the Grievant's termination based on a lack of due process.

C. The Penalty of Discharge was Unreasonable

The final step of the just cause analysis is a determination of whether the penalty imposed by the employer was reasonable based on all the circumstances surrounding the case. If the arbitrator concludes, under all the facts of the case, the penalty is reasonable, then the discipline or discharge is sustained and the union's grievance denied. However, if the penalty is determined to be excessive, unreasonable

or disparate in nature, then the penalty imposed by the employer shall be set aside and modified to a level of discipline the arbitrator concludes is appropriate under all the circumstances of the case.

> In many cases the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question the arbitrator must decide. ... In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe under all the circumstances of the situation.
>
> Elkouri and Elkouri,
> *How Arbitration Works,*
> (BNA Sixth Ed.) Page 958

This view has also found support in other accepted arbitral authorities. In discussing the just cause standard in discipline and discharge cases, the authors of *Just Cause: The Seven Tests*, state:

> Just cause is essentially a standard of reasonableness and fairness. It requires that the penalty imposed must fit the seriousness of the offense and must take into consideration the total circumstances, both those in aggravation and those in mitigation.
>
> Koven and Smith
> *Just Cause: The Seven Tests,*
> (BNA 2nd Ed.) Page 397

In determining the reasonableness of the penalty in this case, the Arbitrator has considered the nature of the Grievant's misconduct during the May 29 service call and his past record of employment. Upon consideration of these factors, the Arbitrator has determined the penalty of discharge was unreasonable and deserving of modification. The Arbitrator has reached this decision based on the following findings and conclusions.

1. The Nature of the Grievant's Misconduct During May 29 Service Call

The starting point in determining the reasonableness of the penalty imposed by the Company is a consideration of the Grievant's unsatisfactory performance during the May 29 service call at the Thobois residence. The Arbitrator concluded the Company had just cause to initiate disciplinary action for two of the four allegations of misconduct: leaving the furnace in an unsafe condition and failing to properly document the service call in his work report. Although the Grievant' s unsatisfactory performance merits a serious disciplinary penalty, it was not so serious that it constituted just cause for termination.

The Grievant's disciplinary action was based on his unsatisfactory performance as a Service Mechanic during a service call. During the service call, it became apparent the furnace was not functioning properly. The underlying reason for the furnace not operating properly was due to a faulty thermostat. In accordance with Company Policy, the Grievant was not authorized to repair the customer's thermostat. This is where the misunderstanding occurred and ultimately led to the customer's complaint regarding the Grievant's conduct. The customers' 18 year-old daughter, Amanda Thobois, was the only person present during the service call, and she was understandably frustrated that the Grievant could not repair the malfunctioning furnace. Ms. Thobois contends the Grievant was rude and unprofessional during the service call. The Grievant testified there was nothing unusual about the service call, and he was neither rude nor unpleasant. Given the conflicting contentions, the Arbitrator concludes the evidence failed to sustain the Company's allegation of disrespectful conduct.

The Grievant did, however, violate Section .095 of the Procedures by failing to properly document the faulty thermostat in the customer service order. The Grievant also violated the Procedures by leaving the furnace in an unsafe condition – when he left the furnace fan running without a method to turn it off, and did not red-tag the furnace or properly notifying Amanda Thobois of the potentially hazardous condition. The Grievant certainly should have been more thorough in performing the service call, explaining the issue to the customer and documenting the call in his work order and in that respect, his performance during the service call was unsatisfactory.

2. The Grievant's Employment Record

A disciplined employee's employment record is a significant factor in determining whether the penalty imposed by employer was reasonable. In this case the Grievant, at the time of his termination, had worked for the Company for 34 years. Although the Grievant was a long-term employee, he had received a number of disciplinary reminders and warnings, which was a significant factor in the Company's decision to terminate his employment.

During the 16-month period extending from March 8, 2011 through July 12, 2012, the Grievant was issued four Written Reminders and three Written Warnings. (Co. Exhs. 31-40) The disciplinary reminders and warnings were issued for a variety of performance-related issues – disconnecting the wrong address, unprofessional conduct toward a customer, not answering phone while on standby, and dropping tools and equipment.

