EVELEIGH, J., dissenting. I respectfully dissent. While I agree with the majority that Connecticut has a strong public policy against sexual harassment in the workplace, I find no evidence in either our statutes or case law that suggests that this public policy mandates a termination of employment in every instance in which there is a factual finding of sexual harassment and this court determines that "the employee's misconduct was so egregious that it requires nothing less than termination of the [employee's] employment so as not to violate public policy." (Internal quotation marks omitted.) I also respectfully suggest that another strong public policy must be considered in this matter. It is the public policy of this state to encourage employees to bargain with their employers so that both parties may enter into collective bargaining agreements regarding the parameters of the working conditions and benefits and, when employer-employee disputes under those agreements arise, to favor resolutions reached through the use of arbitration. See *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 431–32, 747 A.2d 1017 (2000). Indeed, even when review of an arbitrator's decision is de novo, the reviewing court must give deference to the arbitrator's factual determinations. See *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 51–52, 757 A.2d 501 (2000). Thus, while the strong public policy against sexual harassment in the workplace dictates that someone who is found to have committed sexual harassment must receive a strict punishment, our acknowledgment of the strong public policy favoring arbitration should require us to follow the decision of the arbitrator when a strict punishment has been ordered.

Contrary to the conclusion reached by the majority, I would follow the dictates of our decision in *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 271 Conn. 127, 137–39, 855 A.2d 964 (2004) (*New England Health Care*), in which we acknowledged the strong public policy against the abuse of clients in the care of the state agency now known as the Department of Developmental Services. Even with that acknowledgment, however, this court held that the strong public policy did not mandate dismissal in every case where there has been abuse of a client. Id., 139–40. I reach this conclusion because I can find no meaningful distinction between our equally strong public policies against sexual harassment in the workplace and the abuse of clients in the care of the Department of Developmental Services. Consequently, I believe that this court cannot reach the conclusion that the public policy against sexual harassment in the workplace is so strong that, when exhibited, it requires that the offender be terminated and not reinstated with-

out explicitly overruling *New England Health Care*. Put another way, I believe that the majority's conclusion that the facts and circumstances of the present case mandate the termination of the employment of the grievant, Scott Gamache, is in direct conflict with this court's holding in *New England Health Care* that an arbitration award requiring a thirty day suspension without pay was sufficient to enforce this state's strong public policy against the abuse of clients in a residential facility for the developmentally disabled.

In *New England Health Care*, the Department of Developmental Services had terminated an employee who was found to have abused a client. Id., 129. In that case, the arbitrator ordered a reinstatement after a thirty day suspension, without pay, and both the trial court and this court affirmed the award. Id. In the present case, the majority opinion concludes that a one year suspension for sexual harassment in the workplace was not enough and that any reinstatement would violate the strong public policy against sexual harassment in the workplace. Indeed, if we are to engage in a process of parsing the specific actions of employees in each case, I am of the opinion that we are usurping the role of the arbitrator. In my view, respectfully, the position taken in this case and *New England Health Care* are irreconcilable. The difference between the two cases is that, despite equally strong public policies, this court properly deferred to the decision of the arbitrator in *New England Health Care* while, in the present case, the majority does not. Therefore, since I cannot differentiate between these two strong public policies, I would follow the precedent established in *New England Health Care* and, accordingly, reverse the judgment of the Appellate Court and remand the case to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court with direction to render judgment affirming the arbitrator's award.

I understand that the majority decision rests on the premise that, in this case, it is the portion of the arbitration award which permits the employee's reinstatement that violates public policy. In my view, however, this is another way of saying that termination, not suspension, was mandated. Additionally, in my view, any reliance upon the unauthenticated letter from the Commissioner of Correction, Theresa Lantz, a document which was not entered as an exhibit and contains factual information far beyond the findings of the arbitrator, is both contrary to our law and ignores the mandate to give deference to the factual findings of the arbitrator. Therefore, I respectfully dissent.

I agree with the majority that Connecticut courts have recognized a public policy exception to the general rule of judicial deference to an arbitration award rendered pursuant to a voluntary submission. See *Garrity* v. *McCaskey*, 223 Conn. 1, 6, 612 A.2d 742 (1992). The

exception applies, however, "only when the award is clearly illegal or clearly violative of a strong public policy. . . . A challenge that an award is in contravention of public policy is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them." (Citation omitted; internal quotation marks omitted.) *Groton* v. *United Steelworkers of America*, supra, 254 Conn. 45. I agree with the majority that "the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's interpretation of [collective bargaining agreements] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . . The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, the plaintiff can prevail in the present case only if it demonstrates that the board's award clearly violates an established public policy mandate." (Internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, 252 Conn. 467, 475, 747 A.2d 480 (2000). It has been the clearly articulated law of this state that challenges under the public policy exception to arbitral authority are subject to de novo review since the decision of this court in *Schoonmaker* v. *Cummings & Lockwood of Connecticut P.C.*, supra, 252 Conn. 417–18. In *Schoonmaker*, however, we noted that "[b]y no means should our decision be viewed as a retreat of even one step from our position favoring arbitration as a preferred method of dispute resolution. . . . [O]ur faith in and reliance on the arbitration process remains undiminished, and we adhere to the long-standing principle that findings of fact are ordinarily left undisturbed upon judicial review." Id., 431–32.

