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IN THE MATTER OF ARBITRATION BETWEEN:	*
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STATE OF OHIO	*Grievance Case No.
BUREAU OF WORKERS' COMPENSATION	*34-20-(03-08-93)-83-01-09
	*Grievant: Carl Eichelberger
AND	*
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OCSEA/AFSCME, LOCAL 11	*

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ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the State: C. Stanley Wilder

For the Union: Steve Lieber

The Ohio Civil Service Employees Association/American Federation of State, County and Municipal Employees, Local 11 (the Union) brought this matter to arbitration to challenge, as without just cause, the February 26, 1993, decision of the Bureau of Workers' Compensation (the BWC) to remove the Grievant, Carl Eichelberger.

The Hearing in this case was held June 16, 1993, in the Office of Collective Bargaining, Columbus, Ohio. Both parties were represented. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the other party. At the conclusion of the hearing, the parties presented closing arguments in support of their respective positions.

ISSUE

The parties stipulated that the issue to be decided is:

Was the Grievant terminated for just cause?

If not, what shall the remedy be?

Relevant Contract Provision

## Article 24-Discipline

Section 24.01 Disciplinary action shall not be imposed except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action...

BACKGROUND

This case involves alleged misconduct involving the Grievant occurring on the afternoon of January 26, 1993, at the BWC's recently opened Rockside facility. The BWC has two other facilities in the Cleveland metropolitan area. At the time in question, the Grievant had worked for the BWC for nearly 10 years, and held the position of Claims Representative III. He has been active in the Union for most of those years, has been a Steward for the BWC Cleveland offices and had held the position of Union Chapter President for several years prior to the instant case.

The parties stipulated that, before 1986, there was no bargaining law or collective bargaining agreement in effect, and discipline of three days or less was not appealable. The record contains Joint Exhibits documenting the following past disciplinary actions against the Grievant:

1. July 30, 1994 - Counseling interview for "failure to be at work station performing required duties as requested."
2. November 14, 1984 - Written reprimand and warning for causing "work disruptions in both the claims examining area and the District Director's office" on October 5.
3. January 8, 1985 - Counseling interview for "Developing a tardiness problem..."
4. August 29, 1985 - Counseling interview for "Excessive absenteeism."

5. November 26, 1985 - Written reprimand and warning for "absenteeism."

6. March 28, 1986 - Three day suspension for "absenteeism."

7. September 8, 1986 - Five day suspension for "neglect of duty, unexcused absence."

8. March 7, 1987 - One day suspension for "neglect of duty relative to low productivity" pursuant to the terms of a November 8, 1988 Grievance Settlement Agreement resolving a grieved ten day suspension.

9. November 14, 1988 - Ten day suspension for "Unexcused Absence."

10. June 8, 1990 - Arbitration Award of Harry Graham modified removal of the Grievant, who had been accused of being the aggressor in a fight with a co-worker, to a twenty day suspension for his misconduct in that fight and past disciplinary record finding there was insufficient evidence the Grievant was the aggressor.

11. January 21, 1992 - Thirty working day suspension for engaging in a "loud and disruptive argument with a co-worker, during which [Grievant] made several inappropriate comments."

On January 26, 1993, the Grievant attended Claims Representative training at the Rockside facility. This training ended at 3:30 p.m. which coincided with the end of the Grievant's regularly scheduled work day. What transpired thereafter is a matter of controversy between the parties.

**BWC Testimonial Evidence:**

James Fischer, the Rockside Service Office Manager, testified concerning problems at the new facility involving work backlog, since its opening in December 1992, which had necessitated a policy of not releasing the telephone numbers of Claims Representatives for the Rockside facility. He stated that, on January 26, 1993, Claims Representative Supervisor Jerry Elbicki informed him that

someone in the downtown Cleveland office was giving out Rockside phone numbers. Both men went to see Patrick Hayden, the BWC's Regional Director, at his Rockside office. On their way, they encountered the Grievant. Mr. Fischer testified that he mentioned to the Grievant that he and Mr. Elbicki had a problem they needed to discuss with Hayden, and that the three proceeded to Mr. Hayden's office. According to Mr. Elbicki, the Grievant said he was going to see Mr. Hayden to say 'hello'.