At the time of his discharge on June 13, 2013, the Grievant had previously been issued a 3-day suspension on November 11, 2012 for disrespectful conduct. (Co. Exh. 21) The Union grieved the disciplinary suspension and the matter proceeded to arbitration. On October 19, 2014, Arbitrator John Caraway set the disciplinary suspension aside finding the Company had not proven its case against the Grievant. (Co. Exh. 30) Therefore, the Grievant's disciplinary record at the time of this proceeding consisted of four Written Reminders, three Written Warnings and no suspensions. (Co. Exhs. 31-40) None of the Written Reminders or Written Warnings were grieved by the Union.

Article 7, Section 1 of the Agreement, states the "... right of the Employer to issue a written warning, suspension or discharge shall be determined solely by the provisions of Article 7 ...". Section 1 (d) of Article 7, states "... there shall be no discharge unless the Employer has given the Employee at least one (1) written reminder ... followed by two written warning notices, or a written warning and a written suspension." (Jt. Exh. 1)

The issuance of the written reminders and warnings meets the Article 7, Section 1 (d) criteria for discharge. However, Article 6 of the Agreement also requires that employee discipline must be for just cause. (Jt. Exh. 1) Although the Company complied with the Article 7 requirements, the disciplinary action still must be measured against the well-recognized standards of just cause. The just cause standards require an arbitrator to consider both the aggravating and mitigating factors in determining the

reasonableness of the penalty. In this case, the Arbitrator considered the Grievant's long-term of employment a mitigating factor and his disciplinary record, consisting of several written reminders and warnings, an aggravating factor.[1]

The Grievant's disciplinary record, considered in conjunction with his unsatisfactory performance of the May 29 service call, is deserving of serious disciplinary action, but not discharge. The penalty of discharge is reserved for the most serious of offenses or when disciplinary efforts to correct the employee's pattern of misconduct have been unsuccessful. Neither of these factors was present in this case. Except in cases of proven egregious employee misconduct, progressive discipline generally requires that prior steps of corrective discipline be exhausted before the imposition of discharge. That did not happen in this case.

> Because the purpose of progressive discipline is to put the employees on notice of improper behavior in order to give them a chance to correct their behavior, it is clearly proper to increase the severity of discipline where the employees have previously committed the same offense.
>
> Brand and Biren,
> *Discipline and Discharge in Arbitration,*
> (BNA 2nd Ed.) Page 2-90

Although the Company issued numerous Written Reminders and Written Warnings to the Grievant for a variety of acts of unsatisfactory work performance and being disrespectful with customers, it did not take the next step of imposing a disciplinary suspension and when it did, the evidence did not support the Company's

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[1] The Union argues the Company is unnecessarily singling out the Grievant for disciplinary action. The Arbitrator considered the Union's allegation of disparate treatment but did not find sufficient evidence to establish a claim of discriminatory conduct by the Company in administering the Grievant's disciplinary action.

allegations. Clearly, the Company has made considerable efforts, through coaching, Written Reminders and Written Warnings, to put the Grievant on notice his work performance and disrespectful conduct was unacceptable and could lead to discharge. However, given the Grievant's long record of employment, there was one more corrective step in the form of a significant disciplinary suspension the Company should have taken before terminating his employment.

3. The Penalty of Discharge was Found to be Unreasonable

The Arbitrator is mindful of his responsibility in the arbitral decision process to give deference to management's judgment in determining the reasonableness of the penalty imposed in disciplinary actions. However, the employer's managerial discretion is not without limitations. An arbitrator may set aside the employer's disciplinary action where it is found to be unreasonable. This is such a case. In the final analysis, the penalty of discharge was found to be disproportionate to the Grievant's offense, even when his prior disciplinary record is considered, and therefore shall be set aside and modified.

D. Remedy

Although the Company had just cause to discipline the Grievant, the Arbitrator concluded the penalty of discharge was unreasonable and deserving of modification.

In determining the appropriate level of discipline to be imposed, the Arbitrator considered the nature of the Grievant's unsatisfactory performance during the May 29 service call and his past disciplinary record. Based on these considerations, and consistent with the principles of progressive discipline, the Arbitrator concludes the

Grievant's conduct merits serious disciplinary action in the form of a thirty (30) day suspension without pay. The length of the suspension places the Grievant on clear notice that further incidents of unsatisfactory performance of a similar nature to what occurred on May 29 could and should result in his termination.