The United States Supreme Court has set explicit limits on the court's involvement in the review of an arbitration award. In *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 567–68, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960), the United States Supreme Court stated that "[t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the [parties] should not be deprived of the arbitrator's judgment, when it

was his judgment and all that it connotes that was bargained for." A court is not free to overrule an arbitration decision simply because the court believes its own interpretation of the contract would be a better one. *W. R. Grace & Co.* v. *Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 764, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983). Where the submission is unrestricted, the award cannot be reviewed for errors of law or fact. *Milford Employees Assn.* v. *Milford*, 179 Conn. 678, 683, 427 A.2d 859 (1980).

There is no dispute that this case involved an unrestricted submission to the arbitrator. The arbitrator was asked to answer the following questions: "[1.] Was the dismissal of the [g]rievant for just cause? [2.] If not, what shall be the remedy consistent with the [collective bargaining agreement]?" The arbitrator answered these two questions in his award. The award states that: "The dismissal of [the] [g]rievant was not for just cause. The dismissal is reduced to a suspension of [the] [g]rievant from December 5, 2005 to December 5, 2006. Said suspension shall be without pay and benefits. [the] [g]rievant is hereby re-instated as of December 6, 2006 to the position he held at the time of his termination."

If the plaintiff, the State of Connecticut, wanted the grievance to be handled differently and not subject to the decision of a neutral arbitrator, then the language within the collective bargaining agreement and the grievance process could have been structured differently. For instance, as suggested by the defendant, AFSCME, Council 4, Local 391, "the language could [have] state[d] that if the arbitrator finds the facts presented by the employer to be true and accurate, then the discipline imposed by the employer cannot be changed by the arbitration award. Another alternative [would be] a provision stating that should the arbitrator find that the discharge was not for just cause, any award of back pay cannot exceed thirty (30) days. The [plaintiff] could have negotiated to have such language included in the parties' collective bargaining agreement, but failed to [do] so. Now, the [plaintiff] attempts to use the public policy exception to escape the long-standing, clearly established law giving deference to arbitration awards where the parties' contract provides that such forum would be used to resolve disputes."

In the case of an unrestricted submission, this court has recognized the following three grounds for vacating an award: (1) the award rules on the constitutionality of a statute; (2) the award violates clear public policy; and (3) the award contravenes one or more of the statutory proscriptions of General Statutes § 52-418. See *Harty* v. *Cantor, Fitzgerald & Co.*, 275 Conn. 72, 84–85, 881 A.2d 139 (2005). I agree with the majority that, when the public policy exception is invoked, "[t]he courts employ a two-step analysis . . . . First, the court

determines whether an explicit, well -efined and dominant public policy can be identified. If so, the court then decides if the arbitrator's award violated the public policy. . . ." *State* v. *AFSCME*, *Council 4*, *Local 387*, *AFL-CIO*, supra, 252 Conn. 476." (Internal quotation marks omitted.)

This case involves the issue of whether the award violates a clear public policy. Any analysis of this issue must start with the proposition that public policy "is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." (Internal quotation marks omitted.) *Watertown Police Union Local 541* v. *Watertown*, 210 Conn. 333, 340, 555 A.2d 406 (1989). Although I agree with the majority's conclusion that a clearly defined public policy against sexual harassment is established by the Department of Correction's administrative directive 2.2 and General Statutes § 46a-60 (a) (8) (C), I disagree with its conclusion that this strong public policy mandates termination in every instance in which sexual harassment is established and this court determines that the employee's misconduct is so egregious that it requires nothing less than termination.