Mr. Hayden was having a discussion with another Claims Representative in his office when the men arrived. Mr. Fischer testified (as corroborated by Mr. Hayden) that he left messages about his problem and kept checking to see if Mr. Hayden had completed his meeting with the Claims Representative. When Mr. Hayden became available, he went into a conference room with Messrs. Fischer and Elbicki, and the Grievant "tagged along."

Mr. Fischer testified that he expressed his concerns to Mr. Hayden about release of the telephone numbers and that Mr. Elbicki mentioned that the downtown Service Office Manager, Dan Neubert, was the person who had been giving out the Rockside numbers. According to Mr. Fischer, the Grievant tried to interject his concerns about Mr. Neubert regarding Union problems, at which time Mr. Hayden said he was trying to address Mr. Fischer's problem. Mr. Fischer stated that the conversation between Mr. Hayden and the Grievant became progressively louder as the latter continued to interject other concerns into the discussion.

Mr. Fischer testified that Mr. Hayden asked the Grievant to

"stop", but the Grievant persisted and their voices grew louder still. According to Mr. Fischer, Mr. Hayden then said, "I said stop", slammed his hand on the table the men were seated around, and subsequently, Mr. Hayden said, "the meeting is over." According to Mr. Fischer, Mr. Hayden then attempted to leave the conference room through one of its two doors. Mr. Fischer testified that, thereupon, the Grievant got up, went to the same door, "leaned" against it, stopped Mr. Hayden from leaving and said to him, "I'm not your boy." This witness further stated that Mr. Hayden then said, "move" to the Grievant, that he did not move and that Mr. Hayden pushed the Grievant. At this juncture, Mr. Fischer testified that he got between the two men, pushing the Grievant a foot or so to a wall and saying to him, "Chill out, it isn't worth it."

According to Mr. Fischer, Mr. Hayden then left the room and came back shortly thereafter to "reprimand" him and the Grievant. At that time, Mr. Fischer stated that the Grievant tried to shake Mr. Hayden's hand, the result of which by the account of all persons present can best be described as a "macho handshake tussle." According to Mr. Fischer, the Grievant also commented about putting "gloves on" so he felt that the possibility existed that another physical confrontation could occur between Mr. Hayden and the Grievant. Mr. Fischer testified that he, once again, separated Mr. Hayden and the Grievant, that the Grievant then reiterated to Mr. Hayden, "I'm not your boy," and that Mr. Hayden responded, "I don't understand what you are talking about, I don't

have any boys." According to Mr. Fischer, the confrontation ended then when one of the two men left the conference room.

This witness acknowledged that, when he first saw Mr. Hayden on January 26, he said in jest that he "brought his Union rep and a Supervisor to cover his [Mr. Fischer's] butt." Mr. Fischer also admitted that he received a three day suspension for "malfeasance" as a result of the incident in question and that he had received a written reprimand three years ago.

Mr. Elbicki's testimony was comparable to that of Messrs. Fischer and Hayden. Unlike Mr. Fischer, he never moved from his seat at the table in the conference room during any of the aforesaid events. Mr. Elbicki also testified that, when Mr. Hayden first tried to leave the room, the Grievant said, "You can't leave right now, I'm not done with you." According to this witness, Mr. Hayden made two attempts to leave the conference room and the Grievant slammed the door shut on both occasions. He described Mr. Hayden's "push" of the Grievant as "forceful." This witness also corroborated Mr. Hayden's testimony that, when the latter returned to the conference room, he stated that he would not tolerate such behavior and, the next time it occurred, he would call the police. Mr. Elbicki was not disciplined as a result of the incident.

Mr. Hayden's testimony was substantially comparable to that of Messrs. Fischer and Elbicki. He stated that Mr. Fischer stuck his head into his office three times while he was meeting with the Claims Representative, each time reiterating the importance of speaking to him. According to Hayden, when he finished this

conversation, he came out of his office, looked for a place to meet, found the conference room was open, went in with Messrs. Fischer and Elbicki, and the Grievant also came along. Mr. Hayden testified that he and the Grievant shook hands, and the Grievant said "I was just in the building and wanted to say 'hello'." Mr. Hayden recalled commenting to the Grievant that he would see him on January 30 for a meeting.

