#1319

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio State Workers Compensation Bureau

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For the State
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Dena L. Cochran, Supervisor, Medical Claims Specialists
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For the Union
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Case-Specific Data
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June 30-31, 1998 & July 28, 1998

Grievance #
34-26-980 225-0037-01-09

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Termination

Table of Contents

I. Facts

Although the arbitral record contains substantial evidence—and some proof—of several types of problematic, and ill-advised conduct by the Grievant, the Arbitrator shall confine his analysis to the specific conduct on which the Bureau relied to terminate the Grievant on February 20, 1998.[1] The following factual findings are supported by both documentary and testimonial evidence in the record as a whole.

The Ohio State Bureau of Workers Compensation (the Bureau or the Employer) employed Mr. Carlton Castlin Sr. (the Grievant) from July 7, 1991 until February 20, 1998 when he was fired for insubordination, failure of good behavior, and neglect of duty. At that time, the Grievant was was a Clerk I in the Bureau's Main File Room (Mayfil), a unit of the Bureau's Central Claims Department, Operations Division. During his tenure with the Bureau, the Grievant held several clerical positions, including the position of Office Assistant. In addition to receiving several promotions during his tenure with the Bureau, the Grievant accepted several voluntary demotions.[2] Also, while employed with the Bureau, he suffered one disciplinary action. The specific events that led to the Grievant's removal began in his seventh year of tenure with the Bureau and are set forth below.

A. Neglect of duty—Work Production

The Bureau charged that the Grievant neglected his duty by failing to file the required number of claims per day. And the record clearly shows that Ms. Payne and Ms. Cochran were concerned

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[1] Joint Exhibit 2f. However, where necessary, other events will be considered for purposes of credibility.

[2] Joint Exhibit 6.

about the quantity and quality of the Grievant's work.[3] In late December 1997, Ms. Cochran determined the Grievant's production expectation (expectation) was to file 400 claims per day, and on or about January 8, 1998, Ms. Payne communicated this expectation to him. Some employees were clearly aware of their expectations,[4] others were not.

By setting expectations for the Grievant, Ms. Cochran sought to help him increase his productivity. In addition to establishing this expectation, Ms. Cochran offered the Grievant verbal suggestions, one-to-one counseling, and additional training. Also, she teamed him with other productive employees, gave him a mentor, and the equipment he requested.

Ms. Cochran took several steps in deriving the 400/day expectation. First, she considered that other employees filed an average of approximately five hundred claims in approximately 3 hours. She also considered the Grievant's position as a Clerk I and based the 400/day expectation on the production of approximately five Clerk IIs and a supervisor, all of worked overtime on a Saturday. Within this group, the least tenured employee had approximately 4 years of filing experience. Also, employees in this group had spent most of their tenure with the Bureau working in Mayfil. In contrast, the Grievant had worked in Mayfil from 30-60 days when he received the 400/day expectation. On the other hand, the Grievant had as much general experience (4-5 years) in filing claims as the comparable group of employees.

The Grievant failed to fulfill his 400/day expectation. Instead of attaining the 400/day goal,

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[3] Employer Exhibit 2.

[4] See Management Exhibit 21 Ms. Cochran's e-mail to employees regarding expectations thus showing that other employees were subjected to expectations.

the Grievant's daily totals tended to hover between 100 and 150 claims per day.[5] Moreover, his daily tally often included misfiled claims, an improper practice which artificially inflated his daily totals.[6]

Also, the Grievant enjoyed several advantages relative to employees in the comparable group. First, he was assigned relatively current (1997)files which were the easiest to organize and to file. The older more voluminous and bulky files are more difficult to handle, as some are three inches thick. Second, the Grievant only filed claims, while Clerk IIs had additional duties. And third, the 500/day average of the Clerk IIs was based on only three hours of filing; the Grievant's 400/day expectation was based on seven.

The Bureau distinguishes expectations from work standards in several ways. First, work standards apply to an entire department, but expectations apply only to individual employees. Second, the Bureau does not always afford employees clear written notification of their expectations, though it does offer some notification as exemplified in Employer Exhibit 21. Third, the Bureau does not always give employees *clear written notice* that disciplinary consequences may accompany unfulfilled expectations. However, in this case, Ms. Cochran did verbally inform the Grievant that failure to meet his expectations could (or would) result in discipline. Finally, the Bureau does not offer the Union clear written notice of expectations for employees.