Administrative directive 2.2, which was promulgated by the Department of Correction and identifies several prohibited actions which constitute sexual harassment, provides in relevant part: "Any employee who engages in conduct prohibited by this policy will be subject to discipline, up to and including termination. . . ." Thus, while termination is certainly contemplated as part of the policy, actions short of termination are also contemplated. Section 46a-60 (a) reads in relevant part as follows: "It shall be a discriminatory practice in violation of this section . . . (8) For an . . . employer's agent . . . to harass any employee . . . on the basis of sex . . . . 'Sexual harassment' shall, for the purposes of this section, be defined as any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when . . . (C) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment . . . ." Further, we have specifically recognized a well-defined and dominant public policy against workplace sexual harassment as established by § 46a-60 (a) (8) (C). We reasoned in *State* v. *Connecticut State Employees Assn.*, *SEIU Local 2001*, 287 Conn. 258, 276–77, 947 A.2d 928 (2008), that "the clear and unambiguous language of § 46a-60 (a) (8) (C) explicitly indicates that the maintenance of a hostile work environment constitutes sexual harassment and is prohibited by the laws of this state."

I agree with the majority that there is a strong public policy against sexual harassment in the workplace and I endorse that public policy. I write separately to express my concern that neither the statutes nor the

case law indicate that this strong public policy mandates termination whenever it is discovered and this court determines that the nature of that misconduct requires termination. Indeed, the majority has not suggested that the termination language exists in any state statute. I find the majority's position particularly weak when, as in this case, we are presented with a collective bargaining agreement that not only provides for the prospect of termination when sexual harassment is proven, but also provides for the possibility of remedies short of termination when sexual harassment is established. In my view, the majority's decision may result in the rewriting of hundreds of collective bargaining agreements that have been negotiated in good faith, and that provide for remedies less than termination when sexual harassment has been proven. It is interesting to me that the majority relies upon both administrative directive 2.2 and § 46a-60 (a) (8) (C) to derive the strong public policy against sexual harassment in the workplace that requires termination where the administrative directive explicitly allows for a punishment short of termination by including the phrase "up to and including termination." In my view, the majority's conclusion would have been warranted and supported by the administrative directive if it mandated termination whenever sexual harassment was proven. The fact that it allows for a punishment short of termination, in my view, supports the proposition that the arbitrator was entrusted with the discretion to determine the appropriate punishment.

With reference to administrative directive 2.2, I note that a directive may reflect, but does not determine public policy. *South Windsor* v. *South Windsor Police Union*, 41 Conn. App. 649, 658, 677 A.2d 464, cert. denied, 239 Conn. 926, 683 A.2d 22 (1996). "Where there is no clearly established public policy against which to measure the propriety of the arbitrator's award, there is no public policy ground for vacatur." *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 475. Further, I would conclude that a suspension without pay or benefits for one year is consistent with the public policy against sexual harassment in the workplace.

The mere fact that statutes and regulations exist does not automatically mean that such statutes and regulations embody a public policy which is so explicit, well-defined and dominant that it overrides the strong public policy favoring arbitration as a means of alternative dispute resolution. See *Stratford* v. *International Assn. of Firefighters, AFL-CIO, Local 998*, 248 Conn. 108, 127, 728 A.2d 1063 (1999) (holding that strong public policy favoring arbitration as alternative means of dispute resolution outweighs public policy in favor of collateral estoppel). The public policy foundation cited by the majority simply does not mandate that a person be terminated once sexual harassment is established and this court determines that the employee's misconduct

is so egregious that reinstatement must not be allowed. Certainly, if the parties had agreed to establish termination as the sole remedy in the collective bargaining agreement, the arbitrator would have been bound by the terms of that agreement. In the present case, however, termination clearly was not the only remedy available to the arbitrator pursuant to the collective bargaining agreement. Since he found that just cause did not exist for termination, he was asked to decide the appropriate remedy, which is precisely what he did. The parties submitted the questions to the arbitrator and he answered them directly. I cannot find a specific public policy mandating termination that would require upsetting the arbitrator's award. There simply is no public policy that mandates the termination of an employee if sexual harassment is proven.

Assuming, arguendo, that a strong public policy requiring termination existed, that policy would effectively vitiate the second prong of our test, namely, whether the award in the present case violated that policy. Therefore, in my view, the majority opinion does not distinguish our prior jurisprudence established in the case of *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, supra, 271 Conn. 127. In that case, the arbitrator concluded that the state agency, now known as the Department of Developmental Services, did not have just cause to terminate the grievant, a department employee and union member who had been dismissed after he was found to have abused a client, and ordered his reinstatement with a thirty day suspension. Id., 129. The arbitrator found that the grievant had deliberately shoved a client into a chair and concluded that he was "culpable of patient or client abuse under these circumstances." (Internal quotation marks omitted.) Id., 131. The trial court concluded that "[t]he existence of the state public policy to care for and protect mentally retarded persons necessarily includes a public policy to protect those mentally retarded persons in the custody of [the Department of Developmental Services] and to provide them with an environment reasonably free from abuse." (Internal quotation marks omitted.) Id., 137–38. This court then performed the two step analysis in which we determined whether: (1) there is a clear public policy against the conduct described; and (2) if the arbitrator's award violated that policy. Id., 137. This court concluded that "[g]iven the clear statutory policy to protect persons under the care of the [Department of Developmental Services] from harm and its mandate that no employer shall hire or retain an individual terminated or separated from employment as a result of substantial abuse, we agree with the trial court that there is an explicit, well-defined and dominant public policy against the mistreatment of persons in the [custody of the Department of Developmental Services]." Id., 138. Therefore, we held that the first prong of the inquiry was satisfied.

