

ARBITRATION

BETWEEN

**OHIO REHABILITATION SERVICES
COMMISSION**

02-12 - AND -

**GRIEVANCE NO. 29-02-971202-0520-
(KEVIN SALISBURY SUSPENSION)**

**DISTRICT 1199, THE HEALTH CARE AND
SOCIAL SERVICE UNION, SERVICE
EMPLOYEES INTERNATIONAL UNION,
ALF-CIO**

APPEARANCES:

For the Commission: Darla J. Burns, Esq.
General Counsel
Ohio Rehabilitation Services Commission
Columbus, Ohio

For the Union: Harry W. Proctor
Administrative Organizer
District 1199/SEIU
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

STATEMENT OF THE CASE:

This case came on for hearing in Columbus, Ohio, on February 9, 1999. It involves the three-day disciplinary lay-off/suspension of State Employee Kevin Salisbury, a Vocation Rehabilitation Counselor II (VRCII) for the Ohio Rehabilitation Services Commission, Bureau of Vocational Rehabilitation (BVR), who worked out of the BVR's Portsmouth, Ohio facility.

By letter dated December 1, 1997, Commission Administrator Robert L. Rabe notified the Grievant of his suspension, as follows:

"I have carefully reviewed the recommendation of the Director [Guttermann] of the Bureau of Vocational Rehabilitation and I have determined that there is just cause for discipline. This is to notify you that you are hereby suspended for three (3) working days from your position of Vocational Rehabilitation Counselor 2 for failure of good behavior. The reason for this disciplinary action is your behaviors toward a female coworker, including rubbing against her and getting under the desk with her when she was there attending to a problem; this discipline specifically excludes your sending floral arrangements to the coworker."

This discipline followed notice to Employee Salisbury from BVR Director June K. Guttermann, dated October 6, 1997, that she intended to recommend that he be suspended for three working days for failure of good behavior. More specifically, that letter reads in pertinent part as follows:

"This is to notify you of my intent to recommend that you be suspended for three (3) working days for failure of good behavior. An administrative investigation has revealed that you engaged in activities that are inappropriate for the workplace. These actions primarily were focused toward one female coworker and included: rubbing against her, sending a large floral arrangement to her at the office after she advised you not to send her flowers, and getting

under the desk with her when she was attempting to find a dropped article. These actions occurred despite this coworker having told you that she wanted you to leave her alone and 'stay your distance.' When you were asked about these actions you denied that they occurred; however, information gathered through the investigative process corroborated the credibility of the allegations.

As a vocational rehabilitation counselor with this agency, you are expected to demonstrate professionalism and effectuate judgment in your actions with staff and consumers. Your actions as noted above are unacceptable and constitute failure of good behavior.

In accordance with Article 8 of the 1199 Contract, you will be provided an opportunity to respond to these charges at a pre-disciplinary meeting which will be arranged by the Administrator."

Article 8, referenced in Director Gutterman's letter, reads as follows:

" **ARTICLE 8 - DISCIPLINE**

8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. A fine in an amount not to exceed five (5) days pay
- D. Suspension
- E. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

The employee's authorization shall not be required for the deduction of a disciplinary fine from the employee's paycheck.

8.03 Pre-Discipline

Prior to the imposition of a suspension or fine of more than three (3) days, or a termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the 'Loudermill Decision' or any subsequent court decisions that shall impact on pre-discipline due process requirements."

The pre-disciplinary meeting referred to in Director Gutterman's letter of October 6, 1997, was indeed conducted on November 21, 1997, before Staff Attorney Darla J. Burns, General Counsel for the Commission, and the Commission advocate here. Following this meeting, Ms. Burns prepared a document for Administrator Rabe comprised of Findings of Fact, Discussion, and Recommendation. In the latter, Ms. Burns' finding was that "just cause exists for discipline" of Employee Salisbury.

Following Director Rabe's imposition of a three-day suspension of Employee Salisbury on December 1, 1997, Salisbury grieved his suspension on December 12, 1997. This grievance reads in pertinent part as follows:

"Statement of Grievance - I have been suspended for three days without 'just cause' for Failure of Good Behavior,' based on affidavits of Dave Whitman and Sandra Faulkner. Whitman and Faulkner have committed a criminal misdemeanor by providing false statements in affidavits.

Contract Articles and Sections - Article 8 and all others that apply.

Resolution Requested - Removal of discipline from personnel record with three days pay for suspension of 12/15/97 through

12/17/97."

The grievance of Employee Salisbury, herein the Grievant, was immediately advanced to Step 3 before Step 3 Agency Head Designee Bruce Mfrofka. In this regard, the parties' Contract at Article 7, Grievance Procedure, Section 7.06 - Grievance Steps, at Step 3, provide in pertinent part that "[a]t the Step Three (3) meeting the grievance may be granted, settled, or withdrawn, or a response shall be prepared and issued by the Agency head or designee" In the instant case, Designer Mfrofka, following a twenty page summary (single spaced) of the parties' contentions and the evidence in support thereof (See, Appendix I hereto which is the index of the parties' Exhibits submitted at Step 3 to Designee Mfrofka) made the following "Findings":

"I find no violation of Article 8.

