#1560

OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

EEO Bureau/Ohio DR&C
-AND-
OCSEA/AFSCME Local 11

Appearing for Equal Employment Opportunity Bureau
David Burrus, Labor Relations Officer
Kay Carnein, Labor Relations Specialist
Annette Chambers, Deputy Warden, ORW
Rick Chuvalas, Warden's Assistant
Eric Dahlberg, Deputy Director, HR
Brian Eastman, Deputy Director, Budgets
Phyllis D. Hart, EEO Officer
Marsha Kent, EEO Officer
Tina Krieger, Attorney, DRC
Beth Lewis, Team Leader
Elizabeth Murch, Agency Representative

Appearing for OCSEA
Lynn Belcher, OCSEA 1st Chair
Anissia Goodwin, OCSEA, 2nd Chair
Victoria Holdren, Corrections Officer
Desmon Martin, Civil Rights Investigator (OCRC)
Suzanne Meade, OCSEA Union Steward, Observer
Elnora W. Rickman, DRC/EEO Secretary
Frankie D. Smith, DRC/CO Secretary
Allen V. Svendson, DRC OCI
Amanda Via, Secretary PCI
Maudie G. Williams, Grievant

CASE-SPECIFIC DATA

Grievance Nos.
Grievance No. 2701-010914-216-22-EX,
Hearings Held
January 25, 2002 & February 5, 2002
Case Decided
April 15, 2002
Subject
Removal Under Rules 8, 24, and 38

Grievance Denied In Part And Sustained In Part

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. Preliminary Statement

The parties to this dispute are the Equal Employment Opportunity Bureau ("The Bureau"), an agency within the Ohio Department of Rehabilitation and Corrections ("DR&C") and the Ohio Civil Service Employees Association, AFSCME (OCSEA) Local 11 ("The Union"),[1] representing Ms. Maudie G. Williams ("The Grievant"). DR&C employed the Grievant from approximately December 1996 until September 10, 2001 when it removed her for allegedly violating three work rules.[2] The Union responded to that disciplinary decision with Grievance No. 2701-010914-216-22-EX ("The Grievance"), which the Parties could not resolve.[3] The Parties then appointed the Undersigned from their panel of arbitrators to hear the instant dispute. On January 25, 2002 and February 5, 2002, the Undersigned conducted arbitral hearings in this dispute, which the Parties agreed was free of procedural issues and was properly before the Undersigned. The hearings were held at the Union's home office in Worthington, Ohio.

All parties relevant to the resolution of this dispute attended both arbitral hearings and both Parties were afforded a full and fair opportunity to present admissible evidence and arguments, supporting their positions in the instant dispute. Specifically, the Parties were permitted to make opening statements and to introduce admissible documentary and testimonial evidence, all of which was available for relevant objections and for cross-examination respectively. Finally, the Parties had a full opportunity to submit either closing arguments or post-hearing briefs. They opted for the latter and preferred e-mail as their medium of exchange. Therefore, the Undersigned was not required to exchange briefs between the Parties. The last briefs were emailed on March 1, 2002 and the last arbitral precedent was delivered by the U.S. Postal Service on March 5, 2002, when the arbitral record was officially closed.

I. Facts

A. General Backdrop

DR&C has approximately 14,000 employees and comprises approximately thirty-two correctional facilities,

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1 [1] Collectively referred to as "The Parties."

2 [2] Joint Exhibit No. 5.

3 [3] Joint Exhibit No. 6.

which are responsible for housing persons convicted of felonies in Ohio. Numerous agencies throughout Ohio are also associated with DR&C.[4] For purposes of this dispute, the most relevant agency within DR&C is the Bureau, which is DR&C's internal investigative department. Part of the Bureau's mission entails:

1. Ensuring that various correctional facilities within DR&C comply with equal employment opportunity policy so as to secure employees' faith in that policy.
2. Reducing friction between employees.
3. Avoiding situations that might subject DR&C or its agencies to liability for violation of equal employment opportunity laws and policies.

Realization of these goals requires the Bureau to investigate claims of discrimination, assess their validity as well as the existence or nonexistence of probable cause. When a DR&C employee alleges discrimination based on any federal or state-protected characteristics—gender, race, age—the Bureau assigns one of its EEO investigators or officers to gather and assess the facts and circumstances surrounding that allegation and to reduce their factual findings and conclusions to a written report ("Report") containing: (1) a statement of the established, relevant facts and circumstances, (2) a determination of whether the facts support the allegation, and (3) a determination of whether there is probable cause to believe that the agency in question is liable. The Bureau's finding of probable cause turns on whether the agency in question rapidly and effectively responded to an established claim of discrimination. If so, then the Bureau issues a finding of no probable cause (or vice versa), irrespective of the merits of an employee's claim of unlawful discrimination. In short, the pivot of the Bureau's probable cause determinations is the sufficiency and timeliness of the agency's response. Finally, during 2000, the Bureau investigated and closed approximately 115 complaints of EEO violations without issuing a single probable cause determination.[5]

The Bureau's definition of probable cause is not the only one, however. For example, although the Ohio Civil Rights Commission ("OCRC") and the Equal Employment Opportunity Commission ("EEOC") also process claims of employment discrimination, those agencies are independent of and external to both DR&C and the Bureau. Indeed, DR&C employees who are dissatisfied with the Bureau's findings of probable cause may appeal those findings to the OCRC and ultimately to the EEOC. Nevertheless, OCRC and EEOC define probable cause in terms

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4 [4] See mission statement at Joint Exhibit No. 43.

5 [5] Union Exhibit No. 11.

of the likelihood of the alleged unlawful discriminatory conduct. For example, whether the relevant facts and circumstances show that there is probable cause to believe—whether it is more likely than not—that a given victim was sexually harassed.

A. Facts Triggering this Dispute

DR&C hired the Grievant in December 1996, and she became an EEO Investigator for the Bureau in October 1999. As an Investigator, the Grievant was responsible for counseling employees about issues relating to equal employment opportunities as well as investigating and responding to complaints of discrimination from DR&C employees. During her approximate five-year tenure with the Bureau, the Grievant served under three Chiefs: Mr. Dennis Baker, Mr. Brian Eastman, and Ms. Elizabeth Murch, who has been the Grievant's supervisor since 2000.

It is unclear exactly how much formal training the Grievant has had regarding matters of equal opportunity employment in general and matters of probable cause in particular. Although the Bureau has no written definition of probable cause in any of its work rules or policies, it has periodically afforded its investigators training on that subject. When assessing issues of probable cause, the Grievant applied the OCRC and EEOC definitions, which focus on the existence of alleged discrimination, rather than the Bureau's definition, which focuses on employer conduct after discrimination has occurred.