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5 Employer Exhibit 2c-o.

6 Employer Exhibit 2.

B. January 7, 1998 Insubordination—(a) Willful Disobedience/Failure to Carry Out a Direct Order & Failure of Good Behavior—(b) Discourteous and/or Rude Treatment of a Fellow Employee or Manager.

On January 7, 1998, the Grievant arrived at work at approximately 8:00 a.m. and turned on his personal computer. Then he went elsewhere for approximately fifteen minutes to assess his work load for the day, returned to his computer, and signed onto his e-mail. Shortly thereafter, the Grievant's supervisor, Ms. Dena L. Cochran asked him to come to her office (cubicle or pod). The Grievant asked if he could finish his e-mail, and she said no. In her pod, Ms. Cochran asked the Grievant about a grievance meeting that he was required to attend that day. During their conversation, some friction developed between them. Therefore, on that same day, the Grievant filed a grievance against Ms. Cochran, claiming that she became verbally abusive and or unprofessional during their conversation in her cubicle.

Later, on January 7, the Grievant entered Ms. Cochran's pod, gave her the grievance, asked her to sign it, and give him a copy. After she accepted the grievance, Ms. Cochran and a Clerical Supervisor, Ms. Judith L. Payne, stepped into a conference room to read and discuss the complaint. Instead of accompanying the supervisors into the conference room, the Grievant stood at the conference-room door and would not enter because Ms. Cochran prohibited him from bringing a tape recorder into the room.

After Ms. Cochran and Ms. Payne read the grievance, the Grievant again insisted that Ms. Cochran sign it, but she declined his invitation. As she left the conference room, the Grievant followed her to her pod, continually insisting that she sign the grievance form and give a copy to him. When Ms. Cochran entered her pod to make a telephone call, the Grievant stood on the other

side of the wall and waited for her to finish. Ms. Cochran left her pod, and the Grievant again followed her to insist that she sign the grievance and give him a copy. At some point, Ms. Cochran informed the Grievant that she would process the grievance and return it to him within the contractually prescribed time limit. Then the Grievant asked her to return the original grievance form so that he might amend it. She advised him to amend a copy of the form. At this point, the Grievant tried to snatch the original copy of the grievance from Ms. Cochran's hand.

The Grievant returned to Ms. Cochran's pod several times, on January 7, 1998, to insist that she give him a signed copy of the grievance. During these visits he made, "loud disruptive remarks" and cited provisions of the contract that covered her duties regarding the processing of the grievance. Ms. Cochran directly ordered him to lower his voice. He refused. Moreover, as she continued to order him to lower his voice, she also advised him that his loud speech was disturbing other employees and that he could be disciplined for refusing to lower his voice. Finally, Ms. Cochran initialed the grievance and gave him a copy. This version of the incident is generally corroborated by Ms. Payne's testimony and statement.[7]

With a copy of the grievance in his possession, the Grievant returned to his cubicle for approximately fifteen minutes and then asked Ms. Cochran to open sick the bay door because he was ill. She agreed to open the door. Some four or five minutes later, Ms. Cochran appeared with a document from Ms. Sharon Csonka notifying Ms. Cochran to release the Grievant with pay for a grievance meeting on January 7, 1998.[8] When Ms. Cochran attempted to deliver the document to the Grievant, he made a loud "coughing" or "gaging" sound and ran down the hall to the men's

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[7] Joint Exhibit 1i, Ms. Cochran's memorandum to herself.

[8] Union Exhibit 6.

room. Persistent in her attempt to deliver the document, Ms. Cochran followed him to the door of the restroom. Eventually, the Grievant left the restroom and returned to his cubicle. Ms. Cochran, subsequently, approached the Grievant in his pod and again ordered him to accept the document.

C. January 8, 1998 Insubordination—(a) Willful Disobedience/Failure to Carry Out a Direct Order

The incident on January 8, 1998 occurred while Ms. Payne was in the Grievant's work area instructing him on the proper methods for filing claims. While so informing the Grievant, Ms. Payne ordered him to leave the files "standing out"[9] so that she could subject them to a quality review. The first time Ms. Payne ordered the Grievant to leave the files out he informed her that he was not stupid.[10] Upon returning to check the files, Ms. Payne discovered that the Grievant had failed to leave them out as she had instructed. Ms. Payne then ordered the Grievant a second time to "leave the files out" in order that she might later do a quality review. This time he flatly stated that he would not leave the files out and in fact did not leave them out as directed.[11]

Later, on January 8, 1998, the order, together with the consequences of disobedience, was unambiguously repeated to the Grievant. Ms. Cochran and Ms. Payne sent the Grievant a memorandum notifying him that he had disobeyed a direct order to "leave the files 1/2 way out." Moreover, the memorandum specifically stated that the Grievant was being directly ordered "to leave the files ½ way [out]" and that "failure to comply will result in disciplinary."[12]

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9 Employer Exhibit 1 m.