* * * *

The Grievant was disciplined for three (3) working days for failure of good behavior. **An administrative investigation revealed that the Grievant engaged in activities that are inappropriate in the workplace. These actions primarily were focused toward one female coworker and included: rubbing against her, sending a large floral arrangement to her at the office after she advised the Grievant not to send her flowers, and getting under the desk with her when she was attempting to find a dropped article. These actions occurred despite the coworker having told you that she wanted you to leave her alone and 'stay your distance.'** It was noted that when the Grievant was asked about these actions he denied that they occurred; however, information gathered through the investigative process corroborated the credibility of the allegations. It is RSC's position and supported by this designee that a VRC with the agency is expected to demonstrate professionalism and effective judgment in their actions with staff and consumers.

The Grievant's actions are unacceptable and constitute failure of good behavior. The discipline was issued for just cause and is not arbitrary or capricious. Management's actions are supported by the contract, Ohio Civil Service Law and Administrative Rules.

The grievance is denied."

Testifying on behalf of the Commission were: Michael Esker, Human Resources Officer, Selections Unit; RSC, BVR employee Kathy Tubb; and Darla O'Connor, Assistant Manager, Human Resource Management, RSC. Testifying on behalf of the Grievant and the Union was the Grievant himself. The parties also entered into the following Stipulated Facts:

- "1. Kevin Salisbury was originally employed by the Ohio Rehabilitation Services Commission, Bureau of Vocational Rehabilitation (BVR) effective September 1984 as a vocational rehabilitation counselor (VCR) I.
2. Effective July of 1986 Mr. Salisbury was reassigned to VRC II the position he currently holds.
3. Mr. Salisbury is headquartered at the Portsmouth, Ohio BVR office.
4. On October 7, 1997, Mr. Salisbury was informed of the recommendation to suspend him for three working days for failure of good behavior.
5. Mr. Salisbury was informed that the three working day suspension was based upon activities toward a female coworker which are inappropriate for the workplace, which included rubbing against her, sending a large floral arrangement to her office after she advised him not to send flowers, and his getting under the desk with her when she was attempting to find a dropped article.
6. The female coworkers who made the allegations against Mr. Salisbury is Kathy Tubb.

7. Mr. Salisbury was suspended for three working days for failure of good behavior effective December 15, 1997.
8. Mr. Salisbury was informed that the three working days suspension specifically excluded his actions of sending floral arrangements to Ms. Tubb.
9. Mr. Salisbury timely grieved the three working day suspension.
10. The grievance was denied at Step 3 of the grievance procedure.
11. The grievance is properly before the arbitrator.
12. The collective bargaining agreement effective August 3, 1997 through May 31, 2000 is applicable to the grievance."

It is also noted that on March 12, 1991, the Grievant acknowledged in writing his receipt of the Employee Manual and that he understood that it was his responsibility to read the Manual and maintain it, including new and revised materials. As of September, 1995, the Manual provided in pertinent part as follows:

"POLICY PROHIBITING SEXUAL HARASSMENT

POLICY STATEMENT. It is RSC's policy, and the policy of the state, to maintain a working environment free from any discrimination, and to prohibit sexual harassment in the workplace. This policy extends to the actions of managers and supervisors, co-workers, and outsiders who come in contact with RSC employees in a work-related context. Sexual harassment, like harassment on the basis of any protected case, is a form of discrimination and is expressly prohibited by the following federal and state laws:

Section 703 of Title VII of the Civil Rights Act of 1964;

42 U.S.C. 2000e-2a;
Section 4112.02 and related sections of the Ohio Revised Code; and
State Executive Order 92-60V."

Following the arbitration hearing, the parties' advocates filed helpful post-hearing briefs.

As noted in the Stipulated Facts, the record reflects that the Grievant was hired by the Bureau of Vocational Rehabilitation as a Vocational Rehabilitation Counselor I (VRC) in September, 1985, and promoted to a VRC II in July, 1996, a position he has held to date. The Grievant's "Position Description" provides that "VRC's work in partnership with people with disabilities who are vocationally handicapped ... assisting them to achieve community participation through employment and independent living opportunities, thereby reducing ongoing tax support." Said Description identifies the Grievant's principle job duty as "counsel[ing] eligible people with disabilities toward increased functioning and mutually agreeable vocational goals based on an assessment of inherent values, capabilities, and vocational handicaps" The Grievant himself has a disability, namely, epilepsy, which requires considerable medication for its control, including dilantin, which the record shows can (and in the Grievant's case occasionally does) affect the patient's equilibrium. In the material time frame of 1995 and 1996, Word Processing Specialist (WPS) employee Kathy Tubb worked with and for the Grievant, typing up dictation for him from audio tapes he'd made; taking and screening his phone calls; and filing case files for him, among other duties. Since Tubb performs work for the Grievant (and another VRC), the Grievant has input into her evaluation. However, the Grievant was not her supervisor.