The Grievant's problems in this dispute began when she was assigned to investigate the sexual harassment complaint of Ms. Victoria Holdren ("Ms. Holdren or "the Complainant"), a corrections officer at the Ross Correctional Institution("RCI").[6] Essentially, Ms. Holdren claimed that on or about October 22, 2000, two male corrections officers sexually harassed her several times at work.

On or about March 20, 2001, the Grievant completed her investigation and drafted her

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6 The Complainant was unmarried when she alleged discrimination and, thus, filed the claim under her maiden name, Ms. Gose.

7 Joint Exhibit No. 2 at 39-40.

Report, corroborating Ms. Holdren's allegations and finding probable cause.[7] In this respect, the Report stated, "The Hearing Officer [for the corrections officers' pre-disciplinary hearing] found just cause. We therefore, recommend a finding of *Probable Cause*."[8] Apparently, the Warden of RCI identified the culprits and quickly disciplined them, imposing five-day fines and five-day suspensions on both harassers.[9]

Ms. Murch was aware of RCI's quick disciplinary response and therefore changed the finding of probable cause in the Grievant's Report to no probable cause. However, Ms. Murch did not substantially change the Report's factual findings, even after editing several drafts of the Report for grammatical errors.[10] The revised finding of probable cause stated:

> Although Ms. Holdren experienced what most probably could be perceived as sexual harassment, the institution did everything it could in promptly investigating the matter, and took prompt remedial action via the discipline handed down and separating Complainant from the other Officers. The institution followed DR&C Policy and acted promptly and correctly. Therefore, as this situation was handled properly by management, there is a *no*

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7 Joint Exhibit No. 2 at 39-40.

8 *Id* at 40.

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10 The Grievant submitted revised Reports on March 20, 2001 (Joint Exhibit No. 2 at 38-40), March 21, 2001 (Joint Exhibit No. 2 at 41-44), and March 23, 2001 (Joint Exhibit No. 2 at 45-48). *See* also Joint Exhibit Nos. 8-11.

11 *Id* at 43.

probable cause finding. This case is a *no probable cause* finding.[11]

The Report became official when the Grievant and Ms. Murch signed it on or about April 2, 2001.[12]

Throughout her investigation of Ms. Holdren's complaint, the Grievant spoke to Ms. Holdren several times. But their conversation on March 23, 2001 is the most relevant. During her work shift that day, Ms. Holdren telephoned the Grievant at her office to ascertain the status of the sexual harassment case, but the Grievant advised her to wait until the end of her shift and telephone the Grievant from home.

Although she was generally upset about her sexual harassment claim, Ms. Holdren telephoned the Grievant as requested. During their telephone conversation, Ms. Holdren quickly inquired about the status of her sexual harassment claim and was incensed to learn that the Bureau had found no probable cause, especially since the Bureau had disciplined the two harassers. Ms. Holdren then asked the Grievant what did she find? In a discernibly annoyed tone, the Grievant said she had found probable cause but that the department had changed it to no probable cause.[13] At some point in the conversation, Ms. Holdren indicated that even before she heard this news, she had decided to contact Congressman Strickland again. The Grievant responded that she "would not lie about her findings."[14] Finally, at some point in their

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11 \11 *Id* at 43.

12 \12 Joint Exhibit No. 2 at 54-57.

13 \13 Ms. Holdren testified that she could "hear in the Grievant's voice that she was upset."

14 \14 Ms. Holdren's testimony under cross-examination.

conversation, the Grievant advised Ms. Holdren "not to let it [her sexual harassment claim] go."[15]

Sometime before March 23, 2001, Ms. Holdren's then fiancé, Mr. Greg Holdren, sent Congressman Ted Strickland an e-mail, apparently complaining about perceived departmental inaction regarding Ms. Holdren's sexual harassment complaint.[16] That e-mail apparently triggered a letter of inquiry, dated February 9, 2001, from Congressman Strickland's office to Ronald A. Wilkinson, Director of the Department of Rehabilitation and Correction.[17] On February 20, 2001, Director Wilkinson wrote a letter to Congressman Strickland, assuring him that Ms. Holdren's complaint was receiving due consideration.[18]

Although Mr. Holdren did not witness this conversation, on or about March 23, 2001, he again e-mailed Congressman Strickland's office, purportedly detailing Ms. Holdren's March 23 conversation with the Grievant. That e-mail offered the following account of the conversation, referencing an earlier communication with Congressman Strickland's office, and pled for assistance:

> I have been in contact with your office concerning Victoria Holdren. soon to be Victoria Holdren.. we had contacted your office about a sexual harrassment case aginst the Ross Correctional Inst. and two male officers..
>
> Sir. I e/mailed you recently explaining that we were not having much luck geting help with this case. I also explained that due to it being a state agency, i felt that people were not intrested in helping.

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15 \15 *Id.*

16 \16 Joint Exhibit No. 2 at 33.

17 \17 Joint Exhibit No. 5 at 86-87.

18 \18 *Id.* at 83-84

I would like you to know about a conversation between Victoria and Maudie G Williams, EEO Officer/investigator, Bureau of Equal Employment Opportunity on March 23 2001.

Mrs Williams contacted Ms. Holdren at work at 9:30am concerning her complaint. she told Vicky that she wanted to talk to her about her EEO Complaint but did not want to talk on Instutition phone lines, That she would call her at home at 3:00pm.

Vicky spoke to Mrs williams at 3:00pm on March 23.2001. Mrs williams begain to explain that the findings on her complaint had been concluded and that there was no probable cause. She begain to explain that her Supervisor had changed her findings of her investigation and that she was tired of her changing things..she stated that she had done all the work investigating this and then they changed it. She made the statment that sexual harrassment was proven and that all they needed to do was read through her complaint, that it is in black and white. she also stated that these officers cant get away with this and told Vicky not to let it go. she also told Vicky that she was not aloud to be giving this information to her, that to request a hearing and she would not lie about her findings in the investigation. In closing she made it very clear to make sure our Representative got a copy of all the documentation.
Sir.. if this is not a *cover up* i dont know what is.
I do not know who the Supervisor is or who gave her/him the right to change anything in the investigation, and findings of Mrs. Williams. But you can bet i will find out.
If you can assist me in any way please help. Fill free to contact Mrs. Williams. I think this has gone too far, and it need to be taken care of.
Covering up a investigation of this nature is aginst the law. Please Help.[19][19]

The Grievant played no part in the Holdren's decision to contact Congressman Strickland about the alleged sexual harassment.[20][20]

After learning of the allegations in Mr. Holdren's second e-mail, DR&C decided to investigate the Grievant's interactions and conversations with Ms. Holdren and assigned Annette Chambers, Assistant Chief Inspector for DR&C ("Inspector Chambers") to conduct the

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19 [19] the Arbitrator opted not to flag as "sic" the substantial quantum of grammatical and spelling errors in the e-mail.