All witnesses agree that Mr. Fischer was very angry because he felt he was constantly being undermined by BWC officials downtown, citing the release of the Rockside phone numbers as the most recent example of that problem. It was then, according to Mr. Hayden, that the Grievant said he wanted to know why one downtown official had so much power over others, to which Mr. Hayden replied that this was not the case.

The discussion continued, according to Mr. Hayden, with Mr. Fischer describing how he found out about release of the phone numbers. He had not, however, spoken to the official involved, so Mr. Hayden advised him to do so before he would get involved. Mr. Hayden testified that the Grievant then said to him, "What are you doing about grievances at Lauche" (BWC's downtown facility)? Mr. Hayden replied, "Stop, we'll deal with this another time." Mr. Hayden stated that the Grievant continued to raise other issues, he told him to stop two more times, then slammed his hand on the table, and proceeded to leave the room. At that time, the Grievant said, "I ain't your boy," ran around the conference table, and, as Mr. Hayden put his hand on the door handle, the Grievant lunged

toward the door slamming it. Mr. Hayden testified that the Grievant then stood in front of the door and he told him to "move." When the Grievant did not move, Mr. Hayden said he pushed the Grievant, and said to him, "If you ever put your hands on me again, I'll call the police", to which the Grievant responded, "Don't be putting your hands on me. Anytime you want to go to the gym and put gloves on, let's do it."

Mr. Hayden further testified that, after Mr. Fischer got between him and the Grievant, he exited the room and tried to find his secretary to have her call the police. He could not find her, so Mr. Hayden stated that he returned to the conference room and the Grievant offered his hand to him saying, "Let's end it here, and it's not going anyplace, right?" According to Mr. Hayden, the Grievant repeated his comments about, "I ain't your boy", "gloves" and going to the gym. During this handshake, Mr. Hayden stated that the Grievant shook and squeezed his hand in an attempt to make him lose his balance. Mr. Hayden also said that the Grievant asked him if he knew what the handshake meant, to which he replied "No." Mr. Hayden said it was then that Mr. Fischer got between him and the Grievant for the second time.

Mr. Hayden testified that he reprimanded Mr. Fischer for bringing a Union official along when he and Mr. Elbicki wanted to discuss management concerns. Mr. Hayden admitted that he was suspended three days for "unprofessional and discourteous behavior" for his role in the incident of January 26, 1993. He said that he had not been disciplined previously. He acknowledged that he did



not ask why the Grievant was present, or order him to leave, when he realized the discussion pertained to management issues. Mr. Hayden denied ever pointing his finger at the Grievant during the incident.

In addition to the above testimony, Nancy Seman, BWC Director of Employee/Labor Relations, testified about the Grievant's past disciplinary record and the charges against him. She stated that the Grievant was not charged with insubordination because a review of the facts led management to conclude that Mr. Hayden's use of "shut up" or "stop" was not a direct order.

The record contains written statements written within a week of the incident by the Grievant and by Messrs. Hayden, Fischer, and Elbicki, which parallel their testimony in this proceeding. The record contains a February 11 letter to the Grievant from BWC Hearing Officer Stephanie Whitis, informing him that his removal was being contemplated because of his involvement in the January 26 incident. That letter also informed the Grievant there would be a hearing on the matter, at which time he would have the opportunity to respond to the charges against him. The hearing on the charges was held February 24, at which time the Grievant was present and represented by the Union. On February 26, he was notified in writing by Wes Trimble, BWC Chief Executive Officer/Administrator, that he was being removed for violation of the BWC's "Employee Handbook Memo 1.06(3A) 'Failure of Good Behavior'-Discourteous treatment of fellow employees, management..." and (15B) "Violation of

the Ohio Revised Code Section 124.34-Malfeasance."<sup>1</sup> That letter goes on to state, in pertinent part:

"Specifically, on January 26, 1993, you followed three (3) management representatives into the Rockside Service Office conference room and a conversation between two of the management representatives ensued. You interrupted this conversation several times and were told to be quiet. When you refused, the Northwest Regional Manager ended the meeting and tried to leave the conference room. You raised your voice and argued with the Manager. When the Manager opened the door to leave the room you went to the door and pushed it shut. At this point, you leaned against the door holding it at the handle with your hand and at its base with your foot. The Manager told you he had nothing further to say and tried to leave the room again by opening the door on which your hand and foot were placed. You again forced the door closed and would not allow the Manager to leave the room.