In the early eighties, and at a time when Tubb did not work for the Grievant, but did work in the Portsmouth office, the Grievant asked her out for

a few dates. After a few dates, Tubb declined to date the Grievant any further. The events which lead to the Grievant's discipline under scrutiny here commenced on September 19, 1996, when Tubb called her supervisor in Columbus, Alma Boffman, wishing to file a sexual harassment charge against the Grievant. Boffman sent a memo concerning her telephone conversation with Tubb to Personnel Coordinator Mike Esker, dated September 26, 1996, which was received into evidence. This "writing" was the first document of what was to become a very voluminous, indeed daunting compilation of documents, comprising the record in this matter, namely, witnesses' statements; E-mail; narrative contentions and allegations; and extensive excerpts from books and periodicals. One need but peruse Appendix I to get a feel for the volume and kind of documentation accompanying the third step grievance proceeding. All of these documents were received into evidence here for the Arbitrator's consideration.

Boffman's memo to Esker of September 26, 1996, reads in pertinent part as follows:

"On Thursday afternoon, September 19, 1996, I received a telephone call from Kathy Tubb, WPS in the Portsmouth office. She was in tears and stated to me that something had to be done. She was filing sexual harassment charges against Kevin Salisbury, VRC in the same office. I asked Kathy what was happening. She stated to me that Kevin was being inappropriate. On occasion, he has sent flowers to her and she has told him not to. He constantly brushes up against her and when she says something to him about it, he says he's sorry. When the repairman was there to fix the work station they were looking for some screws that went with the work station. Kathy thought maybe the screws might be under the table and she got down to look and Kevin also got down on the floor and put his hand on her and stated he just wanted to help. Kathy also mentioned that once she had taken cases to his office

and he stated "you want me to say something mean or nasty to you, don't you." She left the office. Kathy further stated that she no longer wanted to work overtime to reduce the waiting list because she was afraid to be alone in the office with Kevin. Kathy mentioned that the situation has been going on for some time. I asked her why she didn't mention it before and she stated she thought he would stop but now things has (sic) gone too far."

This report led to an investigation, the results of which were put forth at the pre-disciplinary meeting on November 6, 1997. During the intervening year, the Grievant was placed on administrative leave pursuant to O.R.C. Section 124.388 by Administrator Rabe and paid at his regular rate of pay, with the expectation that he would be responsible to be available during scheduled working hours in the event that the Employer needed to contact him. In its opening statement, the Union appeared to contend that this administrative leave was improper and that accordingly, some remedy on that point was in order. However, the grievance was never amended to include this issue, nor does the record reflect that the parties had any discussion prior to the arbitration hearing concerning the propriety of the placement of the Grievant on administrative leave. Hence, any issue concerning the propriety of the Grievant's placement on administrative leave is beyond the scope of the instant grievance.

Following the pre-disciplinary meeting, management's pre-disciplinary meeting officer who conducted the meeting, Ms. Burns, the advocate here, generated a Report for Administrator Rabe dated November 21, 1997, (previously referenced herein) setting forth, among other matters, as noted previously, "Findings of Fact." The Arbitrator has reviewed said "Findings" and the entirety of the documents referred to therein, and finds that Ms. Burns accurately and excellently summarizes their content. Accordingly, excerpted

below are the more pertinent of Ms. Burns' summary. References to "Employee" are a reference to the Grievant.

"Management ... interviewed Ms. Tubb concerning her allegations She acknowledged that Employee had not asked her out recently. She stated that. Employee continued to send her flowers on Secretary's Day. She also noted that Employee had made her a beneficiary on a \$10,000 insurance policy. Ms. Tubb was asked about occasions when Employee stared at her and/or stood next to her when she is filing, and she responded that this would occur all the time. She added that there were occasions when he would stand next to her and move his pelvis. Regarding the incident of Employee getting under the desk, she stated that this occurred just a few weeks prior to the interview and he got as close to her as he could. Ms. Tubb stated that in June of 1996 she specifically warned Employee to leave her alone, but that the behaviors were continuing. She stated that his e-mail of September 18, 1996 telling her to refrain from sending e-mails when the option to speak existed was the last straw."

Tubb was asked by Esker, the interviewer, to put her complaint in writing and she did. This writing was received in evidence as Employer's Exhibit "D." It also was put before Ms. Burns at the pre-disciplinary meeting. In it, Ms. Tubb related several matters, but only some of these appear to have been given serious consideration and some follow-up by Management. Those matters, as related by Tubb, are set forth below:

"The harassment started when [the Grievant] started work ... in Portsmouth. He would continually ask me out and would never take no for an answer. I finally went ... out with him He would continue to ask me out and I told him I was dating another guy and not interested

Kathy Cooper, a former summer receptionist also said [Grievant] asked her if she had red panties on. She let him know it was none

of his business what color underwear she had on.

Pam Crabtree, a Columbus Counselor, said that [Grievant] told her that she would look good in a negligee.

[W]hen I am in [Grievant's] office filing cases or pulling cases for mail, he seems to make me feel uncomfortable by just staring or getting up and asking if he can help and just standing there next to me.

After they had installed our working stations, I got down underneath my desk to plug in my equipment and Kevin got down underneath my desk next to me and said 'I just wanted to help.' This, to me, made me feel very uncomfortable.

