**OCB AWARD NUMBER:**

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| **SUBJECT:** | Arb Summary #2510 |
| **TO:** | All Advocates |
| **FROM:** | Megan Schenk |
| **OCB GRIEVANCE NUMBER:** | DRC-2015-00323-11 |
| **DEPARTMENT:** | DRC |
| **UNION:** | SEIU District 1199 |
| **ARBITRATOR:** | Robert G. Stein |
| **GRIEVANT NAME:** | Christopher Carnes |
| **MANAGEMENT ADVOCATE:** | Don Overstreet |
| **UNION ADVOCATE:** | Amanda Schulte |
| **ARBITRATION DATE:** | December 15, 2015 & January 26, 2016 |
| **DECISION DATE:** | May 11, 2016 |
| **DECISION:** | Denied |
| **CONTRACT SECTIONS:** | 24.01 |
| **OCB RESEARCH CODES:** | 118.01 – Discipline in General; 118.301 – Progressive Discipline; 118.3133 – Relevance of Prior Work Record; 118.41 – Double Jeopardy; 118.645 – Horseplay; 118.6461Inmate Abuse; 118.6897 – Threat to Security |
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**HOLDING:** Grievance **DENIED**. Employer acted appropriately when terminating Grievant. Video and investigatory evidence revealed that Grievant violated the Standards of Employment by threatening an inmate, threatening the security of an inmate, and abusing an inmate.

**Facts:** Grievant was a Registered Nurse employed at Warren Correctional Institution. Grievant had previous employment with the DRC as a Correctional Officer for approximately 10 years and as a Nurse for several additional years. Grievant had a clean disciplinary record. On December 25, 2014, Grievant was accused of engaging in reprehensible and threatening behavior by thrusting the base of a vital signs cart into the face of a severely mentally ill patient who was handcuffed to a belly chain and seated in a chair. Grievant was subsequently investigated and terminated on January 30, 2015. Grievant was terminated for acting in a way that constitutes a threat to the security of any individual under supervision of the Department, abuse of an inmate, and threatening an inmate.

**The Employer argued:** Grievant was terminated for just cause.The grievance is procedurally defective because it was not filed in a timely manner of within sixty (60) days of the date of mediation, and no more than one hundred eighty (180) days after the filing of the grievance. Even if the grievance is found to be procedurally valid, Grievant violated the Standards of Employee Conduct. Video evidence shows Grievant picking up a portable vital signs cart and thrusting the base of that cart at a restrained inmates head. The restrained inmate was in a vulnerable position having just been pepper sprayed, his hands were cuffed together, and he was sitting down. The thrust of the base of the cart caused the inmate to flinch backwards. This threatening action against a vulnerable inmate should not be taken in jest, and is a threat to an inmate, threatening the security of an inmate, and abuse of an inmate.

**The Union argued:** Grievant was wrongfully terminated.The collective bargaining relationship has not strictly adhered to the procedural timelines contained in the Agreement, and this case should not be prohibited from being arbitrated because of a technicality. On the merits, grievant should not be terminated for a first-time violation for abuse. Grievant and the inmate were joking back and forth and the thrusting of the monitor was done in horseplay. The video surveillance does not have audio, and there is conflicting testimony as to whether or not Grievant and inmate were engaged in horseplay. Three witnesses said that Grievant was engaged in horseplay, while only one said otherwise. Grievant was not a threat to security because armed guards were present, and the inmate was handcuffed and seated. Grievant was not acting in a threatening manner because the inmate’s eyes were likely swollen shut from the pepper spray, and it is unlikely that he could see what was happening. Grievant has suffered double jeopardy because he was verbally disciplined after the incident, and is now being punished again. The Union also argues that the Employer failed to use progressive discipline, lacked credible witnesses, and mitigating circumstances such as Grievant’s long, spotless record should be considered.

**The Arbitrator found:** There is a presumption favoring arbitrability and this particular procedural defect should not limit the parties’ ability to decide the case on its merits. On the merits, the employer did not misuse its discretion or act arbitrarily when terminating Grievant. The contract has a negotiated “just cause” standard; the Employer meets this standard. The conflicting witness testimony is secondary to what is clearly captured on video. The video evidence is more than sufficient to support the employer’s findings and prove that Grievant engaged in threatening behavior upon a defenseless inmate. The arbitrator also finds that there is enough evidence to support a violation of Rule #43 Abuse because of the circumstances, Grievant’s conduct, and fragility of the inmate. The inmate was a schizophrenic who had just been pepper sprayed; Grievant knew this and still abused his position in a professional capacity.