10 Employer Exhibit 1n.

11 Joint Exhibit 1m.

12 Employer Exhibit 1o.

D. First Scheduled Pre-Disciplinary Hearing

On February 3, 1998, the Grievant was notified that a predisciplinary hearing was scheduled on February 6, 1998 to consider whether to suspend him for: "Insubordination, (a) willful disobedience/failure to carry out a direct order; Neglect of duty, (c) work production; and Failure of good behavior, (b) discourteous and/or rude treatment of a fellow employee or manager." In support of these charges, the Bureau listed several incidences that occurred in December 1997 but which are irrelevant to this case. However, the Bureau also listed the following relevant incidences:

> On January 7, 1998, you failed to lower your voice and refrain . . . [from] making remarks that disrupted the work area in violation of a direct order. On January 8, 1998, you refused to leave files out for quality review as directed by Judy Payne in violation of a direct order. Since your arrival at Mayfil you have failed to produce at the expected level of filing at least 400 claims per day. On January 29, you stuck your middle finger up at your supervisor."

E. February 5, 1998 Insubordination—(a) Willful Disobedience/Failure to Carry Out a Direct Order & Failure of Good Behavior

Before the February 6 predisciplinary hearing was held, another incident occurred on February 5, 1998. That day the Grievant arrived at work at approximately 8:30 a.m. but did not begin filling claims until approximately 11:15 a.m. He used these two hours and twenty-five minutes to perform personal tasks like receiving and/or sending e-mail and conversing on the telephone. The first time that Ms. Payne instructed him to begin his tasks he simply continued to attend to his personal duties. Then, at approximately 10:15 a.m., Ms. Payne ordered him to complete his tasks by no later than 11:00 a.m. and begin to file claims. Nevertheless, the Grievant continued to perform personal duties until approximately 11:15 a.m. Although she ordered the Grievant to

begin work, Ms. Payne never ordered him to stay off the telephone on February 5, 1998.[13]

F. Reconvened Predisciplinary Meeting: Additional Information and Violations

In light of the February 5 incident, on February 9, 1998, the Bureau reconvened and notified the Grievant that a new predisciplinary hearing had been scheduled for February 12, 1998 to contemplate his removal for: "Insubordination, (a) wilful disobedience/failure to carry out a direct order." To support its decision to elevate the proposed penalty from a suspension to a removal, the Bureau noted: "Specifically, on February 5, 1998 you refused to follow a direct order issued to you by your immediate supervisor, Judy Payne, to go to work. The above charges are in addition to those outlined in your predisciplinary meeting of Friday, February 6, 1998."

On February 20, 1998, the Bureau removed the Grievant based on the following charges: "Insubordination, (a) Willful disobedience/failure to carry out a direct order; Neglect of duty, (c) work production; Failure of good behavior, (b) discourteous and/or rude treatment of a fellow employee or manager."[14] In support of these charges, the Bureau stated:

> Specifically, on January 7, 1998, after being given a direct order to do so, you refused to lower your voice and refrain from making disruptive remarks in your work area. On January 8, 1998, you refused a verbal direct order and a written order to leave files half way out on the shelves to provide your supervisor an opportunity to perform a quality review of your work. On February 5, 1998, you refused a direct order to stop writing E-mails, making telephone calls, and going into the file room to work on filing your mail and claims. Finally your production is not at expected levels. The average filing for a clerk at Mayfil is 400 filings per day. By your own records you are averaging only 169 filings per day."[15]

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[13] Although there is no written proof of this, the Arbitrator finds Ms. Payne's testimony on this point to be credible.

[14] Employer Exhibit 2f.

[15] Employer Exhibit 2f.

II. Relevant Contract Language

Article 24.01

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

Article 24.02

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include: A. one or more oral reprimand(s) (with appropriate notation in employee's file): B. one or more written reprimand(s); C. a fine in an amount not to exceed five (5) days pay; for any form of discipline; to be implemented only after approval from OCB; D. one or more day(s) suspension(s); E termination.