At the front desk on 6/14/96, [Grievant] said: 'you just have to draw the men in.' Then he rubbed up against me. I said, 'Kevin, this is my space and stay your distance because you have been warned.' He still continued to get in my space time and again. Even when I walk up the hall, he has to be right up against me. He seems to wait to see if I will say something or get upset.

While doing overtime one day [the Grievant] and I were the only employees working. He came to the front desk eating a banana. He opened his mouth and asked me to look at the stitches in his mouth. This made me sick. I would not even look. I can't believe he would have done this to anyone else.

He is always saying not to leave a note on a case, that he wants me to come into his room and discuss it with him or talk to him. When I take a case in his room he always says, 'this is more like it, see how nice this was, this is the way I want it to be done.' I feel that he knows it makes me feel uneasy about being in the same room with him, and I feel uneasy being there. When he asked me personal questions, I will usually only answer 'yes' or 'no' or give him a look. He said he will find a way to get me to talk to him.

September 26, 1996, Kevin e-mailed me with a copy to John Medert, Rehabilitation Supervisor, thanking me for all my hard work. The last sentence in this e-mail stated, 'If I forget to say think-you for awhile, I know I will remember to send a big bundle of flowers on Secretary's Day.' This again is just a form of harassment. **He knows how I feel about the flowers and he just like to provoke things. I don't feel that I should have to work in a sexual harassment environment.**

On October 3, 1996, HR Management and John Medert, VR Supervisor, met with Employee concerning the allegations brought by Employee. Employee was asked whether he named Ms. Tubb as a beneficiary in a life insurance policy. He responded that he did name her on a certificate of deposit about two years ago. Employee was asked about the frequency of sending flowers to Ms. Tubb, and whether she had ever told him she did not want to be given flowers. He responded that he sends Ms. Tubb flowers and a gift certificate to Sarah's restaurant on each secretaries' day. He further responded that he also had given another WPS a small order of flowers and the same gift certificate. **Employee further responded that Ms. Tubb has never told him not to send flowers, and added that she really enjoys the flowers, as she has in her office area dried flowers from an arrangement he previously sent to her.** Employee was also asked whether he has rubbed against Ms. Tubb while she was filing, and he responded he never has touched or rubbed against Ms. Tubb. Employee was asked whether he had ever gotten under the desk with Ms. Tubb and rubbed against her, he responded that the allegation is a lie. Employee was also asked whether he had ever asked a former summer receptionist if she had on red panties, and Employee responded he has never said anything like that. Employee was asked whether he had told Pam Crabtree, VRC, that she would look good in a negligee, and he responded no.

Subsequent to meeting with HR Management, Employee submitted

written responses to Ms. Tubb's allegations. Employee stated that Ms. Tubb is presently engaged in a pervasive pattern of behavior intended to discredit him within the work environment which is directly a result of his realization since July 1996 of the extent of her manipulative behaviors. Employee further stated that by utilizing her work environment during the normal performance of work tasks she would engage in hostile behaviors intended to provoke a response from him and letting other employees think she was being victimized. Employee further stated that through extensive reading he came to see ms. Tubb as a passive aggressive personality whom is highly manipulative and using the work environment to constantly provoke him and then allow others to think she was being victimized. Employee further stated he has never stared at, rubbed or touched any part of Ms. Tubb in this work environment. Employee further stated he has never gone underneath a desk and touched Ms. Tubb.

On October 8, 1996, HR Management contacted Ms. Tubb to confirm that Employee was placed on administrative leave pending the outcome of the investigation. Ms. Tubb indicated that she had received a call from someone who said that an incident of a sexual nature between Employee and a MRDD consumer had occurred previously at the Tri-State MRDD facility and that the Bureau should talk with them. As a result of [this allegation] combined with the original allegations by Ms. Tubb, the Bureau requested the assistance of the State Highway Patrol in investigating possible criminal activity between Employee and mutual consumers of Tri-State MRDD. As a result of its investigation, the Patrol notified the Bureau in June of 1997 that it had found no evidence of criminal activity. [The Scioto County Prosecutor's office concurred.]"

The record reflects that Crabtree and Plummer were interviewed and that they confirmed the statements attributed to them by Tubb concerning comments made to them by the Grievant some 8 to 9 years ago.

The record shows that Plummer had located her hearing aid business next to the BVR facility in Portsmouth and understandably hoped to pick up business from BVR clientele, many whom were hearing impaired. Initially, the Grievant referred his clients to her, but soon he ceased doing so, assessing that the services she could render were not up to par under BVR standards. Plummer met with the Grievant and expressed her dissatisfaction.

The witnesses testifying at the arbitration hearing essentially supported the documentary evidence of their statements, either as they wrote them or as reflected in the record of their interviews by Management, principally Esker. I would note that in the Grievant's testimony, he referred to his e-mail of 9-26-96 to Tubb, copy to Supervisor John Medert. This e-mail is highly praiseful of Tubb's work performance, and it is the one which concludes that "if I forget to say thank you for awhile, I know I will remember to send a big bundle of flowers on Secretary's Day," which it will be recalled was also referenced by Tubb in her written statement back in early October, late September, 1996. By way of contrast, the Grievant's written statement of October 2, 1996, concerning the allegations which Tubb made against him and sent to Supervisor Medert, are highly critical of Tubb. In particular, I note that Grievant's notation that Tubb "would very often give me a 'dirty' look when giving her work or asking a question."