We agreed, however, with the arbitrator that reinstating the grievant would not violate the public policy. Id., 140–41. We opined that "[t]o conclude that the arbitrator's decision and award violated the public policy of protecting persons in the custody of the [Department of Developmental Services] from abuse, the court would have had to conclude that, if a single instance of deliberate conduct results in any injury to a client, no matter how inadvertent or minor, the conduct is grounds for termination, per se. We agree with the union that such a rule is not required to advance the public policy of protecting clients from mistreatment. Rather, an arbitrator reasonably may consider circumstances such as the length of employment, previous instances of harmful conduct by the employee, and the circumstances and severity of the misconduct under review in determining the likelihood of future misconduct and whether discipline less severe than termination would constitute a sufficient punishment and deterrent. We also agree with the union that the rule urged by the state effectively would grant authority to the state to discharge an employee for such conduct without review, thereby undermining both the collective bargaining process and the arbitration process voluntarily agreed to by the parties. Accordingly, we conclude that the trial court properly concluded that the arbitrator's decision and award did not violate the public policy of protecting [Department of Developmental Services] clients from mistreatment." Id., 138–39.

I express the same concerns as those recognized in *New England Health Care*. In my view, the decision reached by the majority takes away the discretion of the arbitrator, when the collective bargaining agreement, as in this case, allowed for that very discretion. Further, the rule adopted by the majority effectively grants authority to the state to discharge an employee whenever sexual harassment is established, regardless of the nature of the harassment, thereby undermining the arbitration process voluntarily agreed to by the parties.

The arbitrator in this case performed the precise type of analysis of which we approved in *New England Health Care*. In the present case, the arbitrator stated in his decision as follows: "The [g]rievant in this matter . . . began his employment with the Department of Correction on December 3, 1999, as a correction officer. Throughout the course of his employment, [the] [g]rievant demonstrated himself to be a very good employee. His personnel file reflects . . . 'among other things, that he was never late for work, considered to be a good communicator, well respected by his supervisors and co-workers and on several occasions was noted for his outstanding performance . . . . In [the] [g]rievant's [e]xhibits 5 and 6, Captain Eric Stewart and [Lieutenant] Neil Senecal, direct supervisors of [the] [g]rievant, spoke very highly of [the] [g]rievant and stated that no individuals had ever filed even a minor

complaint about [the] [g]rievant. [The] [g]rievant was repeatedly selected to work as a hospital officer, a difficult job in the unit. Evidence established that medical officers often requested that [the] [g]rievant be assigned to this post and there were no complaints made against his conduct in that position." (Internal quotation marks omitted.) The arbitrator continued: "[The] [g]rievant put forth cases at the hearing and in his brief that he maintains display innumerable examples of cases in which the employee being disciplined for sexual harassment received substantially less discipline than that given to [the] [g]rievant in this matter. It is noted that the Department of Correction offered only one example of an employee who was terminated in 1995 for a violation of the rule allegedly violated by [the] [g]rievant." The arbitrator considered the nature of the conduct, the length of the grievant's employment, and whether any other complaints had been filed against the grievant. After this consideration, he came to a reasoned decision and reduced the penalty from termination to a one year suspension without pay or benefits. I would conclude that, pursuant to *New England Health Care*, the second prong of our test is not satisfied as the arbitration award did not violate the public policy demonstrated.

I further note that a similar result was reached in *Brantley* v. *New Haven*, 100 Conn. App. 853, 863, 920 A.2d 331 (2007) ("we cannot conclude that [the employee's] conduct, when viewed in the context of [the employee's] entire career and in light of the [employer's] inconsistent enforcement of its security policy and the lack of clarity in regard to whom that policy applied, is so egregious that it requires nothing less than termination of the [employee's] employment so as not to violate public policy"); see also *Philadelphia Housing Authority* v. *AFSCME, District Council 33, Local 934*, Pa. , 52 A.3d 1117, 1132 (2012) (McCaffery, J., concurring) (When a court is applying the public policy exception, "considerations of an employer's subjective policies, even a zero-tolerance policy, [or] what a reviewing court feels an employer 'should' be able to do . . . do not in any manner constitute public policy and are thus not relevant to our inquiry. A reviewing court's only inquiry is whether the arbitration award . . . violates a clearly established public policy."). I would conclude that the public policy in this case did not require the termination of the grievant's employment instead of a one year suspension without pay or benefits.