#### The Union's Evidence

The Grievant testified that a Training Officer who conducted the session he attended January 26 was a bargaining unit employee, who said she was a "fair share member" and who made negative comments about the Union and about regular members. He said he went to Mr. Hayden's office to complain about the Training Officer, which he believed was consistent with his understanding of State Management's "open door policy." The Grievant added that he would not have gone to see Mr. Hayden if it was not on Union business. According to the Grievant, Messrs. Fischer and Elbicki asked him to come along with them to Mr. Hayden's office. He acknowledged that Mr. Fischer did start talking first about the telephone problem,

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<sup>1</sup>At the arbitration on June 16, 1993, the BWC struck Section 124.34 as a grounds for the removal.

but asserted that was not the issue he wanted to discuss.

According to the Grievant, Mr. Hayden got angry when he questioned why Mr. Neubert had so much power. He testified that Mr. Hayden pointed his finger at him, stood up and told the Grievant to "shut up" three times. Then, the Grievant stated, Mr. Hayden slammed his hand on the table and began to leave as the Grievant said he was talking to Mr. Hayden in his capacity as a Union representative. He testified that Mr. Hayden came back into the room and talked to Mr. Fischer. The Grievant stated that he closed the door because he did not want others to hear the profanity Mr. Fischer was using.

The Grievant further testified that he gave Mr. Hayden a Masonic handshake to see if he was a member and as a peace making gesture so that he would know that the Grievant "wasn't there to harm him." At that time, the Grievant said to Mr. Hayden, "Pat, I'm not your boy and I will not roll over like a dog whenever you point your finger at me." Then, the Grievant stated, Mr. Fischer walked over to them and, while the Grievant was concealing the handshake, Mr. Hayden pushed the Grievant against the wall, at which time Mr. Fischer said "chill out." According to the Grievant, Mr. Hayden "never walked out the door" and everybody sat down again. The Grievant acknowledged that Mr. Hayden did say "this better not happen again or I'll call the police."

He stated that Messrs. Fischer and Elbicki again started talking about the phone problem and he again asked why Mr. Neubert had so much control. At that time, according to the Grievant, Mr.

Hayden said to him, "I don't even know why you are here. This is a management meeting." The Grievant testified that Mr. Fischer then apologized saying that he invited the Grievant to come along with them. Since he had been made to feel unwelcome, the Grievant testified that he then left of his own volition.

The Grievant also stated that, upon leaving the conference room, he went to another office in the facility where his wife was waiting for him. According to the Grievant, Mr. Elbicki later entered the office and said, in response to a question from the Grievant's wife, that the Grievant did not do anything. He denied saying anything about "going to the gym to work this out." The Grievant also acknowledged that Mr. Hayden could have misunderstood what he meant when he asked if Mr. Hayden understood what the handshake meant. On the way out of the building, the Grievant stated that Mr. Fischer told his wife that the Grievant did not do anything wrong, that "Pat pushed" the Grievant, and when she asked what the Grievant did, Mr. Fischer responded "nothing."

The Grievant believes that Mr. Hayden was the aggressor in the incident. He filed a complaint with the police on February 2, 1993. In that complaint, it is asserted that Messrs. Fischer and Elbicki asked the Grievant to come to their meeting with Mr. Hayden because it involved a Union matter. The complaint also mentions that Mr. Hayden shoved the Grievant saying he was not going to tolerate his "Bullshit" anymore and that it took "several employees" to separate the two men. The record does not contain

any evidence as to the outcome of that complaint.<sup>2</sup> The grievant also testified that, on January 29, Mr. Hayden was hostile to him.