Article 44.03-Work Rules

"[W]ork rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them.

Work Rules: Bureau of Workers Compensation

"[T]he principles of progressive discipline are to be observed." These guidelines are provided to aid managers and supervisors in doing employee discipline properly. They are guidelines only. It may be appropriate to provide greater or lesser levels of discipline in specific cases based upon specific conditions."

Work Rule Guidelines

Violations	1st	2nd	3rd	4th	5th
Insubordination					
Willful disobedience/failure to carry out direct orders*	Suspension/Removal	Suspension/Removal	Removal		
Neglect of Duty					
Work production	Verbal	Written	Suspension	Suspension	Removal
Failure of Good Behavior					
Discourteous and/or rude treatment of a fellow employee or manager	Written/Suspension	Removal			

* "Removal is recommended only in extreme cases where the employee is clearly put on notice that because of direct, willful and repeated refusal to follow a direct order, the employee may be terminated."
"These guidelines should generally be followed. However, there will be times when it is necessary to deviate from the grid due to the severity of the incident or other good business reasons."

III. The Issue

Was Carlton Castlin removed for just cause? If not, what shall the remedy be?

IV. The Parties' Positions

Union's Position

1. The insubordination charge of January 7, 1998 is a fabrication to enhance the severity of the Grievant's discipline.
   a. Even if the Grievant disobeyed a direct order on January 7, 1998, that disobedience does not constitute insubordination.
2. The insubordination charge of January 8, is unsupportable because the Grievant complied with Ms. Payne's directive.
3. The insubordination charge of February 5, 1998, is also insupportable because Ms. Payne

rescinded her first direct order and gave the Grievant extra time to complete his personal tasks.

4. With respect to the "Neglect of duty charge," the Bureau failed to give the Union proper notification of production expectations and used a flawed process in establishing and implementing those expectations.
5. The Bureau failed to follow principles of progressive discipline, failed to impose a penalty commensurate with the alleged offense, and stacked its charges against the Grievant.

Bureau's Position

1. Testimonial and documentary evidence in the record establishes that the Grievant was insubordinate on January 7, 1998, January 8, 1998, and February 5, 1998.
2. The Grievant's work expectations were properly created and implemented.
3. Work expectations are not the same as work standards, and the parties have a past practice of recognizing that distinction.
4. The Bureau need not slavishly adhere to principles of progressive discipline where relevant circumstances indicate otherwise.
5. The Union has not met its burden of proving that the Grievant was subjected to disparate treatment.

V. Analysis

A. January 7, 1998 — Insubordination—Willful Disobedience/Failure to Carry Out a Direct Order & Failure of Good Behavior—Discourteous and/or Rude Treatment of a Fellow Employee or Manager

In alleging insubordination, the Bureau specifically charged that, on January 7, 1998, "after being given a direct order to do so, . . . [the Grievant] refused to lower . . . [his] voice and refrain from making disruptive remarks in . . . [his] work area." Because this is the specific conduct on which the Bureau rests its January 7 insubordination charge, it is incumbent upon the Bureau to establish the existence of that conduct by a preponderance of the evidence in the record as a whole. Curiously, however, neither the Bureau nor the Union gives substantial attention to this specific conduct in their post hearing briefs, though they adequately addressed it in the hearing. Ultimately, there is sufficient evidence in the record to determine whether this conduct occurred and, if so, whether it constitutes insubordination.

In their post hearing briefs, both the Union and the Bureau argue whether the Grievant was insubordinate when he refused to accept Ms. Sharon Csonka's letter from Ms. Cochran and ran to the men's room with Ms. Cochran in tow. The difficulty here is that although this event occurred on January 7, the Bureau did not rely on it when deciding to terminate the Grievant for insubordination on February 20, 1998. Therefore, the Arbitrator is obliged to ignore that conduct when deciding whether the Bureau terminated the Grievant for just cause.