The public policy against sexual harassment in the workplace does not require the arbitrator to defer to the employer's chosen form of discipline for such misconduct. As the majority recognizes, the United States Supreme Court has held, "an arbitrator is authorized to disagree with the sanction imposed for employee misconduct." *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 484 U.S. 29, 41, 108 S.

Ct. 364, 98 L. Ed. 2d 286 (1987). While "the arbitrator's decision must draw its essence from the agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies." (Emphasis omitted; internal quotation marks omitted.) Id. The arbitrator has the authority to choose the appropriate form of discipline even when the employee's misconduct implicates public policy. See *Eastern Associated Coal Corp.* v. *United Mine Workers of America, District 17*, 531 U.S. 57, 67, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000) (when "reasonable people [could] differ as to whether reinstatement or discharge [was] the more appropriate" form of discipline for employee who was terminated for violating public policy against drug use by workers in safety sensitive positions, arbitrator has authority to reinstate employee); *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, supra, 45 ("[n]or does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task" of determining appropriate form of discipline); see also *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 474–75 ("[w]hen a challenge to the arbitrator's authority is made on public policy grounds . . . the court is not concerned with the correctness of the arbitrator's decision." [internal quotation marks omitted]). Respectfully, I am of the opinion that the majority is performing the function intended for the arbitrator.

A collective bargaining agreement may reserve to the employer "the unreviewable discretion . . . to discharge an employee once a violation of [an employment rule] is found"; *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, supra, 484 U.S. 41; in which case deference to the employer's choice of discipline would be required. When the collective bargaining agreement reserves no such power to the employer, fails to define "just cause" or otherwise explicitly provides that an employee will be terminated for a specific type of conduct, and the parties have voluntarily submitted to the arbitrator the question of whether the grievant's conduct was for just cause, not merely the factual question of whether the grievant had engaged in the alleged misconduct, the arbitrator has the authority to determine the appropriate form of discipline and the courts must defer to the arbitrator's choice, unless it is unlawful. See *LB & B Associates, Inc.* v. *International Brotherhood of Electrical Workers, Local No. 113*, 461 F.3d 1195, 1200 (10th Cir. 2006) ("[w]hen an agreement includes a 'just cause' termination provision and does not explicitly provide that an enumerated offense is such cause, the 'profound deference' owed to an arbitrator's decision, coupled with the fact that the parties have bargained for the arbitrator, not the courts, to decide their dispute, compels affirmance of an arbitrator's interpretation" [emphasis omitted]). I note further

that the phrase "just cause" is not defined in the collective bargaining agreement in this case. The plaintiff makes no claim that it reserved to itself the unreviewable discretion to determine the appropriate discipline and, therefore, the arbitrator had the authority to impose the discipline he deemed appropriate as long as it did not violate public policy. As several courts have recognized, the fact that there is a strong public policy against certain misconduct does not require an employer to terminate every employee who engages in that conduct. See *Way Bakery* v. *Truck Drivers Local No. 164*, 363 F.3d 590, 596 (6th Cir. 2004) (employer "cites no case, nor have we found any, that establishes a public policy of flatly prohibiting the reinstatement of a worker who makes a racially offensive remark"); *Westvaco Corp.* v. *United Paperworks International Union, AFL-CIO*, 171 F.3d 971, 977 (4th Cir. 1999) ("[t]here is no public policy that every harasser must be fired"); see also *Eastern Associated Coal Corp.* v. *United Mine Workers of America, District 17*, supra, 531 U.S. 67 (when governing statute and regulation reflected public policy against use of illegal drugs by employees in safety sensitive positions but did not require termination of employees who used drugs, court will not infer that public policy requires termination). The public policy against sexual harassment in the workplace is aimed at the prevention and elimination of such misconduct. If the form of discipline imposed against the employee was sufficient to attain that goal, public policy is not violated merely because the collective bargaining agreement may have permitted a harsher form of discipline. Accordingly, when the matter was submitted to the arbitrator to determine if there was just cause for termination, the parties were relying upon the experience and quality of the arbitrator to interpret the phrase for them. The arbitrator determined that one year without pay was sufficient punishment for the employee's admittedly loathsome remarks and actions. Further, there is no mandatory order of termination required in the collective bargaining agreement for a complaint of sexual harassment. It is certainly one of the options, but not the exclusive option.