Additional witnesses called by the Union included the Grievant's wife who corroborated her husband's testimony about Messrs. Elbicki's and Fischer's comments to the effect that Mr. Hayden was the sole cause of the incident and the Grievant had done nothing wrong. Cindy Laeseire testified corroborating the Grievant's wife's testimony and the fair share problem at the training session. Chief Union Steward Leroy Bell testified that Mr. Hayden was hostile to the Grievant at the January 29 meeting. The Grievant and his wife testified that they had asked Mr. Elbicki to give them a statement about what happened on January 26. They said he later advised that management had told him he could not give such a statement and that he seemed "scared."

#### The Parties' Contentions

The Union contends that the removal was without just cause and that the grievance should be sustained. It maintains that there was no fair and impartial investigation preceding the decision to remove the Grievant since it would have been discovered that Mr. Hayden was the aggressor in the January 26 incident. The real reason the Grievant was terminated, the Union argues, is that Mr. Hayden wanted the Grievant "out of the way." According to the Union, management's decision was also based more upon the Grievant's prior record than on the facts of the incident in question as evidenced

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<sup>2</sup>The Grievant also filed a similar complaint with the State police. No disposition of that complaint was introduced into the record.

by its third step grievance decision. The record shows, the Union contends, that the Grievant was the "victim" in this case, he was the one who exercised extreme restraint during the incident, and he was not guilty of the "alleged action."

The following mitigating circumstances are stressed by the Union: "the Grievant was not the aggressor;" Mr. Hayden "provoked the fight" verbally and by "his demeaning gestures - finger pointing to the Grievant;" the Grievant did not retaliate; no one was injured; the incident occurred after hours, with the Grievant present as a Union official; and the Grievant had not been told to wait outside, while Mr. Hayden talked to Messrs. Fischer and Elbicki.

The Union also argues that the Grievant had been subjected to double jeopardy because all the persons present at the incident thought the matter ended by Mr. Hayden's saying, "If you ever pull another stunt like that, I'll have you escorted out of the building by the police." Additionally, the Union contends that the Grievant is a victim of anti-union animus because he has been an active and outspoken representative of the bargaining unit; and his presence as a Union representative "should have been accorded equal status under labor management relations and SERB rulings." Decisions supporting the last contention were cited by the Union.

For purposes of argument only, the Union asserted that, even if all of management's accusations are believed, to uphold the Grievant's removal for standing at the door is an extreme punishment for the behavior complained of. Finally, the Union

maintains that the Arbitration decision in the Finney matter more accurately describes the events that led to the Grievant's last long term suspension than the testimony of the BWC's witness in the instant proceeding.

The BWC Position:

The BWC contends that just cause existed for the Grievant's removal and, thus, the grievance should be denied. It is the BWC's position that the Grievant disrupted Regional Manager Hayden's meeting by his "intolerable harangue and further, exerted force to prevent his Regional Manager from exiting the conference room." The BWC further asserts that the Grievant "insinuated himself between the door" and Mr. Hayden, then slammed the door shut, and continued his "unruly behavior and a confrontational attitude" by slamming the door shut when Mr. Hayden made a second attempt to leave the conference room.

Also, the BWC points out that Mr. Fischer testified that he attempted to come between the Grievant and Mr. Hayden in an attempt to "break up the situation." The BWC maintains that the Grievant was "infringing upon a co-worker's civil rights by detaining him against his will in violation of Memos 1.06(3A) and (15B) of the BWC employee handbook." The BWC stresses that the Grievant has a significant track record of "confrontational behavior", which caused "pain and suffering, medical attention and [extended] rehabilitation for one of his past victims," and for which he has been progressively disciplined. Removal is justified, the BWC contends, because progressive discipline has not worked to correct

the Grievant's behavior and his aggressive, disruptive conduct can no longer be tolerated.

The BWC acknowledges that the reason Messrs. Hayden and Fischer were disciplined was because they "should have acted differently with regard to Mr. Eichelberger's presence." The differences in the discipline meted out, the BWC explains, are attributable to the Grievant's past disciplinary record, the nature of those prior violations, and his behavior as an aggressor on January 26, 1993. His restricting Mr. Hayden's ability "to flee what was clearly a confrontational situation" was "willful, intimidating and threatening" behavior, according to the BWC. It argues, therefore, that the Grievant's behavior, not Mr. Hayden's, provoked the incident in question.