To prove a charge of insubordination, an employer must show that: (1) the order in question was "clear and specific enough to let the employee know exactly what is expected;" and (2) "the employee was told exactly what the penalty will be if he or she refuses to comply."[16]

The record establishes that on January 7, 1998, the Grievant attempted to force Ms. Cochran to sign his grievance and to give him a copy. While talking to Ms. Cochran, the Grievant spoke in a loud, disruptive manner and cited contractual provisions to her. In the pods which lack solid walls, the Grievant's outbursts could be easily heard by other employees and disturb them. At that point, Ms. Cochran specifically and clearly ordered the Grievant to lower his voice and he refused. Therefore, Ms. Cochran's order was legitimate, clear, explicit, and reasonable and, thereby, satisfied the first criterion.

Turning now to the second criterion, the record shows that Ms. Cochran specifically warned the Grievant that he could be disciplined for refusing to lower his voice. The criterion here requires a supervisor to inform an employee of the exact penalty. Therefore, the only remaining question is whether Ms. Cochran's warning was specific enough to satisfy the second criterion. In this

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[16] ADOLPH M. KOVEN & SUSAN M. SMITH, JUST CAUSE THE SEVEN TESTS, 79 (2d. ed. 1992)

Arbitrator's view, it was. In other words, her warning was specific enough to alert a reasonable employee that refusal to comply with the direct order could result in discipline. More is not needed, or perhaps even possible. No supervisor can necessarily predict the exact measure of discipline that will be imposed for a given type or level of insubordination. It, therefore, suffices to inform the employee that his behavior is sufficiently unacceptable to trigger discipline. This Ms. Cochran did. Accordingly, the Arbitrator holds that on January 7, 1998, the Grievant's refusal to lower his voice constituted insubordination. Furthermore, because the Grievant's outbursts on this day were abusive and loud, the Arbitrator holds that the Grievant's conduct also constituted failure of good behavior—discourteous and/or rude treatment of a fellow employee or manager.

B. January 8, 1998 Insubordination—Willful Disobedience/Failure to Carry Out a Direct Order

Here, again the record establishes that the Grievant disobeyed a direct order. First, the Arbitrator finds Ms. Payne's testimony more credible than the Grievant's. During direct and cross-examination, the Grievant clearly contradicted himself on several points. Under cross-examination, the Grievant claimed that he "followed all direct orders," though he might not have obeyed the orders when they were given. However, while cross-examining the Grievant, the Bureau established that on January 12, 1998, the Grievant admitted that Ms. Payne had ordered him not to include misfiled claims in his daily tally of claims filed.[17] Yet, three days later, the Grievant's weekly report[18] shows that he included misfiled claims in his tally. Furthermore, the Grievant again admitted that "in the

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[17] Employer Exhibit 26 b.

[18] Employer Exhibit 2i.

past I have been told not to include misfiles in my account. . . ."[19] When the employer pointed these facts out to the Grievant, he simply responded that he had included misfiled claims in an effort to "pad" his totals.

Also, the Grievant testified under cross-examination that "he never received complaints about his work." The employer then used two e-mails to directly impeach him.[20] In one e-mail, Ms. Cochran criticized the Grievant's weekly report for inaccuracy and indicated that she was returning the report to him for corrections. Specifically, Ms. Cochran pointed out that the Grievant's report "was not totaled and was not detailed to the exact figures through out the day as . . . [he was] instructed." The second e-mail was the Grievant's reply to Ms. Cochran's e-mail. Here, the Grievant explicitly admitted that he had been "instructed four or five times on this [matter of weekly reports]." And, the Grievant admitted that Ms. Payne returned one of his problematic reports to him on 1/8/98. Nevertheless, under cross examination, he insisted that Ms. Cochran's e-mail was not a complaint but simply a statement that "he did not do his job completely. . . ."

In a dispute like this where credibility is a—if not the—pivotal factor, much turns on the Grievant's credibility. Indeed, one might say that the Grievant is his own best (or worst) witness. Once fundamental discrepancies or contradictions surface in the Grievant's own testimony, there is little that corroborating witnesses can do to rehabilitate either his credibility or his case.

In addition to Ms. Payne's relatively credible testimony that she ordered the Grievant to leave the files half way out, there is a revealing and corroborative e-mail reply that the Grievant sent to Ms. Payne and Mr. Roger Coe., on January 8, 1998. Among other things, the Grievant denied that his

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[19] Union Exhibit 10.

