#1846

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Edwin Bradshaw

Case No. 27-11(050307)1571-01-06

Date of Hearing: August 3, 2005

Place of Hearing: Lebanon, Ohio

APPEARANCES:

For the Employer:

Advocate: Ray Mussio
2nd Chair: Beth Lewis

Witnesses:

Ron Hart
Akin A. Omoyosi
Inmate Harbrecht

For the Union:

Advocate: Michael Munchen
2nd Chair: Mike Lindsay

Witnesses:

Edwin Bradshaw, Grievant
Keith Profitt
Martin Kinsworthy
Randall Page

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: October 25, 2005

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio - Department of Rehabilitation and Corrections ("DR&C") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support removal of the Grievant, Edwin Bradshaw ("Bradshaw"), for violating Rule 18 – Threatening, intimidating or coercing another employee and the policy on the prevention of workplace violence, as a result of certain conduct which occurred on August 18, 2004.

The removal of the Grievant occurred on March 1, 2005, and was appealed in accordance with Article 24 of the CBA. This matter was heard on August 3, 2005, and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits. Both parties submitted post-hearing briefs, with the record being closed as of September 16, 2005.

BACKGROUND

The grievant worked for the DR&C as a Farm Coordinator on property located at the Lebanon Correctional Institution ("LeCI"). LeCI operated a farm including the raising of livestock. The Grievant commenced his employment in 1996 and worked at LeCI throughout all relevant times associated with this matter.

On August 18, 2004 the employer contends that the Grievant displayed multiple incidents of threatening behavior towards the Farm Manager and others. Akin Omoyosi ("Omoyosi"), Farm Manager at LeCI, was the Grievant's overall supervisor and the

central figure regarding the series of events that occurred. Omoyosi and the Grievant had three (3) separate encounters on August 18th which are significant to Grievant's removal.

The Grievant approached Omoyosi early in the shift and requested a change in his assignment. Omoyosi contacted Grievant's immediate supervisor, Randall Page ("Page"), whereupon Omoyosi, after consultation with Page, declined to change his assignment. Apparently, the Grievant wanted to transport livestock to slaughter in Mansfield as opposed to using the 'square bailer' in the field.

Approximately forty-five minutes after the denial of the job assignment, Omoyosi observed the Grievant kicking the tractor and certain equipment attached to it. Omoyosi approached the Grievant to inquire what was going on. The Grievant appeared angry and according to Omoyosi stated that he wanted the farm to be shut down and he hoped that Omoyosi got into an accident while driving on I-75 since it's a dangerous road. This conversation did not have any witnesses.

The third encounter occurred, later that day when Omoyosi was transporting Inmate Harbrecht ("Harbrecht") in a truck to Harbrecht's jobsite at the farm. The Grievant was observed kneeling beside the fuel pump and gestured for Omoyosi to approach him. Harbrecht was seated in the passenger side of the truck. The Grievant asked if Omoyosi could help him by putting him in an anger management session. Omoyosi asked what was wrong, and the Grievant made the following comments: the Farm won't shut down; you (Omoyosi) drive home on I-75 everyday and you don't die; I don't own a gun or rifle but if I did I would blow off your head-both of you! Everybody and I mean everybody; and I would kill everything that moved here; if I seen a weed move. I would blow it up.

Omoyosi told the Grievant he would contact Ron Hart ("Hart"), Deputy Director of Administration, about the anger management session whereupon the Grievant stated "you better go do it right now, I will do it. I swear. Harbrecht was upset by the Grievant's comments but returned to his job duties. Martin Kinsworthy ("Kinsworthy") and Inmate O'Hara ("O'Hara") were at the diesel pump and observed or heard portions of this exchange.

Omoyosi contacted Hart and informed him of the events and expressed his (Omoyosi's) fear of the threats made by the Grievant. Hart directed Omoyosi to bring the Grievant to his office. The Union President, Keith Profit ("Profit") had arrived at the farm by this time and agreed to take the Grievant to Hart's office. Prior to arriving at Hart's office, the Grievant indicated to Profitt that he was sick and went home.