Accordingly, the Arbitrator shall Order the Grievant's termination be set aside and modified to a 30-day disciplinary suspension without pay, extending from June 11, 2013 to July 11, 2013. Following the suspension period, the Grievant shall be reinstated to his former position as a Service Mechanic and, in accordance Article 7, Section 3, shall be restored all lost wages, without interest, from July 11, 2013, to the date of his reinstatement, less any interim earnings previously received or unemployment compensation benefits granted. The Arbitrator shall further Order the Grievant be restored his lost seniority and benefits from the date of the discharge to the date of the reinstatement.

In accordance with Article 5, Section 4 (d), the Arbitrator's fees and expenses shall be borne equally by the parties. Pursuant to the stipulation of the parties at the commencement of the hearing, the Arbitrator shall retain jurisdiction over this matter for a period of sixty (60) days to resolve any disputes arising out of the implementation of the Order.

IN THE MATTER OF THE ARBITRATION

BETWEEN

INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL, UFCW LOCAL 121-C, UNION,	)	**ORDER**
and	)	Re: Grievance of Edward Marquard – Termination
CASCADE NATURAL GAS COMPANY, EMPLOYER.	)	FMCS Case No. 15-02939-6

The Arbitrator, in arriving at this decision, has reviewed the evidence, exhibits, hearing transcript, and has considered the arguments of the parties as set forth in their post-hearing briefs. In view of all the evidence and for the reasons set forth in this Opinion, it is the decision of the Arbitrator the Company had just cause to take disciplinary action against Marquard on June 11, 2013, for unsatisfactory work performance. However the penalty of discharge, under all the circumstances of this case, was found to be unreasonable and therefore deserving of modification. Accordingly, the Arbitrator Orders the following:

1. The discharge of Edward Marquard on June 11, 2013, shall be set aside and modified to a 30-day disciplinary suspension, without pay, extending from June 11, 2013 through July 10, 2013.

2. Following the disciplinary suspension, Edward Marquard shall be offered immediate reinstatement to the position of Service Mechanic and shall be restored all lost wages, without interest, from July 11, 2013, to the date of his reinstatement, less any interim wages previously received or unemployment compensation benefits granted.

3. Edward Marquard shall be restored all lost seniority and benefits from the date of his discharge to the date of his reinstatement.

4. Pursuant to Article 15, Section 4(d) of the Agreement, the costs of the Arbitration shall be shared equally by the parties.

5. In accordance with the stipulation of the parties, the Arbitrator shall retain jurisdiction over this matter to resolve any disputes arising out of the implementation of the terms of the Order.

Eric B. Lindauer,
Arbitrator

July 7, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CASCADE NATURAL GAS CORPORATION, a Washington Corporation, Plaintiff, v. INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UFCW LOCAL 121-C, Defendant.	No. 1:16-CV-3163-SMJ **ORDER REMANDING TO ARBITRATOR**

I. INTRODUCTION

Edward Marquard has been a service mechanic for Cascade Natural Gas Corporation (Cascade) for more than 34 years and is represented by the International Chemical Workers Union Council/UFCW Local 121-C (the Union). In June 2013 Cascade terminated Marquard's employment following a service call where he failed to follow company policy, left a residence in an unsafe condition, and allegedly was disrespectful to a customer. The Union brought a grievance on behalf of Marquard, which eventually reached arbitration in March 2016. The Arbitrator issued a decision concluding that while Cascade had just cause to

discipline Marquard and provided due process, termination was unreasonable. The Arbitrator modified the penalty to a 30-day suspension without pay and ordered Cascade to reinstate Marquard with back pay.

Cascade now asks this Court to vacate the arbitration award. Labor arbitration awards may be vacated only in a very narrow set of circumstances. Cascade argues that two of those circumstances are present here: that the award does not draw its essence from the Collective Bargaining Agreement (CBA) and that the Arbitrator exceeded the boundaries of the issues submitted to him. It is clear that the Arbitrator did not exceed the boundaries of the issues submitted for arbitration. It is not clear, however, whether the award draws its essence from the CBA. Language in the arbitration decision appears to directly contradict a provision of the CBA, but it also appears to conflict with the Arbitrator's ultimate decision and with other findings in the decision. In this circumstance, because it is unclear whether the Arbitrator ignored a provision of the CBA—which would justify vacating the award—or simply failed to explain his reasoning or made an error—which, under the extraordinarily deferential standard of review, would not—the Court finds that remand to the Arbitrator for clarification is appropriate.

II. BACKGROUND

A. Factual background

Cascade supplies natural gas and provides related services to customers

primarily in central Washington. ECF No. 1-2 at 85. At the time of the events in this case, Cascade employed approximately 31 Service Mechanics who were represented by the Union. ECF No. 1-2 at 85. Cascade and the Union are parties to a CBA governing the rights and responsibilities of the Service Mechanics and Cascade.