[20] Employer Exhibit 26.

behavior regarding the files constituted willfully disobedience. Instead, he insisted that he left "them out but not as far as . . . [Ms. Payne] wanted."[21]

A careful examination of the reply tends to support the proposition that Ms. Payne indeed ordered the Grievant to leave the files half way out. The reply asserts in relevant part: "As you can see and know, it files are left out half way there is a strong possibility of them falling to the floor due to the unevenness of the files. I thought I was doing the right thing. Sorry for trying to keep the area clean."[22] The passage suggests that: (1) Ms. Payne did indeed order the Grievant to leave the files half out; (2) the Grievant understood her order to leave the files half way out; (3) the Grievant disagreed with that order; and (4) he chose to disobey it for his own reasons. Later, on January 9, 1998, the Grievant claimed that Ms. Payne's order (January 8, 1998 at 11.14 a.m.) never explicitly mentioned leaving the files half way out. In light of the preceding discussion, the Arbitrator finds that Ms. Payne did order the Grievant to leave the files half way out.

Nevertheless, merely showing that Ms. Payne clearly communicated a legitimate order is not enough to establish actionable insubordination. The Bureau must also show that Ms. Payne explicitly warned the Grievant about the disciplinary consequences of disobeying her order. The record reveals that later, on January 8, 1998, Ms. Payne and Ms. Cochran specifically informed the Grievant that refusal to leave the files out as directed would lead to disciplinary action against him. But, nothing in the record suggests that after receiving that particular warning, the Grievant refused to leave the files half way out.

Yet, there is reason to believe that, under these circumstances, explicit notification of

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21 Union Exhibit 8.

22 *Id.*

disciplinary consequences was unnecessary because the Grievant had constructive notice. That is, he had every reason to understand that disobeying direct orders will result in discipline. First, the Grievant had been suspended for insubordination on or about May 23, 1997. The suspension was later upheld in arbitration. Second, because the Grievant was a former shop steward or union representative, one can reasonably and safely presume that he fully understands the consequences of disobeying direct orders. Third, on January 7, the Grievant had been specifically warned that failure to follow a direct order would result in disciplinary action. Still the very next day, he indulged in the same misconduct ostensibly because it suited his purposes. The rationale for requiring supervisors to notify employees of the disciplinary consequences of disobeying direct orders is to afford the employees an opportunity to correct their errant behavior. In this instance, however, it is highly unlikely that the Grievant needed such warning because he scarcely could have forgotten that adverse actions accompany such disobedience. Therefore, under the circumstances of this case, Ms. Payne need not have specifically informed the Grievant that failure to leave the files out would lead to disciplinary action.

C. February 5, 1998 Insubordination—Willful Disobedience/Failure to Carry Out a Direct Order

The record shows that on February 5, 1998, Ms. Payne initially ordered the Grievant to stop doing personal tasks at about 10.15 a.m. When he refused to obey that order, she effectively rescinded it by allowing him to work until 11:00 a.m. At this point, there was only technical insubordination, if any. However, after Ms. Payne extended the Grievant's time for personal tasks, she directly ordered him to begin work at 11:00 a.m. sharp. Instead of obeying this order, the Grievant performed personal tasks until 11:15 a.m. in direct contradiction to Ms. Payne's orders.

By insisting on working those extra fifteen minutes after being ordered to stop, the Grievant crossed the line and disobeyed a direct order. Even though Ms. Payne did not specifically and directly order the Grievant to stop using the telephone for personal calls, she did order him back to work and he refused.

For the reasons mentioned in the foregoing section, Ms. Payne's failure to expressly notify the Grievant that he would be disciplined for continuing to do personal work on the Bureau's time is not fatal to the Bureau's charge of insubordination under *these particular circumstances.*

D. Neglect of Duty—Work Production

This is perhaps the most hotly contested issue in the instant dispute. Because the record clearly indicates that the Grievant did not file 400 claims per day as the Bureau's expectation required, the only remaining issue is the propriety of the expectation. That issue comprises several sub-issues.

E. Distinction Between Expectations and Work Rules

The first issue here is whether an expectation is substantially different from a work rule. The Bureau recognizes such a distinction. Predictably, however, this distinction lies just beyond the Union's perception. To support its contention, the Bureau points first to its Work Rule Guidelines. According to the Bureau, "Neglect of Duty/ Work Production" addresses failure to satisfy expectations, and "Neglect of Duty/ Failure to meet standards" focuses on performance that falls below the work rules. This argument has persuasive force. In addition, in its post hearing brief, the Bureau points out that, when arguing the Grievant's May 1997 suspension, the Union did not view expectations as being the same as work rules. The Arbitrator finds it highly unlikely that the Union would remain unaware that the Bureau was using expectations in addition to work rules, especially

since expectations have been in existence since at least 1997.[23]

Also, the Union maintains that defective notification fatally flaws the Bureau's expectations as they are implemented. Focusing first on employee notification, the Union argues that while the Bureau might have notified employees that expectations exist, it failed to notify them that disciplinary action might accompany unfulfilled expectations.