Numerous federal courts have considered the question of whether, when a collective bargaining agreement authorizes an employer to terminate an employee on certain grounds, an arbitrator is entitled to conclude that an employer did not terminate an employee for just cause when the factual predicate for the employer's just cause determination is not in dispute. The cases reflect that there is a split of authority on the issue. For instance, several federal courts have concluded that an arbitrator is not required to defer to the employer's decision but, rather, conclude that whether an employee has been terminated for just cause is within the scope of the arbitrator's charge. See *LB & B Associates, Inc.* v. *International Brotherhood of Electrical*

Workers, *Local No. 113*, supra, 461 F.3d 1195 (when collective bargaining agreement provided that any employee who engages in sexual harassment may be subject to immediate discharge, court deferred to arbitrator's decision that employee who had engaged in sexual harassment was not terminated for just cause); *Bureau of Engraving*, *Inc.* v. *Graphic Communication International Union*, *Local 1B*, 284 F.3d 821, 825 (8th Cir. 2002) (when collective bargaining agreement provided that employer had sole discretion to determine level of discipline and that fighting on premises would subject employee to immediate discharge, arbitrator's determination that there was no just cause to discharge employee who had engaged in fighting was within his authority because collective bargaining agreement did not define just cause); *First National Supermarkets*, *Inc.* v. *Retail*, *Wholesale & Chain Store Food Employees Union Local 338*, 118 F.3d 892, 895 (2d Cir. 1997) (when collective bargaining agreement provided that employer could summarily discharge employee for drinking or using drugs on job, and employee showed up at work under influence of drugs, was unable to perform his work duties and brandished gun, arbitrator's decision that employee had not violated collective bargaining agreement policy because he had not taken drugs while working and that misconduct did not constitute just cause for dismissal was within scope of arbitrator's authority); see also *Toledo Blank*, *Inc.* v. *Teamsters Local 20*, 227 F. Supp. 2d 761, 769 (N.D. Ohio 2002) ("Other circuits have held that when a collective bargaining agreement does not define 'just cause' and does not explicitly incorporate offenses that will lead to termination, a reviewing court must defer to an arbitrator's interpretation of the 'just cause' provision, even as applied to work rules promulgated under a general management rights clause. This is true when the work rules provide for discretionary penalties."). In general, these cases are premised on the principle that, when parties have bargained for arbitration, they are bound by the result and a court cannot interfere with the arbitrator's decision even if that court disagrees with it. Some of the cases also suggest that, when "just cause" is not specifically defined in the collective bargaining agreement, the arbitrator is "free to determine whether there was just cause for dismissal, applying his expertise and the law of the shop." *Super Tire Engineering* v. *Teamsters Local Union No. 676*, 721 F.2d 121, 125 (3d Cir. 1983).

I acknowledge, however, that there are several federal cases that arrive at a contrary conclusion. See, e.g., *Mountaineer Gas* v. *Oil*, *Chemical & Atomic Workers International Union*, *Local 3-372*, 76 F.3d 606, 609 (4th Cir. 1996) (when employer adopted policy pursuant to collective bargaining agreement that any employee testing positive for drugs "will be" promptly discharged, and arbitrator found that employee had tested positive,

arbitrator's decision that discharge of employee was not for just cause because employer also had policy of rehabilitating employees who use drugs improperly substituted his views of right and wrong for unambiguous language of employer's drug policy); *Delta Queen Steamboat Co.* v. *District 2 Marine Engineers Beneficial Assn.*, 889 F.2d 599, 604 (5th Cir. 1989) (when collective bargaining agreement provided that employee could be discharged for proper cause, defined to include carelessness, and arbitrator found that discharged employee had been grossly careless, arbitrator's decision reinstating employee was without authority under collective bargaining agreement); *Tootsie Roll Industries, Inc.* v. *Local Union No. 1, Bakery, Confectionery & Tobacco Workers' International Union*, 832 F.2d 81, 84 (7th Cir. 1987) (when employer and employee entered into probationary agreement providing that employee "will be terminated" for violation, and employee violated agreement, arbitrator's decision reinstating employee was vacated because it violated clear and unambiguous language of agreement). In general, however, these cases are premised upon the principle that the arbitrator's decision must draw its essence from the contract and that the arbitrator cannot substitute his or her personal views of what is fair for the clear and unambiguous language of a contract where the applicable collective bargaining agreement expressly defined "just cause" to include the policy at issue or expressly gave the sole power to determine the scope of discipline to the employer. In the present case, however, the collective bargaining agreement did not define "just cause" and states only that the punishment could be "up to and including termination." I would conclude, therefore, that the arbitrator's decision was well within his authority pursuant to the collective bargaining agreement in the present case. We must defer, in the absence of a violation of public policy, under our case law, to the decision of the arbitrator.