Edward Marquard has been employed by Cascade as a service Mechanic for 34 years. ECF No. 1-2 at 86. On May 29, 2014, he was assigned to connect gas service for a water heater and furnace at a residence in Yakima. ECF No. 1-2 at 86. When he arrived, Marquard informed one of the residents that he was there to connect the gas service, and he then proceeded to turn on the gas meter and light the water heater and furnace pilot light. ECF No. 1-2 at 86. Marquard was unable, however, to get the furnace to operate properly. ECF No. 1-2 at 86. He informed the resident that she would need to contact her landlord to repair the thermostat. ECF No. 1-2 at 86–87. After Marquard left the residence, the furnace would not turn off and the temperature rose to 95 degrees before another resident shut off the power to the furnace. ECF No. 1-2 at 87. The resident then called his landlord to report the thermostat problem and called Cascade, complaining about the disrespectful manner in which Marquard conducted the service call. ECF No. 1-2 at 87.

On June 3, Cascade's District Operations Manager met with two of the residents to discuss their complaint. ECF No. 1-2 at 88. The residents explained that Marquard was "rude and uncommunicative," and they filed a written statement of

their complaint ECF No. 1-2 at 88.

On June 4, Cascade met with Marquard concerning the May 29 service call. ECF No. 1-2 at 88. Marquard indicated that there was nothing unusual about the service call except for the faulty thermostat switch. ECF No. 1-2 at 88. He recalled the service call being a "very pleasant call—no contention—and 5 to 10 minutes in duration." ECF No. 1-2 at 88. He stated that the furnace was off when he left, and that he believed the tenants may be "looking for someone to blame." ECF No. 1-2 at 88. Following this June 4 meeting, Cascade placed Marquard on leave. ECF No. 1-2 at 88.

On June 11, 2013, Cascade terminated Marquard's employment. ECF No. 1-2 at 89. Cascade sent the following letter to Marquard explaining the basis for the termination:

> Due to your rude and disrespectful behavior towards customers, failure to follow Company procedures and inability to perform your job responsibilities, the Company has elected to end the working relationship with you effective immediately. The Company took into consideration that you previously received a written reminder and were suspended without pay for similar disrespectful behavior and have been informed that any further action on your part that demonstrates disrespectful and rude behavior when performing your job responsibilities will result in your termination. The company also considered that you have violated Company Procedure (CP) 225 and 695 which addresses the expected behavior and performance of a Service Mechanic performing service work.

ECF No. 1-2 at 90.

B. Grievance and Arbitration

The day after Marquard's termination, June 12, 2013, the Union filed a grievance alleging that Marquard was not terminated for just cause and requesting reinstatement with back pay and benefits. ECF No. 1-2 at 81. In accordance with the CBA's grievance procedure, a Board of Review hearing was held on August 21, 2013. ECF No. 1-2 at 89. The Board of Review concluded that Cascade terminated Marquard for just cause. ECF No. 1-2 at 90.

Following the Board of Review decision, the parties submitted the grievance to arbitration. ECF No. 1-2 at 90. The parties stipulated to submit the following questions to the arbitrator: "Did the Company have just cause to terminate the employment of Edward Marquard on June 11, 2013? If not, what is the appropriate remedy?" ECF No. 1-2 at 82.

An arbitration hearing was held on March 3 and March 30, 2016, before Eric Lindauer. ECF No. 1-2 at 80–81. The arbitration decision was issued on July 7, 2016. ECF No. 1-2 at 80. The decision describes the issue in the case as "whether the Company had just cause to terminate the employment of Ed Marquard on June 11, 2013." ECF No. 1-2 at 90. The Arbitrator found that in connection with the May 29 service call there was sufficient evidence that Marquard left the residence in unsafe condition and failed to properly document the service call, but that there was not sufficient evidence to establish that Marquard was rude, disrespectful, or

unresponsive or that he was dishonest with Cascade during its investigation. ECF No. 1-2 at 92–100.