I note too that Commission witness O'Connor conceded that 3rd Step Designer Mfrofka simply "made an error" when he referenced the Grievant's sending of flowers to Tubb in his Findings.

THE STIPULATED ISSUE:

The parties have stipulated that the issue is:

"Did just cause exist to suspending Kevin Salisbury for three

working days? If not, what is the proper remedy?"

THE COMMISSION'S POSITION:

In support of its contention, that it's three day disciplinary suspension of the Grievant was for just cause, the Commission relies in part on Arbitrator Carroll R. Daugherty's oft-cited seven tests of just cause. Thus, the Commission contends that the Agency gave the Grievant forewarning of possible disciplinary consequences of his conduct toward Ms. Tubb. It notes that certain offenses, such as unwelcome touching of another is so serious that an employee is properly expected to know that such conduct is offensive and punishable. The behaviors engaged in by the Grievant are contained within the sexual harassment policy of the Employee Handbook. The Agency notes that while the Grievant was not charged with sexual harassment, but rather failure of good behavior, his behavior is clearly prohibited by that policy. The handbook contains the forewarning that violations of the policies contained in the handbook are subject to discipline. The Agency also contends that its rule is reasonably related to the orderly, efficient, and safe operation of the Agency's business. Thus, the Agency asserts that the Grievant's behavior is covered by the Employer's sexual harassment policy, which prohibits leering, pinching, patting or other types of body contact. The Agency notes that it must be stressed that the Grievant's behavior did not meet the statutory definition of sexual harassment, and as a consequence, he was not found to have sexually harassed Ms. Tubb. Clearly, however, his behavior is inappropriate. As a result, he was charged with and disciplined for failure of good behavior. A policy which prohibits the behaviors of rubbing, touching, and leering at another is reasonable and without questions relates to the efficient operation of the business.

With respect to the just cause test requiring an effort to discover whether the Grievant did in fact violate workplace rules, the Commission contends that it has clearly met this test. In this regard, the Agency points to Ms. Tubb's allegations that he would stare at her or stand next to her while she was filing documents in his office, offering her assistance with her filing. However, it must be noted that such filing tasks were one of Ms. Tubb's job duties, and the Grievant provided no valid reason for needing to assist her to perform this duty. The Agency also points to Ms. Tubb's allegations that the Grievant would brush against her and thereby have physical contact with her. The Commission asserts that initially the Grievant denied ever having touched or rubbed against Ms. Tubb. However, at the pre-discipline meeting, the grievance meeting, and the arbitration hearing, he stated that he takes dilantin which causes unsteadiness. The Grievant stated the effects of the dilantin causes unsteadiness, and as a consequence, he may have bumped against staff, walls and desks. However, one must question the credibility of this defense. Certainly, the Grievant could have offered such a defense at the October 3, 1996 investigatory interview or he could have included it in his October 2, 1996 response, but he did neither. It is noteworthy that the Grievant testified that he typed his response without restriction by Mr. Medert or Ms. Esker and that there were no time restrictions upon completing it. No where in his statement does the Grievant hint that he may have inadvertently touched Ms. Tubb as a result of medication.

Ms. Tubb also reported an unwelcome touch when the Grievant got underneath a desk with her. Initially, the Grievant denied ever going underneath a desk with Ms. Tubb. However, at the pre-discipline meeting, grievance meeting, and arbitration hearing, the Grievant once again, changes his story and admits to going underneath a desk. He claimed, however, that

she asked him to get underneath the desk. It is noteworthy that nowhere in the Grievant's October 2, 1996 written responses to Ms. Tubb's various allegations does he acknowledge at the time.

The Grievant's own testimony corroborates the behaviors of which Ms. Tubb complained. For example, he indirectly admitted rubbing against and/or touching her by claiming that his medication causes unsteadiness and, as a consequence, he may have bumped against staff. He admitted the desk incident. He admitted asking her to look at stitches in his mouth. He admitted naming her as a beneficiary on a certificate of deposit.

The Grievant's inappropriate conduct toward Ms. Tubb occurred over a series of time. Ms. Tubb did not report his conduct until September of 1996. The testimony by Ms. Tubb was that the way she informed the Grievant that his conduct made her feel uncomfortable was that she would give a "a look." Unfortunately, one can understand her reluctance to come forward, given the fact, as testified to by the Grievant, he had an impact upon her performance evaluation ratings. One cannot believe the Grievant's testimony that he would have never said anything negative about Ms. Tubb given his October 2, 1996 negative assessment of her. It is noteworthy that this negative assessment came approximately one week after he sent her an e-mail thanking her for all her hard work during the year. Additionally, the evidence demonstrated that there was no day to day on-site supervision of the Portsmouth Office from 1991

through March of 1997.

As for the just cause test that the investigation be conducted fairly and objectively, the Commission contends that it clearly was. In its presentation at the grievance meeting, the Union appears to take issue with the affidavits which were obtained from Ms. Crabtree and Ms. Plummer. However, it must be noted that Ms. O'Connor testified that because the incidents involving Ms. Crabtree and Ms. Plummer occurred so long ago, they were not included as a basis for the discipline. The testimony by Ms. O'Connor was that the affidavits helped in the determination that Ms. Tubb was credible.