In *New England Health Care*, we noted that "[o]ur review reveals, however, that the arbitrator did not specifically refer to that statute anywhere in his decision and award. Moreover, nothing in the arbitrator's decision suggests that he found that [the employee] wilfully had inflicted pain or injury on the client." *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, supra, 271 Conn. 139. It is clear from that language that this court reviewed both the arbitrator's decision and the award for a determination of the facts found in the case. We did not go beyond the arbitrator's finding to make a determination on the merits of the case.

Unfortunately, in my view, the reliance by the majority on the letter written by Lantz goes far beyond the permissible scope of our review. The letter was sent by Lantz to the Office of the Attorney General after the arbitrator issued his award. It is undisputed that the

letter was not part of the record of the hearing before the arbitrator. The trial court relied on this letter in its decision vacating the arbitration award. The defendant claimed to the Appellate Court that the trial court improperly relied on the letter because it was not part of the record before the arbitrator. *State* v. *AFSCME, Council 4, Local 391*, 125 Conn. App. 408, 422, 7 A.3d 931 (2010). It is axiomatic that a reviewing court only reviews the evidence that was submitted to the arbitrator. "[C]ourts are bound by the arbitrator's factual findings when reviewing a claim that an award violates public policy . . . ." *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287 Conn. 189, 204, 947 A.2d 916 (2008). "The legal determination of whether a particular award violates public policy *necessarily depends on the facts found by the arbitrator* during those proceedings." (Emphasis in original; internal quotation marks omitted.) Id., 201. Yet, in this case, we are considering, as did the Appellate Court, a document that was only attached to a memorandum in a brief to the trial court. The Appellate Court, however, did indicate that it relied on the arbitrator's decision and findings of fact, and not the letter, wherein it stated that "we conclude that the facts in the arbitral record, irrespective of the [Lantz'] letter, adequately supported the court's ultimate legal conclusions." *State* v. *AFSCME, Council 4, Local 391*, supra, 424. The majority makes no such assertion in its opinion.

Respectfully, I consider any consideration of the Lantz' letter to be contrary to our jurisprudence. Whether the letter was objected to when it was attached as an exhibit to the memorandum submitted to the trial court or not, it is not evidence. It did not form the basis of the arbitrator's decision. I note that the arbitrator's decision considered various conflicting views and he determined that, although there was evidence of sexual harassment in the workplace, it did not rise to the level that mandated a dismissal. In my view, any consideration of this letter is improper. The letter was attached to the plaintiff's memorandum of law, submitted to the trial court, in support of its application to vacate the arbitral award that reinstated the grievant. It was not offered as an exhibit in the arbitration. Thus, in my view, the majority engages in the very type of fact-finding expedition that we have always prohibited.

Instead, I would conclude that this court should adhere to our long-standing pronouncement against finding facts not in the record. As we noted in *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, supra, 287 Conn. 204, "we conclude that courts are bound by the arbitrator's factual findings when reviewing a claim that an award violates public policy, even if that claim has been addressed by the arbitrator in the context of a substantive attack on the validity of the contract." (Footnote omitted.) Similarly, in *Stutz* v. *Shepard*, 279 Conn. 115, 128, 901 A.2d 33 (2006), we stated that "[w]e

do not decide issues of law in a vacuum. In order to review an alleged error of law that has evidentiary implications, we must have before us the evidence that is the factual predicate for the legal issue that the appellant asks us to consider." (Internal quotation marks omitted.) Thus, in *Stutz*, when the testimony was not available from phase II of the proceeding, we held that "[i]t bears repeating that in order for us to conclude that the arbitrator's award was clearly erroneous, we would need to determine that there was no evidence in the record to support the award, or that based on the entire evidence, a mistake had been committed. . . . It is impossible to make such a determination when only one half of the record is available to us." (Citation omitted; emphasis omitted.) Id., 129. We continued, in *Stutz*, to define our role in the appellate review process of arbitration proceedings. "*To conclude otherwise would completely ignore the potential significance of the phase II testimony and require us to second guess the judgment of the arbitrator, who is the only individual who had the benefit of weighing the complete record*, inclusive of the testimony from the phase II proceeding. Additionally, such an approach would conflict with our clear preference for making every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings. . . . It is not our role on appeal to try the arbitration proceeding de novo, an undertaking that would obviously defeat our '[wholehearted] endorse[ment] [of] arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation.' " (Citation omitted; emphasis added.) Id., 129–30. "In light of this deferential standard, and in the absence of the transcripts from the phase II proceedings that constitute the full and complete record for review, we decline to consider the merits of the plaintiff's claims and cannot conclude that the arbitrator's reduced fee award was clearly erroneous." Id., 130. In my view, any consideration of a letter which had not been considered by the arbitrator during the arbitration proceeding runs counter to our long-standing standard of review in arbitration proceedings. In effect, respectfully, the majority is using the letter as a substitute for a transcript that does not exist. I note that when the transcript did not exist in *Stutz* we refused to review the claim. In the present case, however, there is no transcript and, respectfully, the majority is not confining its review to the arbitrator's findings and award. In my view, the majority's actions in this regard disturb our settled jurisprudence.