20 [20] Joint Exhibit No. 2 at 86.

investigation.[21] Inspector Chambers' investigation comprised interviews with approximately eight individuals and concluded that the Grievant had: (1) sought to obstruct the Bureau's official investigation, and (2) participated in an inappropriate telephone conversation with Ms. Holdren on March 23, 2001.[22] Regarding the "obstruction" charge, Inspector Chambers' investigation concluded that the Grievant had feigned ignorance of the Bureau's definition of probable cause and denied having been trained on that definition. In support of this conclusion, Inspector Chambers relied on essentially three factors: (1) statements by Ms. Murch and Mr. Eastman that they had trained all of the Bureau's investigators, including the Grievant, on the proper definition of probable cause; (2) statements by other investigators, indicating they understood that definition; and (3) the Grievant's tacit admission to having been exposed to the definition of probable cause after her initial claim of ignorance earlier in her interview with Inspector Chambers. Specifically, the Grievant admitted that Mr. Dennis Baker, predecessor to Ms. Murch, had told the Grievant that a finding of probable cause focuses on an agency's response to a sexual harassment claim rather than on the merits of that claim. Also, at some point, the Grievant had overheard Ms. Murch and Investigator Sheila Adair discussing probable cause in relation to sexual harassment and they were premising their probable cause finding on the agency's response to that claim and not on the merits.

Inspector Chambers' basis for the "inappropriate conversation" charge is the Grievant's telephone conversation with Ms. Holdren, on March 23, 2001, as Mr. Holdren related that

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21 Joint Exhibit No. 2.

22 Joint Exhibit No. 2 at 29-30.

conversation in his March 23 e-mail to Congressman Strickland's office, and as Ms. Holdren described that conversation in her interview with Inspector Chambers.

Based on these conclusions, Inspector Chambers recommended disciplining the Grievant and DR&C agreed.[23] DR&C initiated disciplinary action against the Grievant, alleging that, during the March 23 conversation, she "prematurely" released information that was *"inherently improper"* and potentially harmful to DR&C. In selecting the measure of discipline, DR&C considered that the Grievant's disciplinary record contained active discipline imposed approximately five weeks earlier. A pre-disciplinary conference was scheduled for and held on August 16, 2001,[24] and the Pre-Disciplinary Hearing Officer found just cause for discipline. On or about September 23, 2001, DR&C notified the Grievant that she was removed from her position as "EEO Officer," effective September 10, 2001.[25] The following rationale was offered for the removal: "[Y]ou violated the Standards of Employee Conduct by discussing with a complainant the findings of her case before it was concluded and . . . you disagreed with the determination of your supervisor on the issue of whether probable cause existed. In addition, you provided false information during the investigation of this matter.[26]

I. The Issue

Whether the Grievant was removed for just cause, and if not what shall the remedy be.

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23 Employer's Post-Hearing Brief at 3.

24 Joint Exhibit No. 4.

25 Joint Exhibit No. 5.

26 Joint Exhibit No. 5.

I. Relevant Work Rules and Contractual Language

Rules of Employee Conduct	First Offense	Second Offense	Third Offense	Fourth Offense	Fifth Offense
Rule 8 Failure to carry out a work assignment or the exercise of poor judgement in carrying out an assignment	WR/R	1-3/R	5-10/R	R	
Rule 24 Interfering with or failing to cooperate in an official investigation or inquiry	WR/R	3-5/R	5-10/R	R	
Rule 38 Actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee	WR/R	1-3/R	3-5/R	3-5/R	R

Article 2—Non-Discrimination

The Employer shall . . . take action to eliminate sexual harassment in accordance with Executive Order, 87-30 Section 4112 of the Ohio Revised Code and Section 703 of Title VII of the Civil Rights Act of 1964. . . .

Article 24—Discipline

24.01-Standard

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.

24.02-Progressive Discipline

The Employer will follow the principles of progressive discipline disciplinary action shall be commensurate with the offense.

Article 44-Miscellaneous

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 an opportunity to discuss them.

I. Summaries of Parties' Arguments

A. Management's Arguments

1. The Grievant exercised poor judgment in carrying out her work assignment.
2. The Grievant violated Rule 24 by interfering with or failing to cooperate in an investigation.
3. The Grievant violated Rule 38 which prohibits actions that could compromise or impair the ability of the employee to carry out her duties as a public employee.
4. A first violation of the rules in this case justify removal.

A. Union's Arguments

1. The Grievant did not exercise poor judgement in carrying out a work assignment.
2. The Grievant did not interfere with the investigation, since she was unaware of the Bureau's unwritten definition of probable cause.
3. Management's alleged loss of trust in the Grievant is unreasonable.
4. The penalty is for other than just cause and is disproportionate to any charges leveled or established against the Grievant in this dispute.

I. Analysis and Discussion

Before one begins to assess these issues, a preliminary statement to sharpen the issues in this should prove useful. As mentioned above, DR&C removed the Grievant for having engaged in three episodes of alleged misconduct, thereby allegedly violating Work Rules 8, 24, and 38. A significant hurdle for the Bureau is the absence of any rules that specifically prohibit the conduct alleged herein. Although Work Rules 8, 24, and 38 broadly condemn certain misconduct, none explicitly condemns the conduct attributed to the Grievant.

Still, for reasons discussed below, the analysis of whether the Grievant's March 23 discussion of her unofficial Report with Ms. Holdren was premature and improper involves an assessment of the absence of a written rule or policy explicitly prohibiting that conduct as well as an assessment of whether the Grievant knew or should have known that such conduct was prohibited, even absent a written rule. With these considerations as a backdrop, the Arbitrator now turns to an assessment of the charges against the Grievant.

A. Prematurity of Discussion on March 23, 2001

On March 23, 2001, the Grievant stated to Ms. Holdren with *discernable annoyance* that the department had changed the Grievant's probable cause finding to no probable cause. Furthermore, the Grievant indicated that she would not lie should she be called upon to testify or make a statement in a different forum about Ms. Holdren's case. Finally, the Grievant advised Ms. Holdren not to let her claim go.

DR&C argues that the Grievant's discussion of her probable cause finding with Ms. Holdren was premature and thus improper because Ms. Murch had yet to sign off on the Report. The Union does not deny that the Report was unofficial on March 23, 2001. Instead, the Union contends that: (1) There was a past practice of prematurely disclosing investigative reports to complainants, and that throughout her tenure with the Bureau, the Grievant has advised complainants of her probable cause findings before mailing those findings to the complainants; (2) No written rule prohibits premature disclosure; and (3) Premature disclosure is irrelevant in this case, given the

availability and scope of discovery to Ms. Holdren.