With respect to the just cause test as to whether at the investigation there was substantial evidence or proof that the Grievant was guilty as charged, the Commission asserts there was such substantial evidence. The Agency asserts that prior to the final decision to impose discipline, Mr. Salisbury changed his initial denial of ever having touched Ms. Tubb and denying the desk incident to providing reasons which explained that he "may" have touched her at times and reasons for going underneath the desk. Mr. Salisbury admitted to opening his mouth asking her to look at stitches. Mr. Salisbury admitted to having named Ms. Tubb as a beneficiary. There was clearly substantial proof that the Grievant was guilty of failure of good behavior. Also, asserts the Agency, the Grievant testified that he named Ms. Tubb as a beneficiary hoping she would start communicating with him. This clearly is inappropriate, contends the Agency.

As for the test of whether the Agency has applied its rules and penalties even-handedly and without discrimination, the Commission asserts that it was and that indeed, there is no contention from the Grievant or the Union to the contrary.

With respect to the just cause test of whether the degree of discipline

meted out is reasonably related to the seriousness of the Grievant's proven offenses and his record of service, the Agency contends that the degree or level of discipline is reasonable. The Agency asserts that the discipline imposed upon the Grievant was for actions he directed toward Ms. Tubb. The environment created by the Grievant towards Ms. Tubb is certainly inappropriate, and could have exposed the Employer to liability, asserts the Agency. The Agency also asserts that the Grievant admitted to a great deal of Tubb's allegations. It notes that the Grievant testified that Tubb would be at her desk crying. Given the evidence presented, one can reasonably assume that the Grievant's actions were the reason Ms. Tubb was crying, contends the Agency.

Concerning the Union-raised issue that the Grievant was improperly disciplined for the action of giving Ms. Tubb a floral arrangement, the Agency takes the position that the Union incorrectly reads the Agency's Step 3 response to the grievance. In this regard, the Agency notes that the Agency's third step answer issued on February 13, 1998, and stated that:

"The Grievant was disciplined for three working days for failure of good behavior. An administrative investigation revealed that the Grievant had engaged in activities that are inappropriate in the workplace. These actions were primarily found toward one female coworker and included: sending a large floral arrangement to her at the office after she advised the Grievant not to send her flowers"

The Commission asserts that a careful reading of the 3rd step response reflects that the response does not claim that the Grievant was disciplined for sending flowers to Ms. Tubb. The response states that sending flowers to her was an activity that was included in the administrative investigation. This is entirely

correct. Sending flowers to Ms. Tubb was an issue she brought up. Thereafter, it was investigated as part of the administrative investigation and was included as part of the recommendation for discipline. It was addressed in the pre-discipline meeting. The Grievant must have set forth an acceptable reason and/or defense as sending flowers to Ms. Tubb was specifically excluded as a basis for the discipline. Not only is this activity specifically excluded in the notice of discipline, but it must be noted also that the Union agreed in paragraph eight of the stipulated facts that this action was excluded as part of the three working day suspension. Even in its opening statement the Union acknowledges that this activity was excluded. The Union cannot simultaneously agree that it was excluded as a basis for the discipline that was imposed and also argue that it was included because the Step 3 response refers to it. Again, a careful reading of the Step 3 response reflects that the Designee cites this activity as part of what was investigated, and not as a reason for the discipline. Even if the Step 3 Designee had made such an error, it must be kept in mind that it is the notice of discipline sent by the Administrator which is the official record of discipline, and not the Step 3 grievance response. As a consequence, the Arbitrator can only come to one conclusion, and that is, sending flowers to Ms. Tubb was not included as a basis for which the Grievant was disciplined. Therefore, there was no procedural or due process violation.

Based on all of the above, the Employer requests that the Arbitrator find that just cause exists for the discipline, and deny the grievance in its entirety.

THE UNION'S POSITION:

The Union makes several points in support of its position that Management failed to make a case against the Grievant. And, asserts the

Union, while the Union recognizes the seriousness of sexual harassment in the workplace, the Union also notes that unwarranted allegations of sexual harassment are very damaging to those who, like the Grievant, are falsely accused of sexual harassment.

Thus, the Union points out that whereas Director Rabe expressly noted that the Grievant's giving of flowers to Ms. Tubb on Secretary's Day was not one of the bases for imposing a three day suspension on the Grievant, nonetheless, at the 3rd step of the grievance procedure, the Director's designee, Mfrofka, mentions this flower-giving as a basis for denying the grievance and upholding Director Rabe's discharge action. Furthermore, with respect to the Secretary's Day flower-giving, the Union notes that the flowers were accepted by Ms. Tubb, as were the accompanying gifts. If Ms. Tubb were uncomfortable with the Grievant's Secretary's Day gift-giving, as she now claims is the case, she would have objected and protested sooner, contends the Union. Accordingly, argues the Union, the Grievant's Secretary's Day flower and gift-giving was not inappropriate behavior on the Grievant's part.