The Grievant was on various approved leave for health related reasons from August 18, 2004 through March 1, 2005. On November 22, 2004 the Grievant was interviewed by Hart concerning the August 18, 2004 events. (Joint exhibit ("JX") 3-10) The Grievant, in response to each question posed by Hart such as ..." Did you tell Mr. Omoyosi that you hoped he got killed on I-75?", was unable to recall what he said that day. The Grievant did submit paperwork that subsequent to August 18, 2004 he attended sixteen counseling sessions and underwent several medical examinations to determine fitness for duty.

On January 28, 2005 a predisciplinary conference was held and on March 1, 2005 DR&C notified the Grievant of his removal for violating the Standards of Employee Conduct, Rule 18 and DR&C Policy regarding the prevention of Workplace Violence.

The Union contends that management bears some of the responsibility by not providing help to the Grievant when requested and his actions of August 18, 2004 must be viewed in context with the Grievant's health condition. Mitigating factors include failure by DR&C to assist the Grievant in availing himself of the EAP Program; Omoyosi and/or Inmate Harbrecht actions did not suggest they were in fear; the Grievant's participation in the counseling sessions between August 25, 2004 and January 4, 2005; progressive discipline was not followed; and the Grievants' length of service.

The Grievant seeks reinstatement, back pay and restoration of any rights and/or benefits the Grievant would have been entitled to, but for his removal.

ISSUE

Was the Grievant, Edwin Bradshaw, disciplined for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND DR&C WORK RULES
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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

DRC- RULE 18

18. Threatening, intimidating or coercing another employee or a member of the general public.

OFFENSE

1st	2nd	3rd	4th
2 or R	5 or R	10	R

DRC- POLICY NUMBER 31-SEM-08

IV. (In Part)

DEFINITION:

"**Threats or acts of violence**"- includes conduct against persons or property that is sufficiently severe, offensive, or intimidating to alter the conditions of State employment, or to create a hostile, abusive, or intimidating work environment for one or more DRC employees, independent contractors, as well as those individuals visiting the DRC.

EXAMPLES OF PROHIBITED CONDUCT

C. (In Part)

1) Specific examples of conduct that may be considered threats or acts of violence prohibited under this policy include, but are limited to, the following:

- Hitting or shoving an individual
- Threatening to harm an individual or his/her family, friends, associates, or property

POSITION OF THE PARTIES

Position of the Employer

On August 18, 2004 the Grievant made threatening and intimidating statements to Omoyosi and Harbrecht in direct opposition the mission of the DR&C who is charged with the care and custody of others under its supervision.

The mission of the DR&C is to provide a safe and secure environment for both inmates and staff. All employees including the Grievant are trained as to the significance of the Department's Prevention of Workplace Policy and the Department's zero tolerance for violations. (JX 3-13)

Mr. Omoyosi was present for each encounter with the Grievant and provided credible testimony and a written statement. (JX 3-31) Other witnesses statements were provided by Harbrecht (JX 3-32); Inmate O'Hara (JX 3-33); and Kinsworthy (JX 3-34). Significant to O'Hara's and Kinsworthy observation is that they were at the diesel pump and corroborated key recollections of O'Hara and Harbrecht.

As examples, O'Hara observed the Grievant on his knees appearing to pray and when he got up he told Omoyosi that when you (Mr. Omoyosi) drive home down I-75 I prayed that you died. Although, Kinsworthy did not hear what the Grievant said he observed the Grievant on his knees. (JX 3-34) Harbrecht's statement corroborates what O'Hara/Kinsworthy observed as well as the Grievant's comments regarding what should happen on I-75 (JX 3-32).