1. Past Practice

Because the Union alleges a past practice, it has the burden of persuasion regarding that allegation and must establish it by preponderant evidence in the arbitral record as a whole. According to the vast majority of arbitral precedent and respected treatises, a course of conduct becomes a past practice where it is: "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties."[27]

Evidence in the arbitral record simply does not establish any of these criteria. Indeed, in its Post-Hearing Brief, the Union acknowledged that the Bureau stoutly denied the existence of any past practice involving the release of unofficial investigative findings about probable cause. Specifically, the Union stated: "When pressed to answer the question, Ms. Murch denied knowledge of this practice. Inspectors Phyllis Hart and Marsha Kent also denied this practice. Perhaps the termination of Ms. Williams has tainted the answers of these witnesses."[28] Then the Union noted that during his testimony, Mr. Eastman admitted that he "encouraged the investigators to release information of a "no probable cause" finding if a withdrawal or settlement could be obtained as a result. In many cases, this enables the Bureau of EEO to remedy the problem that the employee complained of originally."[29]

Although Mr. Eastman offered this testimony, it hardly establishes a past practice as defined above. That testimony merely establishes that while he was Chief of the Bureau, he would apprise complainants of the unofficial results of EEO investigations *where he thought that such revelations would encourage them to settle their claims*. He did not elaborate on the longevity, clarity, or bilateral acceptability of that strategy. Instead, he simply stated that he had condoned such conduct under certain circumstances. Finally, the Union points out that Ms. Murch gave a complainant information from an unofficial report, but the record reveals that Ms. Murch had obtained supervisory approval to release that information. The Arbitrator can find no grounds to support a past practice here. The

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27 \27 elkouri and elkouri, how arbitration works 632 (5th ed. 1997).

28 \28 Union's Post-Hearing Brief at 6.

29 \29 *Id.*

allegation suffers from uncertainty and doubt that must be resolved against the Union as the party with the burden of persuasion.

1. Absence of Specific Rule

Next, the Union stresses the absence of a work rule or policy that explicitly forbids EEO investigators to give complainants information from unofficial EEO investigative reports. The Bureau does not contend that such a rule exists, thereby impliedly conceding that point. Instead, the Bureau seeks to compensate for the absence of such a rule by emphasizing the testimonies of Ms. Murch and Mr. Eastman who testified that the premature release of investigative information is improper.

Neither parties' contention is decisive here because in arbitral jurisprudence the absence of written work rules or policies prohibiting certain conduct does not necessarily shield an employee from discipline for engaging in that conduct. Thus, the pivotal issue here is whether the Grievant knew or should have known that it was improper to disseminate unofficial investigative information to complainants. Furthermore, whether the Grievant possesses the requisite actual or constructive knowledge is determined by whether she received adequate notice of the alleged impropriety or whether that impropriety is such that a reasonable person of ordinary intelligence would have recognized it without notification from the Bureau. Finally because it claims that the Grievant possessed such knowledge, the Bureau has the burden of establishing that point by preponderant evidence in the arbitral record.

1. Actual Knowledge

Employees with actual knowledge that specific conduct is prohibited very well may be held accountable for engaging in that conduct, despite the absence of written policies or rules. Thus, it has been observed that:

> There is no one way of either establishing or publicizing a rule. The key point is whether or not the employees are aware of it. . . . [W]hat counts is the substance, not the form, of notice. How employees come to know about a rule or policy is less important than that they do in fact know what is expected of them. Thus, something less than directly communicated knowledge—as where one becomes aware of what is expected through chance or inadvertence—may be as binding as

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30 \30 *See, e.g.*, Adolph M. Koven & Susan L. Smith, Just Cause the Seven Tests 47 (Donald F. Farwell, ed., 2d ed. 1992). fairweather's practice and procedure in labor arbitration, 241 (ray a. schoonhoven, ed., 3rd ed. 1991) (stating,

> Often a critical facet of the management's prima facie case in a disciplinary proceeding is proof that the

notice in the form of a posted bulletin.[30]

In this case, however, the testimonies of Ms. Murch and Mr. Eastman, standing alone, fail to show that the Grievant actually knew it was improper to give unofficial probable cause findings to Ms. Holdren. Essentially two reasons dictate this conclusion. First, the Grievant stoutly and credibly denied having such knowledge. The thrust of Ms. Murch's and Mr. Eastman's testimony on this point is that the Grievant's conduct was inappropriate. They did not directly address whether the Grievant knew or had reason to know that her conduct was inappropriate. Second, nothing in the record shows that the Grievant received training about the timely release of investigative information to claimants. For example, there is no documentary evidence showing that the Grievant attended training sessions that focused on this point. Thus, the Arbitrator cannot conclude that the Grievant actually knew of this alleged impropriety.

1. Constructive Knowledge

Nevertheless, employees are charged with commonsense. As pointed out above, arbitrators commonly hold grievants accountable for engaging in conduct, even absent actual knowledge thereof, if a reasonable employee under the same or similar circumstances as the grievant would have known that the conduct was improper. In other words, the surrounding circumstances are such that commonsense would or should "notify" the employee that the conduct is improper. Knowledge of the forbidden nature of the particular conduct is therefore imputed to the employee. For example, no employee needs either direct or indirect notice that discipline will likely follow the intentional destruction of his employer's valuable machinery or his gratuitous physical attack upon a supervisor.[31]

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employee had knowledge of the rule he or she allegedly violated. Generally, however, arbitrators indulge in an evidentiary presumption of knowledge if the rule violated is one of common knowledge or the rules have been distributed.

31 Thus, one writer has observed:

It is implicit in the employer-employee relationship that an employee must conform to certain well known,

By its very nature, disclosing investigative information to claimants before Ms. Murch officially signs off on the Report does not fall within the class of conduct illustrated by the foregoing examples. Indeed, Mr. Eastman testified that he prereleased probable cause findings where he thought such information might encourage claimants either to settle or withdraw their claims. In addition, Ms. Murch prereleased such information, albeit with her supervisor's prior approval. Therefore, one cannot reasonably assert that it is absolutely improper to prerelease such information. Instead, the propriety of such releases turns on the surrounding circumstances. That being the case, the Grievant is entitled to some training or guidance that would equip her to determine when disclosure is permissible and impermissible.

Ultimately, then the record does not show that an employee in the same or similar circumstances as the Grievant should have known (due to commonsense or any other established indicia) that releasing unofficial information to Ms. Holdren on March 23, 2001 was inherently or even arguably inappropriate. What the evidence does show is that Ms. Murch and Mr. Eastman know (or believe) such conduct to be improper under certain circumstances, which the record does not show were revealed to the Grievant.