The BWC denies that Mr. Hayden was hostile to the Grievant on January 29. Instead, it affirms Mr. Hayden's judgement in prohibiting the Grievant from participating on the labor-management committee because he was not a team player and, he was not assigned to the facility in question as referenced by Gulla, citing Article 3.02.

The BWC points out that the Union did not prove its allegations that there was an improper or incomplete investigation. It maintains that the Grievant's conduct was violative of reasonable work rules which he was well aware of as a Union official and as a result of his prior misconduct. The BWC also asserts that there is no real evidence management was "out to get" the Grievant since the Union's allegation is based upon



"inconsistencies and self serving testimony". Since the penalty was "progressive and commensurate" with the Grievant's misconduct and prior record, the BWC asks that the discipline be upheld.

#### Analysis and Award

Pursuant to Article 24, Section 24.01 of the collective bargaining agreement, the BWC has the "burden of proof to establish just cause for any disciplinary action." Essentially, that burden includes the responsibility to demonstrate with sufficiently reliable evidence that the charges against the Grievant upon which the removal decision was based, in fact occurred, and that the removal was warranted under all the relevant circumstances of the case. While the BWC has, for the most part, sustained its burden as to the charges against the Grievant, it has not sustained that part of its burden in showing that removal was justified consistent with just cause principles.

Having made these rulings at the outset, it is also appropriate to clarify what this case is and is not about. The Grievant in the instant proceeding is not charged with being the aggressor in the incident as was the circumstance in the Finney arbitration. Here, the notice of management's decision to remove the Grievant cites with specification the precise facts which formed the grounds for his removal. Essentially, those charges involve the Grievant's entering a management meeting, interrupting it, refusing to be quiet when asked, arguing with Mr. Hayden, and impeding his leaving the conference room on two occasions.

The record is clear in showing that the problem giving rise to

the incident on January 26, is that the Grievant was not told that he could not attend the meeting at any time immediately prior to that meeting, when it began, or during its course by any of the three management officials present. It is also clear that it was the Grievant's presence at an essentially management meeting which contributed to the difficulties which then arose. To that extent, the parties were equally at fault. Likewise, it is evident that the meeting was for one purpose only; for Mr. Fischer to air his complaints about the release of the Rockside phone numbers. That was a purely management concern, and not a matter which concerned the Grievant in his Union capacity. Indeed, there is no indication that the Grievant ever even mentioned the alleged Union reason, the Training Officer's comments, to Mr. Hayden.

Whether the grievant came to say "hello" to Mr. Hayden or to discuss Union concerns arising out of the earlier training session pursuant to the "open door" policy, he clearly overstayed his welcome once it became apparent the three BWC officials were discussing a matter of purely management concern. The Grievant remained in the conference room for no other apparent reason than neither Mr. Hayden nor the other two managers asked him to leave and he wanted to voice his opinions about Mr. Neubert. These factors separately or in combination, however, do not excuse the Grievant from recognizing the nature of the meeting and excusing himself, since he claimed to have been there in his official Union capacity. He had no right in this capacity to remain in the room or to interrupt the discussion. Indeed, the interruptions if

anything, heightened the tension in the room as evidenced by Mr. Hayden's repeated statements to the Grievant to "shut up" or stop.<sup>3</sup>

Up until that juncture, it would be difficult to say that the situation warranted discipline at all. However, both Mr. Hayden's and the Grievant's discourteous behavior to one another was a harbinger of things to come, yet no one acted responsibly by directing the Grievant to leave and thereby precluding escalation of the confrontation. Mr. Hayden, at worst, exhibited poor management skills in not asking the Grievant to leave and by saying "shut up" or "stop" to him. On the other hand, the Grievant exercised poor labor relations skills by not excusing himself from the meeting and by repeatedly interrupting the discussion. Even the Grievant in his own testimony, albeit self-serving, acknowledged that he later exited the room when he was first told it was a management meeting. As a Union official, he knew or should have known earlier on in the discussion that he should have excused himself from the room.