The Arbitrator concluded that because evidence supported that Marquard left the residence in unsafe condition and failed to properly document the service call, Cascade had just cause to discipline Marquard for violating its policies and procedures. ECF No. 1-2 at 92. The Arbitrator further concluded that Cascade's actions met the CBA's criteria for discharge stated in Article 7, Section 1(d). ECF No. 1-2 at 105. However, the Arbitrator concluded that in light of the nature of Marquard's violation and employment record, the penalty of discharge was unreasonable. ECF No. 1-2 at 101–07. The Arbitrator modified the penalty to a 30-day suspension without pay and ordered Cascade to reinstate Marquard with back pay. ECF No. 1-2 at 108.

Cascade reinstated Marquard on July 18, 2016, ECF No. 27-1 at 2, but it has not paid Marquard's unpaid wages and benefits. ECF No. 27-1 at 2–3; ECF No. 37 at 2.

Cascade filed this action in September 2016 to vacate the arbitration award. ECF No. 1 at 1. Cascade alleges that the Arbitrator exceeded the authority granted to him under the terms of the CBA and that the Arbitrator's decision does not draw its essence from the CBA because it ignores the plain language of certain provisions of the CBA. ECF No. 1 at 8. The Union answered and counterclaimed, alleging that

Cascade has failed to pay back-pay as required by the arbitration agreement, that even if the Arbitrator's decision is vacated, the Arbitrator is procedurally precluded from terminating Marquard, and that the Arbitrator acted within his authority. ECF No. 7 at 19–26.

III. LEGAL STANDARD

"Because of the centrality of the arbitration process to stable collective bargaining relationships, courts reviewing labor arbitration awards afford a 'nearly unparalleled degree of deference' to the arbitrator's decision." *Sw Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 530 (9th Cir. 2016) (quoting *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int'l Ass'n of Machinists & Aerospace Workers*, 886 F.2d 1200, 1204–05 (9th Cir.1989) (en banc)). If the "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (citation omitted). A Court may not vacate an arbitrator's award "even if [the court is] convinced that the arbitrator misread the contract or erred in interpreting it." *Sw Reg'l Council of Carpenters*, 823 F.3d at 530 (quoting *Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 913–14 (9th Cir.2007)). "A court may intervene only when an arbitrator's award fails to 'draw its essence from the collective bargaining

agreement,' such that the arbitrator is merely 'dispens[ing] his own brand of industrial justice.'" *Id.* (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

IV. DISCUSSION

The Ninth Circuit has recognized only four limited circumstances in which vacatur of a labor arbitration award is justified:

> (1) when the award does not draw its essence from the collective bargaining agreement and the arbitrator is dispensing his own brand of industrial justice; (2) where the arbitrator exceeds the boundaries of the issues submitted to him; (3) when the award is contrary to public policy; or (4) when the award is procured by fraud.

Sw. Reg'l Council of Carpenters, 823 F.3d at 530 (quoting *S. Cal. Gas Co. v. Util. Workers Union of Am., Local 132, AFL–CIO*, 265 F.3d 787, 792–93 (9th Cir. 2001)) (internal quotation marks omitted). Cascade's argument for vacatur asserts that the first two circumstances are present here: that the award does not draw its essence from the CBA and the Arbitrator exceeded the boundaries of the issues submitted to him. ECF No. 21 at 12. The second circumstance will be addressed first because it is clear that the Arbitrator did not exceed the boundaries of the issues submitted to him. With respect to the first circumstance, however, internal inconsistency and ambiguity in the Arbitrator's decision makes it impossible for the Court to discern whether the decision "draws its essence" from the CBA.

A. The Arbitrator did not exceed the boundaries of the issues submitted to him.

The questions submitted to the arbitrator were:

(1) Did the company have just cause to terminate the employment of Edward Marquard on June 11, 2013?

(2) If not, what is the appropriate remedy?

ECF No. 27-5 at 36.

Cascade argues that the Arbitrator found just cause, and therefore had no basis to move on to whether the remedy was appropriate. ECF No. 21 at 19–20. "[The] arbitrator's interpretation of the scope of the issue submitted to him is entitled to the same deference accorded his interpretation of the collective-bargaining agreement." *Pack Concrete v. Cunningham*, 866 F.2d 283, 285 (9th Cir. 1989). In this case the Arbitrator concluded that Cascade had just cause to initiate *discipline*, he did not conclude that Cascade had just cause to *terminate* Marquard. Indeed, the Arbitrator's conclusion that Cascade's decision to terminate Marquard was unreasonable implies that Cascade did not have "just cause" for that decision. Under the very deferential standard of review, there is no basis to vacate the Arbitrator's decision on the ground that the Arbitrator exceeded the scope of the issues presented to him.