Consequently, the Arbitrator holds that the Grievant had neither actual nor constructive knowledge of the impropriety of discussing her probable cause findings with Ms. Holdren on March 23, 2001. Therefore, she cannot reasonably be expected to somehow fathom that she

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> commonly accepted, standards of reasonable discipline and proper conduct while engaged in his work. . . . Published rules and regulations are not necessary to inform an employee that . . . [such] misconduct . . . may subject him to discharge from the company's employ.

fair weather, *supra* note 29 at 241.

32 \32 Having decided that the Bureau failed to show that the Grievant possessed either actual or constructive knowledge of the alleged impropriety of premature disclosure, the Arbitrator need not reach the Union's contention that premature disclosure is irrelevant in light of the scope of discovery available to Ms. Holdren. Likewise, the Arbitrator need not address the Union's claim that policies in Joint Exhibit No. 2 at 74-80 and Joint Exhibit 37 permit premature releases of probable cause information to

acted improperly.[32] Under these circumstances, the Grievant did not violate either Rule 8 by exercising poor judgement or Rule 38 by depleting managerial trust in her ability to perform her duties without creating unnecessary liability for the Bureau or DR&C.

A. Propriety of Mentioning Change in Probable Cause Finding

As an EEO Investigator, the Grievant had a duty to discuss Ms. Holdren's case with her. Indeed, "In all cases the complainant shall be informed, in writing, of the outcome of the investigation. The complainant may review the investigation file and *discuss the findings* with the EEO investigator."[33] Still, the Bureau argues that the Grievant violated Rules 8 and 38 by mentioning that the Bureau decided to change her probable cause finding and by "airing" her disagreement with that. In support of the Bureau's position, Ms. Holdren specifically testified that the Grievant said *her supervisor* changed the finding of probable cause. Also, Mr. Holdren's e-mail to Congressman Strickland's office essentially echoed Ms. Holdren's testimony. And although it is not a part of the formal charge, the Bureau stresses that the Grievant improperly displayed her annoyance with Ms. Murch effecting that change. Again, the Bureau does not contend that the Grievant violated a written rule prohibiting such behavior. Instead, it maintains that these revelations were improper under the circumstances, a fact, according to the Bureau, that a reasonable person in the Grievant's position simply would know and understand. The Bureau also points out that one role of EEO investigators is apprising claimants of the Bureau's complaint procedures as well as "doing whatever is necessary to limit the liability of the Department."

In response, the Union admits that the Grievant informed Ms. Holdren of the change in the probable cause finding, but denies that such a revelation was improper and offers several arguments in support of that position. First, it points out that the Grievant simply told Ms. Holdren the truth regarding the investigatory report but only after Ms. Holdren specifically asked the Grievant about her own finding of probable cause. Second, the Union argues that the Bureau's policy uses investigators as points of contact for employees during all facets of the

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claimants.

33 DR&C Anti-Discrimination Policy, Section VI, D, 1, c (Joint Exhibit No. 32 at 3) (emphasis added).

investigation and allows revelations about changes in probable cause. Third, the Union contends that the Grievant's revelations did not encourage Ms. Holdren to file suit, since she intended to do so before talking to the Grievant on March 23, 2001. Fourth, the Union points out that the Grievant violated no written DR&C policy by communicating to Ms. Holdren the change in the finding of probable cause. Finally, the Union asserts that the Report together with the drafts were fully discoverable.

Because the Grievant had a duty to discuss her findings with Ms. Holdren, the threshold issue is whether she exceeded the boundaries of that duty by informing Ms. Holdren of intra-departmental changes in the probable cause finding for her case. The resolution of that issue requires examination of three sub-issues: (1) Whether the Grievant's revelation itself was inherently improper; (2) Whether the Grievant "aired" her *disagreement* about the change in her probable cause finding; and (3) If so, whether airing such discontent was improper. In response to the first issue, the Union points out that the Grievant merely told Ms. Holdren the truth. This argument highlights a critical fact in this case as well as a delicate situation that requires a balance of truthfulness and "commonsense" or good judgement.

Under the circumstances of this case, the revelation of the change in probable cause was reasonable and proper, and the Grievant had no reason to suspect that the Bureau might subsequently condemn her actions. The pivotal fact in this holding is that the Grievant revealed the probable cause modification only in response to a direct question from Ms. Holdren about the nature of thc Grievant's probable cause finding. Mr. Holdren had a right to know this information, and the Grievant did not simply volunteer it.[34] Confronted with Ms. Holdren question, however, the Grievant could either tell the truth or misrepresent it.

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[34] Indeed, the holding on this issue would have been exactly the opposite had the Grievant volunteered such information.

The latter choice very well could have placed her and the Bureau in an even more precarious position in subsequent appeals by Ms. Holdren. One undoubtedly runs a risk of infuriating a complainant by telling her that the probable cause finding in her case was changed to no probable cause. Still, subsequent discovery of that fact after it is has been misrepresented is likely to be even more infuriating. This is especially true where, as here, the claimant probably has suffered the trauma of sexual harassment.

Essentially, the Grievant had to balance three duties: (1) the duty to discuss her findings with Ms. Holdren; (2) the duty to respond truthfully to Ms. Holdren's direct questions; and (3) the duty not to exacerbate an already volatile situation. Such balancing typifies "good judgement." Because Ms. Holdren specifically asked for the Grievant's personal or initial finding of probable cause, it is difficult to discern how one might either advise or reasonably expect a different response from the Grievant. Untruthfulness at that point would effectively saddle the Grievant and the Bureau with a "time bomb." Although the Grievant, as an EEO Investigator, should not evade questions from complainants she is not obliged to (and should not) volunteer potentially incendiary information.

The next issue is whether the Grievant "aired" her disagreement with Ms. Murch's decision to change the probable cause finding. Evidence in the record does not support this charge. First, in her administrative interview and her testimony before the Undersigned, the Grievant stoutly maintained that she said the department (and not her supervisor) changed the probable cause finding. More importantly, under both direct and redirect examination, Ms. Holdren testified that the Grievant never actually said she disagreed with Ms. Murch's change in

the probable cause finding. Instead, Ms. Holdren admitted that she inferred such disagreement from the tone of the Grievant's voice during their conversation on March 23, 2001. This interpretation of the tone of the Grievant's voice simply does not, in this case, constitute "airing" disagreement. Furthermore, the portion of Mr. Holdren's email that contradict's Ms. Holdren's testimony is merely unsubstantiated hearsay.

Consequently, the Arbitrator holds that the Grievant did not exercise poor judgement in violation of Rule 8 and did not violate Rule 38 by informing Ms. Holdren of the change in probable cause. Nor did she voice her displeasure with that change.