Two problems plague this argument. First, whether the Bureau properly notified other employees of the disciplinary component of expectations is not as relevant *in this dispute* as whether the Bureau so notified the Grievant. Regardless of whether the Bureau properly notified other employees in this regard, Ms. Payne and Ms. Cochran credibly testified that the Grievant had several notices that failure to meet his expectation could lead to disciplinary action. Therefore, the Arbitrator finds that the Grievant was properly notified of the disciplinary consequences of failing to meet his expectations.

The other half of the Union's notification argument is that the Bureau failed to afford the Union written notice of the use of expectations as measurements of employees' productivity. In support of this argument, the Union cites Article 44.03 which, in pertinent part, states: "The Union shall be *notified* prior to the implementation of any new work rules and shall have the opportunity to discuss them."[24] Article 44.03 requires only *notification* and not necessarily *written notification*. The Union did not argue that it had not been notified but that it had not received written notification of the Bureau's use of expectations. Since written notification is not required and the Union did not claim to have received no notification, the Union's argument is unpersuasive.

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[23] *See* Employer Exhibit 21.

[24] Emphasis added.

Finally, the Union argues that the Bureau used a flawed process to establish the Grievant's expectations. The Arbitrator sees no substantial flaw in the establishment of the expectations, since nothing suggests that the Grievant is somehow prejudiced by the expectation that he file 400 claims per day. As pointed out above, the 1997 files to which the Grievant was assigned were the easiest to file. Moreover, the Grievant's only official duty was to file claims. And, he had approximately seven hours to file 400 claims while Clerk IIs must file approximately 500 claims per day in addition to performing other job duties. Even if the expectations were flawed in their derivation—and that has not been established—nothing suggests that the Grievant was thereby harmed. The Arbitrator finds no flaws in the manner in which the Bureau established its expectations and no harm to the Grievant in the manner in which those expectations were implemented. Furthermore, since it is clear that the Grievant consistently failed to meet his expectations, the Arbitrator is obliged to uphold the Bureau's charge of neglect of duty.

F. Absence of Progressive Discipline

As the Union concedes in its post hearing brief, the purpose of progressive discipline is corrective rather than punitive. Moreover, the Union is correct in the general proposition that delayed imposition of discipline dilutes the corrective component of corrective discipline. However, it does not follow that the Bureau violated these principles by not disciplining the Grievant sooner. In fact, the Bureau suspended the Grievant in May 1997 for essentially the same conduct that triggered the instant dispute. Apparently that disciplinary experience failed to correct his behavior. Moreover, between the first suspension and the Grievant's removal, the Bureau was poised to at least consider disciplining the Grievant a second time for essentially the same conduct that triggered the first suspension. But before the Bureau could fully act on those charges, the Grievant repeated the

same misconduct by disobeying yet another direct order. Thus, neither discipline in the form of a suspension nor the threat of possibly stronger discipline seemed to assist the Grievant in correcting his behavior. Even though the requirement for progressive discipline is quite prominent in the parties' collective bargaining agreement as well as in the Bureau's Work Rule Guidelines, the Bureau is not obliged to scrupulously adhere to the principles of progressive discipline irrespective of the circumstances surrounding an employee's misconduct. It is, in other words, a well-accepted principle of labor-management relations that some circumstances justify abandoning the progressive disciplinary path.

In the instant case, at least three factors justify such a deviation. First, there is the nature of the Grievant's misconduct. Insubordination is no trivial form of misconduct but threatens the very core of the Bureau's ability to supervise its workforce. Second, the location and manner in which the misconduct occurred looms large in any disciplinary decision. In labor-management relations insubordination away from the eyes and ears of coworkers is one matter; insubordination in the presence of coworkers is quite another. One of the established charges of insubordination occurred in the presence of other employees and managers. This type of insubordination poses the gravest threat to a supervisor's ability to direct the workforce.[25] Third, the Grievant persisted in this type of wholly unacceptable behavior despite previous discipline and threatened disciplined for the same misconduct. Fourth, the Bureau's Work Rule Guidelines leave room for deviation from progressive discipline where necessary. For example, the Guidelines offer a range of discipline that includes