I note that the majority suggests that "the defendant's claim that the trial court should not have considered the letter was not preserved for review. More importantly, although the defendant claimed to the Appellate Court that the letter inaccurately stated that the grievant's conduct was the '"most egregious violation of the zero

tolerance policy that [Lantz had] ever seen'" and that the letter failed to include other 'versions of the facts' . . . the defendant has never claimed that the letter inaccurately characterized the complainant's testimony before the arbitrator. In addition, as we have indicated, the arbitrator expressly found that the complainant's accusations were 'true . . . .' We can perceive no reason why the plaintiff was barred from referring to the specifics of the testimony in its arguments to the trial court when it is undisputed that the characterization of the testimony was accurate and the arbitrator concluded that the testimony was credible. If other evidence cast a different light on the complainant's version of the facts, nothing prevented the defendant from referring to that evidence." (Citation omitted.) See footnote 12 of the majority opinion. I disagree.

In my view, the arbitrator's decision must be considered in its own context. The decision reads as follows: "[the] [c]omplainant complained of [the] [g]rievant's verbal attacks on him and his inappropriate touching." It further reads: "Some of the comments referred to oral sex in reference to [the] [c]omplainant in this matter which was done at his pleasure or as compensation for something [the] [c]omplainant wanted. . . . One could find that some of the witnesses stretched the truth to some extent because of their own personal feelings either for or against [the] [g]rievant or [the] [c]omplainant in this matter." It continues as follows: "This [a]rbitrator finds that the accusations made by [the] [c]omplainant are true and were substantiated by the witnesses presented by the [plaintiff], however, they were not sufficient to require the discipline given [the] [g]rievant." There is no further detail about the allegations contained in the arbitration decision. Certainly, nothing that approaches the detail contained in Lantz' letter. Further, there is no suggestion that Lantz ever testified to the arbitrator concerning the relative severity of these incidents and their relative comparison to the zero-tolerance policy. The letter was highly prejudicial. The fact that the majority has cited so extensively from the letter speaks volumes about the effect it had on the majority in order to determine the "egregious" nature of the conduct. I wonder if the letter were not considered by the majority if a similar result would have been reached based upon the arbitrator's decision. It seems to me that there is a difference between considering a piece of evidence that had not properly been objected to at the time of trial, and considering a document that was considered at the trial court level, although not in the form of either testimony or as an exhibit, but was never considered by the arbitrator. In the first instance, the fact finder had already considered the evidence in making a decision. In the second instance, the trial court was evaluating a piece of evidence never considered by the arbitrator. Whether properly objected to or not, we know that our standard

of review does not allow us to consider matters outside the record. Respectfully, how can we possibly give deference to the arbitrator's findings of fact and decision, as we did in *New England Health Care*, when the majority is using a letter never considered by the arbitrator as evidence? In my opinion, the majority's examination of this letter in the present case represents a departure from our well established jurisprudence.

I note further that, in other contexts, we would ordinarily never consider unauthenticated documentation in examining the proper resolution of a matter. For example, "before a document may be considered by the court in support of a motion for summary judgment, 'there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings . . . .' Conn. Code Evid. § 9-1 (a) commentary." *New Haven* v. *Pantani*, 89 Conn. App. 675, 679, 874 A.2d 849 (2005). In my view, we should not be considering the letter at all. It is abundantly clear, however, that we should never consider an unauthenticated version of any letter. It is interesting to me that for a document to be considered by an appellate court it must have been marked for identification at the trial. See *State* v. *Onofrio*, 179 Conn. 23, 34, 425 A.2d 560 (1979). In this matter, however, the majority examines an unauthenticated letter that was not even submitted at the arbitration proceeding, let alone marked for identification either at arbitration or at the trial level. In my opinion, any examination of this letter not only sets a dangerous precedent that could undermine our jurisprudence on the appellate review of arbitration proceedings, but also ignores our deferential standard to the arbitrator's findings of fact. Therefore, I respectfully dissent from the majority's use of this letter.

Further, because I do not believe that the public policy of this state mandates termination in every situation involving sexual harassment in the workplace and I believe that the arbitrator's decision did not violate the public policy demonstrated as required under the second prong of the test governing the public policy exception, I respectfully dissent.