A. Propriety of Statement Regarding Pursuit of Claim

Assessment of the Parties' contentions here is twofold. First, there is the Grievant's manifest duty to advise Ms. Holdren of her appellate rights. Second, there is the issue of exactly what did the Grievant tell Ms. Holdren on March 23, 2001 about pursuit of her sexual harassment claim.

1. Duty to Advise the Grievant

The Parties agree that, as an EEO Investigator, the Grievant was duty-bound to advise complainants of their appellate rights. The Bureau concedes, for example, that the Grievant has a duty to explain the "complaint process to Ms. Holdren"[35] and to advise complainants of their appellate rights:

> D. Complaint procedure
> 1. Reports of Discrimination
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> * * * *
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> c. Whenever . . . Bureau of EEO staff are contacted by an individual with a complaint of discrimination, regardless of attempts to resolve the issue at the local level, they shall *advise* the individual of his/her right to *file* a formal complaint with the . . . SEOC . . . OCRC and/or . . . EEOC and the respective timeframes for filing the complaint.
> 2. Formal Complaints of Discrimination
>
> * * * *
>
> c. In all cases the complainant shall be informed, in writing, of the outcome of the investigation. The complainant may review the investigation file and *discuss* the findings with the EEO investigator.
> d. Complainants may also file formal complaints of discrimination with the OCRC and

35 \35 Employer's Post-Hearing Brief at 6.

> HEOC. Information on *how to file* with these agencies shall be available from any EEO representative or the Bureau of EEO.[36]

The Union does not disagree with the foregoing passage ("Section D"),[37] which manifestly obliges EEO investigators to *inform* complaints of their appellate rights and how to appeal the Bureau's determinations in claims of employment discrimination, including sexual harassment. However, the role of EEO investigators, under Section D, is informational rather than advisory or advocatory. Therefore, while the Grievant, as an EEO Investigator, may *inform* or *apprise* complainants about the availability of relevant appellate channels and procedures, she may not affirmatively *encourage* them to appeal nor *advocate* that they appeal. In other words, she must remain *neutral* in this role.[38] Despite this interpretation of Section D, one understands that sometimes only a thin line may separate encouragement or advocacy on the one hand from mere informational offerings on the other. Under some circumstances, merely informing claimants of their appellate rights will (or is likely to) have the *effect* of *encouraging* them to pursue those rights. In any event, that potential side effect inheres in the informational mandate of Section D.

The pivotal difficulty here is that the Parties understandably disagree about the boundaries of Section D, thereby leaving it to the Undersigned to discern those boundaries and whether they were breached in this dispute. In other words, where does the duty to inform end and improper encouragement or advocacy begin? For instance, the Bureau properly insists that the Grievant must avoid the advocatory realm of *advising* and/or *encouraging* complainants to pursue their claims elsewhere.[39] Although the Union offers a different articulation, it

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36 \36 Anti-Discrimination Policy, Joint Exhibit No. 32 at 3-4 (emphasis added). The Arbitrator notes that the effective date of this document is April 23, 1997, which suggests that it probably was not in effect when the instant dispute arose on March 23, 2001. However, the quoted language in this Joint Exhibit is not significantly different from that of Joint Exhibit No. 2, pp. 774-77, which has an effective date of June 12, 2001. Because the effective dates of these anti-discrimination statements bracket March 23, 2001, there is reason to believe that the quoted language was in effect when this dispute arose.

37 \37 Union's Post-Hearing Brief at 2-3.

38 \38 Nevertheless, when confronted by complainants with questions, the Grievant must answer those questions as truthfully as possible without becoming an advocate or actively encouraging complainants to appeal their claims.

39 \39 *Id.*

essentially makes the same point—EEO investigators must scrupulously avoid *discouraging* complainants in the pursuit of other avenues. Both Parties are correct: The Union stresses the risk of discouraging complainants in the pursuit of their claims; the Bureau stresses the risk of encouraging such pursuits.

1. **Nature of Grievant's Comments**

The task at this juncture is to determine as accurately as possible what the Grievant said, which necessarily nudges one into the dimly-lit realm of semantics. The Bureau claims that the Grievant "encouraged the complainant to *'not let it* [the sexual harassment claim against DR&C] *go.*"[40] Conversely, the Union asserts that the Bureau took this statement out of context and, consequently, got it all wrong. According to the Union, "When Ms. Holdren said she intended to continue fighting the complaint, the Grievant stated, "You don't have to let it go."[41]

In one sense these two statements share some semantic proximity; in another sense, they fall on either side of the line separating the type of appellate information contemplated in Section D from the encouragement or advocacy that offends that Section. If, indeed, the Grievant told or advised Ms. Holdren "not to let it go," then the Grievant trangressed the boundaries of Section D. On the other hand, the Grievant was permitted to say that Ms. Holdren did not have to let it go, a statement that is more informational than advisory or advocatory.

After reviewing the arbitral record as well as Inspector Chambers' taped interview with both the Grievant and Ms. Holdren, the Arbitrator is convinced that the Grievant told Ms. Holdren "not to let it go," thereby crossing the line from information to encouragement. During the arbitral hearing, Ms. Holdren specifically testified that the Grievant told her "not to let it go." Ms. Holdren's testimony is more credible than the Grievant because Ms. Holdren has less self interest in the outcome of this dispute.

Consequently, the Arbitrator holds that the Grievant affirmatively encouraged Ms. Holdren to pursue her complaint rather than merely informing her of the available appellate channels and procedures. The Grievant's

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40 Employer's Post-Hearing Brief at 6.

41 Union's Post-Hearing Brief at 3.

actions here constituted poor judgement in violation of Rule 8 and to some extent compromised her ability to perform her tasks under Rule 38.

A. Violation of Rule 24

Rule 24 prohibits "Interfering with or failing to cooperate in an official investigation or inquiry." Here the Bureau charges that the Grievant violated Rule 24 (and possibly Rules 8 and 38) by feigning ignorance of the Bureau's definition of probable cause during an interview with Inspector Chambers. In support of this charge, the Bureau argues that the Grievant received training on the Bureau's definition of probable cause from Mr. Eastman and Ms. Murch. Moreover, the Bureau claims that the Grievant must have known and understood the Bureau's definition of probable cause, since other EEO investigators knew it. Consequently, the Bureau asserts that even though it does not have an official written definition of probable cause, the Grievant is still properly charged with knowledge of that term.

The Union broadly insists that the Grievant had no knowledge of the Bureau's definition of probable cause and offers several arguments on this point. First, the Union stresses the Bureau's lack of an official written definition of probable cause. Second, it points out that the Bureau adduced no direct evidence that it trained the Grievant regarding its definition of that concept. Third, the Union argues that the Bureau's definition of probable cause was inconsistent. Finally, according to the Union, the Bureau also inconsistently applied its probable cause standard.