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[25] *See, e.g.* FERMCO v. Fernald Atomic Trades and Labor Council, 107 Lab. Arb. (BNA) 246 (1996 Heekin, Arb).

suspensions and removal for the very first episode of insubordination, thereby implicitly recognizing the need, in some situations, to forego progressive disciplinary principles. Also, the note accompanying the Guidelines states: "Removal is recommended only in extreme cases *where the employee is clearly put on notice* that because of direct, *willful and repeated refusal to follow a direct order*, the employee may be terminated."[26] This note implicitly defines "extreme cases" to include those where an employee is clearly notified of: (1) the discipline; and (2) the link between the discipline and the insubordinate conduct. This note, therefore, wholly agrees with the earlier-discussed standards for proving insubordination.[27] And, the Arbitrator has previously determined that the Grievant was clearly notified that he would be disciplined if he persisted in being insubordinate. Moreover, this notice was reinforced by a suspension—later sustained in arbitration—for the same conduct. In this Arbitrator's view, the behavior established in the instant record and the circumstances surrounding that behavior are wholly intolerable, and neither the collective bargaining agreement nor the Bureau's Guidelines countermand the decision to forego the rigors of progressive discipline in this particular case.

Finally, the Union argues that progressive discipline is indicated where the misconduct that triggered the discipline in question is the same as or similar to an employee's earlier misconduct. The question that this point raises is may the Bureau ever deviate from progressive discipline so long as there is substantial overlap between the "triggering" misconduct and earlier misconduct?

On its face, this categorical proposition is over-inclusive. First, whether "triggering" misconduct that is the same as or similar to previous misconduct justifies harsher discipline—

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[26] Emphasis added.

[27] *See supra* note 17 and accompanying text.

including discharge— depends to some extent on the nature of the "triggering" misconduct. In other words, standing alone, the magnitude or egregiousness of the "triggering" misconduct is not necessarily diminished because it is identical to previous misconduct. For example, one factor that helps to determine the magnitude and, hence, the proper measure of discipline for "triggering" misconduct is the extent to which that misconduct threatens productivity and efficiency in the workplace. Thus, where "triggering" misconduct conduct seriously threatens productive efficiency—as does insubordination— the very fact that it has previously occurred heightens that threat and, therefore, can override the fact that the triggering misconduct is identical to previous misconduct. Moreover, the situation is aggravated where, as here, the triggering event—the February 5 incident—occurs while the Bureau is trying to resolve several other episodes of the same or similar misconduct. Finally, even if the triggering misconduct does not pose an especially large threat, at some point another instance of repetitious misconduct may warrant discharge because of the cumulative impact of repeated infractions on workplace efficiency. For the foregoing reasons, the Union's reliance on "triggering event" analysis is unavailing here. The Arbitrator finds that the Bureau has sustained all three of its charges against the Grievant.

VI. Penalty Assessment and Award

Having sustained all of the Bureau's charges against the Grievant, the Arbitrator feels that some discipline is clearly warranted. In assessing the severity of discipline warranted here, the Arbitrator looks at both mitigating and aggravating circumstances. Mitigating factors include the Grievant's seven-year tenure and the fact that he has only one disciplinary incident on his record. Aggravating factors include the fact the Grievant engaged in the serious misconduct of insubordination. Moreover, he embraced that conduct in the presence of other employees,

exacerbating its potentially erosive effects on Ms. Cochran's and Ms. Payne's ability to direct the work force. Also, given the Grievant's background, he had to have known that the proper avenue for him was to obey first and grieve later, rather than embrace crude and potentially costly forms of self help. This balance of aggravating and mitigating factors persuades the Arbitrator that termination is the proper measure of discipline in this case. Accordingly, the grievance is hereby **DENIED** in its entirety.

Notary Certificate

State of Indiana)

)SS:

County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 12th day of October, 1998

Signature of Notary Public: Claudia J. Ramirez

Printed Name of Notary Public: Claudia J. Ramirez

My commission expires: 12/28/99

County of Residency: Marion

Robert Brookins

Robert Brookins

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio State Workers Compensation Bureau

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

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Case-Specific Data
Hearings Held
June 30-31, 1998 & July 28, 1998

Grievance #
34-26-980 225-0037-01-09

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Termination