B. It is unclear whether the arbitration award fails to draw its essence from the collective bargaining agreement.

An award does not draw its essence from the contract when it ignores the

plain language of the contract and manifestly disregards the contours of the agreement. *See Stead Motors of Walnut Creek v. Auto. Machinists Lodge 1173*, 886 F.2d 1200, 1205 n. 6 (9th Cir. 1989). As discussed above, the Court owes an extraordinary degree of deference to the arbitrator's decision and may not vacate an award on the basis that the arbitrator misinterpreted the contract. *Sw Reg'l Council of Carpenters*, 823 F.3d at 530. As the Ninth Circuit recently explained in *Southwest Regional Council of Carpenters*:

> [T]he quality—that is, the degree of substantive validity—of an arbitrator's interpretation is, and always has been, beside the point. Instead, the appropriate question for a court to ask when determining whether to enforce a labor arbitration award interpreting a collective bargaining agreement is a simple binary one: Did the arbitrator look at and construe the contract, or did he not?

823 F.3d at 532.

Cascade argues that in setting aside Marquard's termination on the basis that it was too severe after finding that the termination satisfied Article 7, Section 1 of the CBA, the Arbitrator directly contradicted Article 5 of the CBA. ECF No. 21 at 14–15. Article 5, Section 4 (a) and (b) of the CBA provides:

> (a) An arbitrator shall have no authority to set aside, find too severe, or modify a warning, suspension, or discharge to any Employee except where the Employer has not satisfied the provisions of Article 7 Section 1.
>
> (b) The arbitrator shall have no authority to modify this Agreement, whether by adding to or subtracting from the terms of this Agreement.

ECF No. 1 at 19. Article 7, Section 1 sets detailed procedural requirements for employee promotion, demotion, and discharge. ECF No. 1 at 20. In other words, Cascade argues that once the Arbitrator found that Cascade complied with the procedural requirements of Article 7, Section 1, the Arbitrator lacked any discretion to modify the penalty of discharge. ECF No. 21 at 15.

The arbitration decision states that "the written reminders and warnings meet[] the Article 7, Section 1(d) criteria for discharge." ECF No. 1-2 at 105. It further states that "[a]lthough the company complied with the Article 7 requirements, the disciplinary action still must be measured against the well-recognized standards of just cause." ECF No. 1-2 at 105. These statements appear to be inconsistent with Article 5, Section 4. But these statements are also inconsistent with the Arbitrator's reasoning and ultimate decision, as well as inconsistent with other findings.

The arbitrator first concluded that Cascade had just cause to discipline Marquard because he left the residence in an unsafe condition and failed to properly document the service call, but not because he was rude or dishonest in the investigation. ECF No. 1-2 at 92–100. Notably, the Arbitrator did not find that Cascade had just cause to *terminate* Marquard. Next, the Arbitrator found that Cascade complied with due process requirements by providing notice of the allegations and a fair opportunity to respond. ECF No. 1-2 at 100–101. But the

Arbitrator does not expressly address whether the requirements of Article 7. Section 1 were addressed in his due process analysis. Finally, the Arbitrator addressed whether the penalty was reasonable based upon the circumstances of the case, reasoning that just cause cannot exist for an unreasonable penalty—"Just cause is essentially a standard of reasonableness and fairness. It requires that the penalty imposed must fit the seriousness of the offense and must take into consideration the total circumstances." ECF No. 1-2 at 102 (quoting Koven & Smith, *Just Cause: The Seven Tests* 397 (BNA 2d Ed.)). The Arbitrator found that Marquard's record and unsatisfactory performance were "deserving of serious disciplinary action, but not discharge." ECF No. 1-2 at 106. Importantly, the Arbitrator found that "[a]lthough [Cascade] issued numerous Written Reminders and Written Warnings to the Grievant for a variety of acts of unsatisfactory work performance and being disrespectful with customers, it did not take the next step of imposing disciplinary suspension." ECF No. 1-2 at 106. The Arbitrator explained that "given [Marquard]'s long record of employment, there was one more corrective step in the form of significant disciplinary suspension [Cascade] should have taken before terminating his employment." ECF No. 1-2 at 107.

The statement that Cascade complied with Article 7 is in conflict with the Arbitrator's ultimate conclusion and supporting reasoning that Cascade had just cause to *discipline* Marquard but not to *terminate* his employment. The statements

also conflict with the Arbitrator's finding that Cascade failed to impose a suspension prior to terminating Marquard.