When turning to an examination of the foregoing arguments, the Arbitrator notes that whether the Grievant was trained in the Bureau's definition of probable cause is one matter; whether she was ignorant of that definition is another.

1. Training on Bureau's Probable Cause Standard

The crux of the Bureau's evidence that the Grievant received training on its probable cause standard involves testimony about the implementation of that training. Thus, the Bureau points to the unrebutted, credible testimonies of Mr. Eastman and Ms. Murch, both of whom insist that they afforded the Grievant the requisite training on probable cause. Indeed, Mr. Eastman testified that he distinctly recalled the Grievant's presence in one or more of those sessions. Mr. Eastman also testified that he had multiple conversations with the Grievant concerning her

probable cause findings when they were contrary to the facts in her investigations.

The single document that the Bureau adduced—"Itinerary for the Office of Human Resources EEO for the Week of: October 16, 2000-October 20, 2000"("Itinerary")—does not show much. It indicates that the Grievant attended a staff meeting on Wednesday, October 16, 2000.[42] However, the Itinerary is silent regarding the subject matter of the training. EEO Investigator Marsha Kent sought to address this gap by testifying that probable cause was discussed during the October 16 session. But she could not recall whether the Grievant actually attended that session. Moreover, she admitted under cross examination that the daily schedules of investigators can quickly change. The logical inference is that the mere appearance of an investigator's name on the Itinerary does not necessarily mean that the investigator actually attended the training session. Still, Investigator Kent stated that if an investigator missed a staff meeting, Ms. Murch subsequently briefed that person on the subject matter of that meeting.

The Bureau also attempts to establish the Grievant's probable cause training through testimonies of other EEO investigators who claim they received such training from Ms. Murch and Mr. Eastman. Thus, Investigator Kent and Investigator Phyllis Hart offered credible, unrebutted testimony that Ms. Murch and Mr. Eastman had frequently offered probable cause training to investigators, and they assumed that the Grievant was among those receiving such training.

While the strength of this part of the Bureau's case is obviously the foregoing unrebutted testimonies, the problem is a lack of corroborative documentary evidence that agencies and other employers usually maintain with respect to their training programs. This is especially true in this case, given the obvious importance of the probable cause standard to the Bureau's daily operations. It is difficult to understand the utter paucity of documents specifically establishing the training sessions. Except for the memory of Mr. Eastman, no one could specifically recall seeing the Grievant at any of the training sessions in question.

Also supportive of the Bureau's position are parts of the Grievant's testimony. For example, she initially testified that, during at least one conference, she had been exposed to something akin to the Bureau's definition of

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42 [42] Employer Exhibit No. 4.

probable cause. Subsequently, however, under cross-examination, she denied making that statement and claimed that liability rather than probable cause was the subject matter in that conference. This type of testimonial inconsistency obviously hurts the Grievant's credibility as a witness in her own case.

1. Whether Grievant Knew Bureau's Probable Cause Standard

In the Arbitrator's view, the question of whether the Grievant received training in probable cause is distinguishable from whether she was aware of that definition. Inspector Chambers accused the Grievant of falsely denying knowledge of the Bureau's definition of probable cause.[43] That accusation was the basis for the Bureau's charge that the Grievant violated Rule 24. Proving that an employee has been trained in a particular subject is one way to establish actual or constructive knowledge of that material. Another avenue is to show that the employee has been exposed to the subject through avenues other than formal training.

This is the weakest part of the Grievant's case because in addition to claiming that she received no training in the relevant definition of probable cause she also claims ignorance of that definition, allegedly becoming aware of the definition only when the instant dispute erupted. The difficulty is that evidence in the record, some of it out of her own mouth, directly contradicts the latter assertion.

a. Inspector Chamber's Report

First, during her interview with Inspector Chambers, the Grievant initially denied having any knowledge of the Bureau's probable cause definition. Later, however, the Grievant admitted that one of her former supervisors had specifically informed her that certain Wardens were upset with her for not giving them time to effect proper changes before she found probable cause. Also, during her interview with Inspector Chambers, the Grievant admitted overhearing Ms. Murch and Inspector Sheila Adair decide to withhold a finding of probable cause against a warden, until they afforded him an opportunity to correct the discrimination established in Inspector Adair's investigation.

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43 Joint Exhibit No. 2 at 29.

a. Grievant's Testimonial Inconsistencies

During her testimony at the arbitral hearing, the Grievant testified that she had never heard of the Bureau's definition of probable cause but admitted that she knew it was part of the "law stuff we had taken training in." She later denied this admission under cross examination, claiming she had only been trained on liability at the conferences she attended.

a. Other Evidence of Grievant's Knowledge

Also, the Arbitrator finds it difficult to believe that during her tenure under Mr. Eastman and Ms. Murch, the Grievant was never once exposed to the definition of probable cause. For example, the Grievant testified that during the period leading up to her removal, Ms. Murch changed most if not all of her probable cause findings. Hearing this pricks one's curiosity as to how could the Grievant suffer through so many changes or rejections of her probable cause findings without asking herself why. This is especially true since she testified that she was behind in her reports, which was triggering threats of discipline from the Bureau. Having to redo so many probable cause findings would only aggravate that situation and enhance the pressure. Any reasonable person would be motivated to learn how to eliminate that bottleneck in their productivity.

Furthermore, the Grievant manifested a certain resistance to the Bureau's probable cause standard. She essentially testified that is was not her job to warn wardens or afford them opportunities to correct discriminatory problems in their institutions. In her view it was her job to determine whether the facts supported claims of discrimination and to base her probable cause findings on the presence or absence of such discrimination. Similarly, Investigator Hart told Inspector Chambers that the Grievant asked her how she determined whether there is probable cause. Investigator Hart said she gave the Grievant the Bureau's definition, which the Grievant rejected.[44][44]

a. Confusion Regarding Working Definition of Probable Cause

Set against the foregoing considerations is the fact that the record reveals some confusion and instability regarding the Bureau's definition. Inspector Chambers' interview with Investigators Kent and Adair is an example. During those interviews, Inspector Chambers initially asked both investigators to define or describe the probable

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[44] [44] Joint Exhibit No. 2 at 24.

cause standard. And each of them initially defined probable cause in terms of the presence or absence of the alleged discrimination and not in terms of the propriety of the agency's response. In other words, they voiced the OCRC definition that the Grievant has consistently embraced. Later during that same interview, however, the investigators described or defined the Bureau's definition of probable cause, after Inspector Chambers questioned them more closely and posed a hypothetical situation. The point is that these investigators claimed to have the definition of probable cause under control, until they were asked to define it, at which point they manifested some confusion.