The Union additionally challenges the propriety of the Commission's investigation, asserting that Management picked and chose whom it interviewed in the course of their investigation, rather than attempting to gather all the facts. Thus, the Union challenges Management's reliance on the testimony of employee Dave Whitman, who does not directly work for RSC and is stationed at the opposite side of the building from the Grievant and Ms. Tubb. The Union also challenges Management's decision to not interview persons who were in direct contact with both the Grievant and Ms. Tubb on a regular basis. In any event, argues the Union, even Whitman said he never witnessed the Grievant acting inappropriately. Alleged incidents eight to nine years ago, now stale, were relied upon by Management, and this reliance was

not shared with the Grievant until the pre-disciplinary meeting. Moreover, asserts the Union, if Management felt that any of these now stale allegations had merit, they had a responsibility to address those issues then in a timely manner, and ought not be allowed to tardily raise them now. The consideration of these stale matters now is arbitrary and capricious, asserts the Union.

As for Ms. Tubb's alleged discomfort upon the Grievant's standing up while she was filing in his office, the Grievant explained without contradiction that he was simply trying to help her, since she inevitably had her arms full of charts to be filed. Nor, asserts the Union, did Tubb establish that the Grievant intentionally physically brushed against her from time to time. It was often very busy in the office and the Grievant's medication affected his balance, which could account for any brushing against the Grievant, a circumstance which Management chose to ignore.

The Union asserts that regarding the Grievant's letter to Supervisor Medert, a supervisor over Ms. Tubb, stating Tubb was a good worker, Management was unable to establish that there was any underlying motive to the letter. Management indicated in their testimony that supervisors were not physically located in Columbus, but frequented the office; Ms. Boffman once every three weeks and Mr. Medert each week. There is no excuse for Ms. Tubb to say she was unable to discuss a problem between her and the Grievant with them. In the Grievant's testimony, he states that he had talked to Management about Ms. Tubb's behavior, but there was no intervention until Ms. Tubb contacted Ms. Boffman. Certainly, if one could discuss a problem, so could the other one. That raises the question of why nothing was done immediately after the Grievant brought a problem to management's attention. Management never took corrective action even after the Grievant notified his supervisor of a

potential problem. It is part of Ms. Tubb's responsibility as a receptionist and computer processor to verbally communicate with the Grievant. If there is any failure of good behavior in this matter, it is management's lack of intervention prior to administering discipline.

The Union takes the position that Management interviewed the Grievant allowing only yes and no answers; it was pretty obvious they did not want him to fully explain his actions.

Still another contention made by the Union is the proposition that it was never established by Management or Ms. Tubb that the Grievant made Ms. Tubb feel uncomfortable; however, Management did establish that there was a communication problem in the office by doing nothing to correct a problem the Grievant brought to Mr. Medert's attention.

With respect to the issue concerning the Grievant's e-mail to Ms. Tubb, the Union contends it was appropriate, since it was established that Ms. Tubb records time for the office. In each of the e-mails, both supervisors John Medert and Alma Boffman are to receive a copy. Mr. Salisbury has the right to know if he is being paid correctly, certainly there is nothing improper in this. Additionally, Ms. Tubb in her testimony said that she obtained a desk and that she did not know if Mr. Salisbury helped to move or repair the desk. Management never rebutted the Grievant's testimony when he stated he was never under the desk with Ms. Tubb, but was fixing her desk with screws he had purchased while she held the desk to assist him. The Union's photographic exhibits, which show what had been done to the desk, were never challenged.

The Union contends that management has the responsibility to take corrective action prior to discipline. The Grievant had no prior discipline, yet management gave no rationale for a three day suspension and did not utilize a

progressive means of discipline in accordance to Article 8 of the Collective Bargaining Agreement even after the Highway Patrol and the City of Portsmouth dismissed charges of sexual harassment.

Based on all the foregoing, the Union urges that the grievance be sustained; and that the Grievant's suspension be expunged; and that the Grievant receive any and all lost wages and benefits and be made whole in every way.

DISCUSSION & OPINION:

As the parties appear to recognize, this case is all about credibility. Having recognized this, the Commission engaged in an exhaustive investigation, and the Union mounted an exhaustive defense. This being so, contrary to the Union's contention, I find no inadequacies in the Commission's investigation. The Union might have had a valid point vis a vis the "yes" and "no" format of the Grievant's initial interview, but in light of the virtually simultaneous opportunity to write out a response as he saw fit, this potential valid point is not persuasive here.

Careful consideration of all the prodigious record evidence persuades me that the Commission was correct when it credited Tubb over the Grievant vis a vis those matters upon which it grounded and relied in disciplining him by way of a three day disciplinary suspension. Moreover, and directly to the point, I concur in the principle reasons argued by Advocate Burns as to why the Commission credited Tubb over the Grievant in these matters. Thus, as Ms. Burns argued on behalf of the Commission, whereas the Grievant initially denied the more serious of the accusations against him made by Tubb, he shortly thereafter conceded at ~~least~~ ^{least for} in part the accuracy of the allegations. In this regard, he initially denied the desk incident and ever touching Tubb, but