Mr. Hart testified that Omoyosi told him that the Grievant behavior was threatening, erratic and the encounter at the diesel pump had scared him. Hart also testified that this was not the first time the grievant acted out of control when he didn't get the assignment to drive the livestock to slaughter. Hart, who formerly worked as Human Resources Director, reviewed all the witnesses' statements and wanted to conduct as investigatory interview with the Grievant on August 18, 2004 immediately. The investigatory interview did not occur because the Grievant stated he was sick and left work. Moreover, the Grievant was charged with aggravating menacing by the prosecuting attorney for the City of Lebanon, Ohio for this conduct.

The DR&C contends that a full and fair investigation occurred. In addition to the written statements Hart also conducted other staff interviews to ensure the reliability of the statements. Hart further opined that the Grievant's behavior would have resulted in a removal even if it is a first offense under the disciplinary grid for a Rule 18 violation. Hart stated that the Grievant's conduct was not benign, but the direct threats to Omoyosi and Harbrecht against their lives, provided just cause for removal.

The DR&C refutes any complicity regarding the Grievants medical problems and that his diabetic condition was the reason for his bizarre behavior. At no time did the Grievant request any medical accommodations for his diabetes, i.e., having availability to store his medicine at work. The Union argues that Omoyosi management style led to chaos and problems since he became farm manager in 2002. However, DR&C points out that no other employee have demonstrated conduct similar to the Grievant's as an alleged result of Omoyosi's management style.

Regarding EAP Assistance, DR&C points out that the Grievant for at least a year prior to August 18, 2004 had attended anger management classes to no avail. The presentment of anger management counseling classes, after August 18, 2004 is self serving since his behavior was not altered by EAP classes prior to August 1, 2004.

Finally, no evidence in this matter will contradict the statements made by the Grievant; the corrobative statements and testimony of Omoyosi and Harbrecht; and no mitigating facts singularly or combined has been presented to change the removal. The DR&C seeks that this grievance be denied in its entirety.

Position of the Union

The Employer failed to acknowledge the diabetic and/or stress conditions the Grievant was experiencing on August 18, 2004. The Employer also failed to provide medical intervention and/or consider his length of service as mitigation prior to the removal.

During the summer of 2004, the Grievant worked long hours and as a result it was difficult to manage certain health issues, i.e, diabetes. The Grievant recalls in July 2004 asking Omoyosi to attend an anger management session in the presence of Page. Between mid July 2004 and August 18, 2004 the employer did not assist the Grievant to avail himself of the EAP Program even though the employer was aware of the Grievant's past behavior in dealing with anger issues.

On August 18, 2004 the Grievant recalls feeling poorly and remembers having words with Omoyosi but cannot specifically recall what the conversations were about. The employer's position on the severity of the threats is inconsistent with Harbrecht's and Omoyosi's behavior. If the Grievant had threatened Harbrecht, why did the inmate

go back to his job and not file any grievance with Omoyosi regarding this conduct? Also, if Omoyosi was fearful of his safety, why would Hart direct Omoyosi to bring the Grievant to his office, knowing they would have to ride in the same a vehicle from the farm to the administration building? Profitt intervened and offered to take the Grievant to Hart's office. However, on the way the Grievant told Profitt that he was sick for not taking his insulin and wanted to go home. Profitt testified that he concurred and the Grievant obtain approval from Page and went home prior to seeing Hart on August 18, 2004.

The Grievant went to his family doctor, who referred the Grievant to a mental health provider for treatment. The aggravating menacing charges in criminal court were reduced to disorderly conduct, and the Grievant pled guilty in October 2005 to this minor misdemeanor. (Union Exhibit ("DX") 3)

The Union contends that the employer failed to initiate this discipline contrary to Article 24.09, in that a timely request in mid July 2004 occurred for EAP intervention that was ignored. The Employer was required to mitigate discipline since the Grievant requested employee assistance. Page submitted a written statement and testified that he (Page) was present when the Grievant asked Omoyosi if he had checked on those anger classes. (JX 3-30) Omoyosi, according to Page, replied that he hadn't had the time. (JX 3-30). Discipline and employee assistance should work together in circumstances such as this to help the employee.