Two DR&C form letters afford a second example of confusion or instability about the proper definition of probable cause. The first letter defines probable cause in terms of the *presence or absence of discrimination*, stating: "*Sufficient evidence* was not found to support your claim of discrimination. Therefore, a no probable cause finding is issued."[45] The second, letter defines probable cause in terms of agency responses, stating: "After completing an investigation, the Department of Rehabilitation and Correction (DRC) found insufficient evidence to support your claim that *DRC failed to investigate and take prompt remedial action* with respect to your claim of discrimination. Therefore, a finding of No Probable Cause is issued. . . ." [46]

Finally, there are two ready examples of the Grievant's confusion regarding probable cause. The first form letter set forth above bears the Grievant's signature and, as noted above, embraces a different definition of probable cause. Second, during her interview with Inspector Chambers, the Grievant offered the following definition of probable cause: "If an institution acts properly and the alleged incident occurred, then there is probable cause but no further action need

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45 [45] Joint Exhibit No. 11 (emphasis added).

46 [46] Joint Exhibit No. 22 (emphasis added).

be taken, since the institution took proper action."[47] On the surface, this seems to be a hybrid of OCRC's and the Bureau's definitions of probable cause, and a paradigm of confusion.

Ultimately, however, preponderant circumstantial evidence in the record establishes that more likely than not the Grievant received some quantum of training in the Bureau's definition of probable cause. Furthermore that same quantum and type of evidence shows that during her tenure with the Bureau as an EEO Investigator, the Grievant was several times exposed to a working definition of probable cause.

Nevertheless, the record reveals more than a little genuine confusion between the Grievant and others as set forth above. Consequently, a preponderance of evidence in the record suggests that the Grievant's claim of ignorance might have emanated from two sources: (1) her genuine confusion about the Bureau's standard, and (2) an intent to misrepresent facts in an official investigation.

Lingering questions also suggest at least some confusion. For example, why would the Grievant bother to ask a fellow employee (Investigator Hart) for a definition that the Grievant purportedly knew. Why would the Grievant sign the letter in Joint Exhibit No. 11 if she knew that definition was wrong. Likewise, why would the Grievant risk possible discipline by continuing to apply a definition of probable cause that her supervisor clearly rejected? As mentioned elsewhere in this opinion, confusion may not be the only explanation for this and other behavior, but it probably played a role, perhaps a substantial one.

Furthermore, insofar as the Grievant was confused, the Bureau played some part in that

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47 [47] Joint Exhibit No.1, the Grievant's interview.

uncertainty by not decisively adopting and promulgating a clear, concise definition of a central operational concept like probable cause. Thereafter, why would the Bureau not also explicitly train investigators on that pivotal definition and clearly document that training? Furthermore, how and why would the Bureau tolerate the Grievant's continual use of an improper definition over such an extended period of time, without taking affirmative steps to correct an obvious deficiency? This is not to say that the Grievant is by any means blameless in this matter. Clearly, she bears substantial blame. Nevertheless, the Arbitrator is left with the distinct view that this dispute was not entirely the Grievant's fault and could have been at least minimized if not avoid were the Grievant and the Bureau "pulling" in the same direction.

I. Penalty Decision

Because the Grievant has been found to have engaged in misconduct, some measure of discipline is appropriate. Assessment of the proper quantum of discipline involves an evaluation of the mitigative and aggravative factors in this dispute and ultimately a determination of whether removal is unreasonable, arbitrary, or capricious under the circumstances of this case.

A. Mitigative Circumstances

The strongest mitigative factor is that the Bureau proved two rather than all three of its charges against the Grievant. A second, albeit weaker, mitigative factor is the Grievant's approximately five-year tenure with DR&C. Finally, a third and equally weak mitigative circumstance is that the Bureau also fell short of the mark in assisting the Grievant and to some extent itself as set forth above.

A. Aggravative Circumstances

Several substantial aggravative factors are also present. First, the Grievant violated Work Rules 8, 24, and 38. Second, the record reveals that the Grievant was struggling to maintain a satisfactory level of performance before her removal. Third, the Grievant has an active five-day suspension on her disciplinary record for improperly attempting

to negotiate her work load. Fourth, the misconduct established in this dispute together with the active discipline on the Grievant's disciplinary record could reasonably erode some of the Bureau's confidence and trust in the Grievant as an EEO Investigator, even though the Bureau failed to prove all of its charges. At best, this record supports only a last chance agreement, a remedy that resolves doubts about the role of the Grievant's genuine confusion in her favor. Furthermore, it reflects the Bureau's part in not affirmatively addressing this situation—the Grievant's rather obvious and extended misapprehension of the probable cause standard as evidenced by its numerous rejections of her findings of probable cause. Under these circumstances, removal is unreasonable but only slightly so.

I. The Award

For all the foregoing reasons, the Grievance is DENIED IN PART AND SUSTAINED IN PART. The Grievant is to be given a last chance agreement without backpay from the time of her removal to the time that DR&C complies with this award *forthwith*. However, the Grievant's seniority is to remain intact, as if she were never removed. The Arbitrator retains jurisdiction of this matter until DR&C has fully complied.

Notary Certificate
State of Indiana)
)SS:
County of _____
Before me the undersigned, Notary Public for _____ County, State of Indiana, personally appeared _____ , and acknowledged the execution of this instrument this _____ day of _____, 2002
Signature of Notary Public: _____
Printed Name of Notary Public: _____
My commission expires: _____
County of Residency: _____

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Robert Brookins

has an active five-day suspension on her disciplinary record for improperly attempting to negotiate her work load. Fourth, the misconduct established in this dispute together with the active discipline on the Grievant's disciplinary record could reasonably erode some of the Bureau's confidence and trust in the Grievant as an EEO Investigator, even though the Bureau failed to prove all of its charges. At best, this record supports only a last chance agreement, a remedy that resolves doubts about the role of the Grievant's genuine confusion in her favor. Furthermore, it reflects the Bureau's part in not affirmatively addressing this situation—the Grievant's rather obvious and extended misapprehension of the probable cause standard as evidenced by its numerous rejections of her findings of probable cause. Under these circumstances, removal is unreasonable but only slightly so.

VIII. The Award

For all the foregoing reasons, the Grievance is DENIED IN PART AND SUSTAINED IN PART. The Grievant is to be given a last chance agreement without backpay from the time of her removal to the time that DR&C complies with this award *forthwith*. However, the Grievant's seniority is to remain intact, as if she were never removed. The Arbitrator retains jurisdiction of this matter until DR&C has fully complied.

Robert Brookins, Labor Arbitrator