shortly thereafter he conceded that perhaps he did physically contact Tubb due to unsteadiness brought on by his medications, and that he was under Tubb's desk on an occasion, albeit purportedly at her request. But, as the Commission points out, the Grievant's medication defense was belatedly raised, thereby undermining its veracity. Contrary to the Union's contention that the Commission ignored the Grievant's medications defense, to the contrary the Commission considered it, but failed to credit it, given the belatedness of its assertion. I agree. Had the Grievant's medication caused unsteadiness, which in turn caused the Grievant to brush up against and touch Ms. Tubb, the Grievant would have been embarrassed and have remembered from the outset these circumstances. At the outset, however, the Grievant simply denied any touching. These bases for the Commission's credibility resolution is so well established in arbitration, and constitute such solid bases as well, that any flaw in other circumstances also relied upon to resolve credibility, such as Crabtree and Plummer's adverse statements concerning the Grievant, which Commission witness O'Connor candidly testified were taken into account in resolving credibility, cannot be found to be of any meaningful consequence. Given the staleness of the events related in Crabtree's and Plummer's statements, one can question the wisdom of relying on same. And this is especially so with regard to Plummer's statement, given the record evidence that she may well have been biased against the Grievant, as asserted by the Union at the 3rd step, because of the Grievant's failure to refer clients to her business and her expressed displeasure with that fact. However, any such flaw in connection with Crabtree and Plummer's statements simply cannot realistically be found to have prejudiced the Grievant. Nor is there any merit to the Union's claim that the Commission erred by not taking corrective action eight or nine years ago in connection with the Crabtree and

Plummer accusations since the record shows that neither of them brought same to Management's attention at the time. Furthermore, the Commission, and the Undersigned's, credibility resolutions are bolstered by the Grievant's strongly inconsistent assessments of Ms. Tubb's work performance over the short span of but about a week between late September and early October. Then too, there is the overall context so readily apparent from considering the record as a whole, namely, that whereas the Grievant's romantic interest in Tubb was clearly rejected by Tubb early on in the early eighties, the Grievant has persisted thereafter in efforts to change that outcome. Furthermore, considering the evidence in the light most favorable to the Grievant, the record will only support the conclusion that Tubb conveyed to the Grievant that physical closeness was unwelcomed by her. Then, while he denied any direct statement by Tubb (contrary to her testimony and statements) expressing unwelcomeness, the Grievant himself acknowledged in his October 2, 1996, statement that he understood Tubb's "dirty" looks as hostile and disapproving. Hence, contrary to the Union's contention, the record amply supports that Management established that Tubb was made uncomfortable by the Grievant's actions, and that she conveyed this uncomfortableness to the Grievant. For example, Ms. Tubb made it clear that she did not want the Grievant's unsolicited help at the filing cabinets.

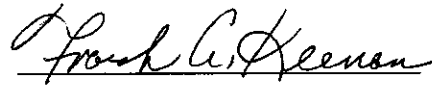
There remains for consideration Designee Mfrofka's action in interjecting back into the picture the purported impropriety of the Grievant giving flowers on Secretary's Day to Ms. Tubb, after Administrator Rabe, in his letter imposing the discipline under scrutiny here, expressly disavowed such as a ground for discipline. In this regard, I am unpersuaded by Counsel Burn's argument that the Union simply misreads the step 3 response. In my view, this 3rd step response clearly indicates that Mfrofka was of the view that the

Grievant's sending of flowers to Tubb was "inappropriate," after the appointing authority Rabe, had made clear that it was not to be regarded as inappropriate. In my view, Employer Witness O'Connor got it right when she testified that Mfrofka made an error. This "error" constitutes a significant due process flaw. Thus, the grievance procedure contemplates a second look at the administrative disciplinary action. Where, as here, the discipline is severe, and furthermore quantified, the reasonable expectation is that the discipline might well be modified and reduced as a consequence of the grievance process. This is especially so where the Grievant, as here, is relatively senior and without prior discipline. Additionally, in the instant case, while numerous allegations were made by Tubb (and others), discipline was meted out on only a couple of grounds. And, as Commission Counsel notes, there was no finding that the Grievant's conduct constituted sexual harassment, which was the nature of the initial allegations. Therefore the perception clearly is, indeed the inference is, that any fair chance of reduction of the penalty is, as a practical matter, precluded, when the reviewing authority adds a ground to the rationale for affirming the level of discipline not only not relied on by the imposer of the discipline, but a ground specifically rejected by the imposer. To remedy this due process flaw and error, the Grievant's penalty is reduced to a one (1) day suspension. The Undersigned is constrained to affirm a "suspension" as the penalty in order to bring home to the Grievant the seriousness of his conduct vis a vis Ms. Tubb, and to send the message, heretofore not received despite Ms. Tubb's efforts to convey same, that certain of his conduct toward Ms. Tubb in the workplace is unwelcome and not to be tolerated.

AWARD:

For the reasons more fully set forth hereinabove, the grievance is sustained in part and denied in part. The Grievant's suspension for rubbing against and getting under the desk with a female co-worker is reduced from a three (3) day suspension to a one day suspension. Accordingly, the Grievant is to be made whole for two (2) days pay and benefits, and his personnel record shall be revised to reflect only the disciplinary penalty imposed herein.

June 25, 1999



Frank A. Keenan
Arbitrator