The Union also contends that the Employer failed to follow the principle of progressive discipline. Article 25.01(G) allows the Arbitrator to consider prior reprimands when deciding a subsequent discipline case. The Grievant's prior

performance reprimands occurred in June 2003 (written reprimand) and May 2004 (verbal reprimand). Therefore, under Rule 18 for a first offense, discretion should have been utilized in deciding the severity of the discipline anywhere from two (2) days to removal in accord with the disciplinary grid.

The Union finally contends that the overall farm operation since 2002 or when Omoyosi became manager has been plagued with complaints from Employees. The Grievant and Omoyosi did not get along which caused a lot of the stress surrounding this matter. The DR&C did not intervene despite clear signs of trouble.

The union seeks reinstatement, back pay and restoration of all benefits and rights the Grievant would have been entitled to, but for his removal.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (6th Ed., 2003). The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in non-arbitrable proceedings. See, *Elwell-Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).*

The evidence in this matter will be weighed and analyzed in light of the DR&C's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and the Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of (the Grievant's) guilt. See, *J.R. Simple Co. and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).*

DISCUSSION AND CONCLUSIONS

After careful consideration of this matter including all the testimony, exhibits and post- hearing briefs of the parties, I find that the Grievance must be denied based upon the following reasons:

The Employer offered credible evidence thru the testimony of Omoyosi and Harbrecht that the Grievant stated the following words at the diesel pump:

> "....you (Omoyosi) drive home everyday on I-75 and you
> don't die. I pray that you die, if I did (own a gun) I
> would blow your head off-both of you, everybody and
> I mean everybody....
> If I did (own-a gun) I would kill everything that moved.
> If I seen (sic) a weed move I would blow it up."

Given an opportunity to recant these words at the hearing, the Grievant testified that he cannot remember without any specificity what he said on August 18, 2004. Problematic to the Grievant's inability to recall or to refute Omoyosi and/or Harbrecht evidence supports a determination that DR&C has presented credible evidence that the Grievant engaged in conduct that was threatening, intimidating and coercing to Omoyosi and Harbrecht in violation of Rule 18.

In support of a violation of Rule 18, Harbrecht testified he was concerned for "my personal safety" and told everyone at the farm after the August 18th exchange that he didn't want to work with the Grievant anymore. Omoyosi testified that after the third encounter the Grievant looked angry and his words scared him. No evidence suggested that Omoyosi and Harbrecht fear were unreasonable under the circumstances; particularly

as to the potential of workplace violence that has occurred on the jobsite throughout the USA. No evidence suggests that a reasonable person would not have felt the same apprehension or in fear for their safety similar to Omoyosi and Harbrecht. *Walker Manufacturing Co.60 L.A. 645, (Simon, 1973).*

The Grievant further did not dispute that he received a copy of DR&C's workplace violence policy, which prohibits conduct that is threatening. Suffice to say, the finding of a Rule 18 violation also supports a finding of a violation of the workplace violence policy.

Having determined that DR&C met its burden to support removal, the Union raised several theories regarding the application of mitigation:1) progressive discipline not followed; 2) length of service; and 3) health condition/ failure of EAP intervention. The employer contends that under any theory the seriousness of the Grievant's conduct makes mitigation moot.

The Union contends that progressive discipline was not followed in this case because only a written reprimand and verbal reprimand on the record. The imposition of progressive discipline under Rule 18 required and should be followed in this case. However, the principles of progressive discipline allows for flexibility based upon the conduct. As noted by Arbitrator Jonathan Dworkin, it would be ludicrous for an employer to issue a "verbal reprimand for a first offense of murder, mayhem or sabotage. " (OBES and OCSEA, # G87-999, Dworkin, April 21, 1999, p.21) To that end, DR&C did not act arbitrary or capricious in determining that removal was appropriate based upon the conduct of the Grievant.

The Grievant as an employee of eight (8) years falls in the ambit of a long-term employee. Generally, as employee's good service over an extended period of time should be considered as mitigating the discipline when appropriate. However, it's well settled that for major misconduct, length of good service should not be a mitigating factor. *In Re International Extrusion & Cabinet Makers and Millimen, Local 721, 106 LA 371 (Selvo 1996).* In short, the Grievant tenure would not mitigate his behavior to Omoyosi and nor to Harbrecht. I find that the Grievant's conduct was a major infraction not subject to mitigation due to the length of service.