The matter escalated when Mr. Hayden slammed his hand on the table and said the meeting was over. Unquestionably, he had the authority to end the meeting because of its management nature. It is the manner he used to achieve this result which reflected poor judgement. For his part, the Grievant also acted inappropriately

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<sup>3</sup>For purpose of this analysis it does not matter which phrase Mr. Hayden used. Either one is inappropriate and apparently constituted part of the grounds for which he was suspended three days for "unprofessional and discourteous behavior". Management conceded that his use of such language instead of a direct order to leave the meeting precluded it from charging the Grievant with insubordination.

by escalating the confrontation when he attempted to preclude Mr. Hayden from leaving the conference room by slamming the door shut on one or two occasions. The Grievant had no right to act in this manner, even if he was on Union business. A union official is not immune from discipline for conduct unrelated to the lawful pursuit of his/her official duties if that conduct constitutes misconduct for which any employee would be subject to discipline under accepted notions of just cause. Thus, the Grievant acted at his own peril, for which discipline can be imposed, based upon the facts of record.

The matter deteriorated further when Mr. Hayden "forcibly" pushed the Grievant. Regardless of whether Mr. Hayden first asked him to move, it was the pushing which was the worst element of the January 26 incident, and, presumably, is the reason why Mr. Hayden received a three day disciplinary suspension.<sup>4</sup> To his credit, the Grievant did not retaliate physically; a significant fact that mitigates against upholding his removal.

That is not to say that the Grievant's conduct in the incident was not serious. It was, and it warranted significant discipline based on the circumstances of record. Some of those circumstances have already been described and discussed. The confrontational atmosphere was perpetuated by the Grievant's hand shake tussle and

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<sup>4</sup>The subsequent Masonic handshake turned "macho" by the Grievant, and his challenging Mr. Hayden to fight by his "gloves" comment and invitation to the gym were not part of the charges against the Grievant. As discussed subsequently, however, it is found that the Grievant's conduct was unwarranted and is considered for purposes of determining the appropriate discipline.

by his inappropriate invitation to Mr. Hayden to fight at the gym which intensified the level of the Grievant's misconduct and culpability for the incident. The Grievant's testimony that he was extending a "peace making gesture" to show Mr. Hayden that he was not going to cause any "harm" is tantamount to an admission by the Grievant that his conduct had crossed the line into an area of potential violent confrontation which necessitated peace making and assurances that he would not harm Mr. Hayden. This clearly was not some minor misunderstanding. It was two men at the brink of a serious confrontation, brought on in large part by the Grievant's misconduct. He was hardly the "victim" the Union contended the Grievant was. Moreover, Mr. Hayden must be held blameless for not understanding the Grievant's Masonic handshake, if that's what it was, since his testimony is unrebutted that he is not a Mason.

In the instant case, removal may have been warranted but for the Grievant's physical self-restraint and for Mr. Hayden's own inappropriate behavior. Had this been the Grievant's first demonstration of inappropriate or abusive behavior, a disciplinary suspension comparable to Mr. Hayden's might have been justified. This is not the case. The Grievant intentionally engaged in misconduct which cannot be condoned in an employment relationship and which justified serious discipline under the circumstances of this record. The Grievant's previous disciplinary record is replete with related instances of inappropriate and abusive behavior. Based upon that record, including prior disciplinary suspensions of twenty and thirty days duration for such


infractions, a suspension in lieu of the removal to the date of this decision is fully warranted based upon just cause principles. As a result of this decision, the Grievant ought to reflect upon his situation and realize that further instances of related misconduct will justify his removal, subject to the terms of the grievance/arbitration provisions of the Agreement and to just cause principles.

AWARD

The removal was not for just cause. This discipline shall be converted to a disciplinary suspension, without pay, covering the period March 2, 1993, to the date of this decision. The Grievant shall be reinstated to his former position, effective seven days after the date of this decision. His records shall be revised to reflect the discipline ordered by this award.

July 15, 1993

Date



MOLLIE H. BOWERS

Arbitrator