Given these inconsistencies, it is simply not possible to say with certainty that the Arbitrator failed to look at and construe the CBA. *See Sw Reg'l Council of Carpenters*, 823 F.3d at 532–33. It is plausible that the Arbitrator failed to consider Article 5, Section 4 of the CBA. But the Court finds that it is equally plausible that the Arbitrator did consider all of the relevant provisions of the CBA and simply failed to adequately explain his reasoning or included the statements inconsistent with Article 5 in error. This possibility is supported by the fact that the Arbitrator quotes Article 5, Section 4 as one of the provisions of the CBA relevant to determining the issues in dispute. ECF No. 1-2 at 82. And an error or faulty reasoning are not sufficient basis to vacate an arbitration award. *Sw Reg'l Council of Carpenters*, 823 F.3d at 530.

Because it is unclear whether the Arbitrator ignored a provision of the CBA, made an error, or simply failed to explain his reasoning, the appropriate remedy is remand to the Arbitrator for a more definite determination. *See M & C Corp. v. Erwin Behr GmbH & Co., KG*, 326 F.3d 772, 782 (6th Cir. 2003) ("A remand is proper, both at common law and under the federal law of arbitration contracts, to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award.") (citation and quotation marks

omitted); *Sunshine Min. Co. v. United Steelworkers of Am., AFL-CIO, CLC*, 823 F.2d 1289, 1294 (9th Cir. 1987) ("It is firmly established that the courts may resubmit an existing arbitration award to the original arbitrator for interpretation or amplification.") (citation omitted).

V. CONCLUSION

For the reasons discussed, **IT IS HEREBY ORDERED**:

1. Plaintiff's Motion for Summary Judgment, **ECF No. 21**, is **DENIED**.

2. Defendant's Cross-Motion for Summary Judgment, **ECF No. 26**, is **DENIED IN PART and GRANTED IN PART**.

3. This matter is **REMANDED** to the Arbitrator for further consideration consistent with this order.

4. The Clerk's office is directed to **ENTER JUDGMENT** consistent with this order and **CLOSE** this case.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 2nd day of June 2017.

SALVADOR MENDOZA, JR.
United States District Judge

Kammi Mencke Smith, WSBA No. 34911
Benjamin H. Rascoff, WSBA No. 45197
WINSTON & CASHATT, LAWYERS, a
Professional Service Corporation
601 W. Riverside, Ste. 1900
Spokane, WA 99201
Telephone: (509) 838-6131

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT YAKIMA

CASCADE NATURAL GAS CORPORATION, a Washington corporation, Plaintiff, vs. INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UFCW LOCAL 121-C, Defendant.	No. 1:16-CV-3163-SMJ **NOTICE OF CROSS-APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS BY CASCADE NATURAL GAS CORPORATION**

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
1900 Bank of America Financial Center
601 West Riverside
Spokane, Washington 99201
(509) 838-6131

Plaintiff, Cascade Natural Gas Corporation ("Cascade"), by and through its undersigned counsel gives notice that Cascade appeals to the United States Court of Appeals for the Ninth Circuit from:

(1) Order Remanding to Arbitrator (ECF No. 44); and

(2) Final Judgment in a Civil Action (ECF No. 45).

DATED this 10th day of July, 2017.

s/Kammi Mencke Smith
s/Benjamin H. Rascoff
Kammi Mencke Smith, WSBA No. 34911
Benjamin H. Rascoff, WSBA No. 45197
Winston & Cashatt, Lawyers
601 W. Riverside, Suite 1900
Spokane, WA 99201
Ph: (509) 838-6131 Fax: (509) 838-1416
kms@winstoncashatt.com
bhr@winstoncashatt.com

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, I electronically filed the foregoing **NOTICE OF APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS BY CASCADE NATURAL GAS CORPORATION** with the Clerk of the Court using the CM/ECF system which sends notification of such filing to the following:

Kristina Detwiler
Robblee Detwiler & Black, PLLP
kdetwiler@unionattorneysnw.com

Randall Vehar
ICWUC/UFCW Legal Department
rvehar@ufcw.org

Robert W. Lowrey
ICWUC/UFCW Legal Department
rlowrey@ufcw.org

s/Abigail Evans
Paralegal

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
1900 Bank of America Financial Center
601 West Riverside
Spokane, Washington 99201
(509) 838-6131