The most interesting point advanced by the Union was the relationship between the Grievant's health and his actions on August 18, 2004.

The Grievant testified that he was ill due primarily to his inability to control his diabetic condition. However, the facts indicate that the first time the Employer was aware that the grievant was allegedly sick was after the last encounter at the diesel pump. At no time was Omoyosi informed of any illness by the Grievant during any of the earlier encounters.

In DR&C post hearing brief, it questions the legitimacy of the alleged illness of the Grievant for the following reasons: 1) the Grievant did not state to anyone he was sick prior to the arrival of Profitt; 2) the Grievant did not state to anyone that his threats were due to a medical condition; and 3) the Grievant's conduct by praying on his knees for harm to others is a deliberate act, not the conduct of an ill man. I agree.

No credible evidence was offered to infer that the Grievant's health condition on the three (3) separate occasions referenced above was the provocation for his conduct. No credible evidence was offered to infer that this health condition was a culmination of a

documented history of related health conduct warranting lesser discipline upon a proper showing.

Another issue of factual discipline is how many times the Grievant contacted Omoyosi for help thru the EAP Program? The Grievant testified on at least three (3) occasions he asked Omoyosi for assistance, two (2) times before August 18, 2004 and once on August 18, 2004. The Union's position is supported, in part, by Page's testimony who indicated that he was present in mid July 2004 when the Grievant asked Omoyosi for assistance. (JX 3-30) On the other hand, the Employer disputes that prior to August 18, 2004, Omoyosi was approached by the Grievant concerning EAP. The underlining issue is whether DR&C had knowledge of the Grievant's desire or actual participation in an EAP Program warranting mitigation under article 24.09 of the CBA.

The Union contends in its post hearing brief that the hearing officer in the predisciplinary report failed to list any mitigating factors including EAP considerations. The Grievant presented evidence that since August 18, 2004 the Grievant attended sixteen (16) counseling sessions with a licensed professional clinical counselor. Coupled with the Grievant's attempts to participate in EAP prior to August 18th, and actual mitigation was appropriate.

The evidence supported by Pages's testimony indicates that Omoyosi was asked about the EAP in mid-July 2004 by the Grievant. The request should have been acted upon by Mr. Omoyosi in a timely manner prior to August 18, 2004, and under different facts this omission would have served to mitigate this removal. However, the Grievant testified at the hearing that prior to August 18, 2004 he had met with a mental health provider set up by the EAP thru LeCI. The Grievant further testified that he was in

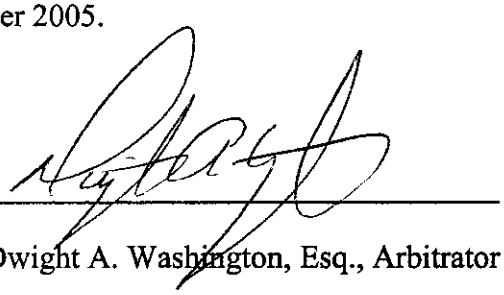
counseling before August 18, 2004 and part of the concerns discussed in counseling was problems associated with the job. The Unions position that repeated requests for EAP Assistance went to no avail, is in direct conflict with the Grievant's testimony that he was undergoing involvement in the EAP program.

Finally, the previous conduct/performance problems of Grievant did not place the employer on notice regarding the level of behavior which occurred on August 18, 2004. Simply, no provocation existed nor was the Grievant subjected to any behavior from Omoyosi and/or Harbrecht that went beyond what the Grievant was expected to tolerate. The Grievant's conduct was extreme and the removal was warranted. The proof of serious misconduct occurred sufficient to uphold the discipline.

AWARD

The grievance is denied.

Respectfully submitted this 25th day of October 2005.



Dwight A. Washington, Esq., Arbitrator