#1887

ARBITRATION DECISION

July 21, 2006

In the Matter of:

State of Ohio, Department of Rehabilitation and Correction, Chillicothe Correctional Institution	)	Case No. 27-03-20050824-1500-01-05
and	)	Shawn Turner, Grievant
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the State:

Beth A. Lewis, Asst. Chief, Bureau of Labor Relations, DRC
John Kinkela, Labor Counsel, OCB
Tim Brunsman, Warden
Bobby L. Johnson, Labor Relations Officer, CCI
Chris Lambert, Labor Relations Officer, DRC
Magdalena Miller, Deputy Warden
Jane Hill, Food Service Coordinator
Lorrie Lowry, Food Service Coordinator

For the Union:

Dave Justice, Staff Representative
Craig Hardesty, President
Shawn Turner, Grievant
David Park, Vice President
Thomas King, Penal Workshop Specialist
Rodney Bowman, Food Service Coordinator
Keith Detty, Food Service Coordinator

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Shawn Turner, was hired by the Department of Rehabilitation and Correction on January 25, 1993, as a Correction Officer at the Orient Correctional Institution. He transferred to Ross Correctional Institution on January 9, 1994, and later to Chillicothe Correctional Institution. On December 29, 2002, the grievant became a Food Service Coordinator at CCI.

The events leading to the grievant's removal occurred on May 5, 2005. On that day, the grievant was scheduled to work from 5:00 a.m. to 1:00 p.m. but he agreed to double over and work until 7:00 p.m. He was assigned to work in the dish room where he supervised approximately 15 inmates who were responsible for washing the dishes and pots and pans after each meal.

The employer charges the grievant with three separate instances of misconduct. The first is alleged to have occurred when Lorrie Lowry, a Food Service Coordinator, who had three months of service at the time, and Rodney Bowman, another Food Service Coordinator, went to the loading dock to smoke. As they approached the door to the dock, the grievant told them that they had to have at least ten years of seniority to smoke on the dock. Bowman proceeded to the dock but Lowry stopped and turned to leave. When the grievant said that he was only joking, Lowry responded, "Whatever," and left the area.

The second incident occurred when Lowry came into the dish room to wash the serving utensils she had used. The employer claims that when she went to the sink with jet sprays that is used to wash pots and pans, the grievant said, "What the hell are you doing," and "Get the hell out of my dish room." The grievant responds that he was afraid

that Lowry would break the utensils in the jet sprays and simply asked her to use another sink. Whatever was the case, Lowry went to another sink, washed her utensils, and left the dish room without making any comments.

The final incident took place near the end of the shift. At that time, a utensil that Lowry had used was reported missing from the shadow board in the tool room. This meant that the food service area had to be locked down until the missing utensil was found. The employer claims that the grievant confronted Lowry outside the Food Service Manager's office regarding the lost utensil and swore at her and waived his arms in an intimidating and threatening manner. The grievant insists that he merely asked Lowry a series of questions in an attempt to locate the missing utensil. At about the same time, another Food Service Coordinator discovered that the utensil that had been reported missing had been located. The search was terminated and the employees, including Lowry and the grievant, clocked out at 7:17 p.m.

The next day Lowry submitted two incident reports to Lloyd Turnover, the Food Service Manager. In her first report, she complained about the three incidents that took place the prior day (Joint Exhibit 8K). The second incident report reiterated her charges about the three incidents and added that the grievant was "telling other staff not to like [her]" and indicated that she felt that her "life is being threatened by [the grievant]" (Joint Exhibit 8L).

Jane Hill, a Food Service Coordinator, who witnessed the incident by the Food Service Manager's office, also submitted an incident report (Joint Exhibit 8G). She indicated that the grievant had yelled and cussed at Lowry. Hill stated that the grievant had told her not to trust Lowry because she was fired from McDonald's where she had

worked with his wife.

Magdalena Miller, the Deputy Warden for Administration, conducted an investigation. She interviewed the grievant, Lowry, Hill, and a number of other employees and supervisors. On May 23, 2005, she issued her report concluding that the grievant told Lowry that she could not smoke on the dock without ten years of service, that he had cussed and used profanity when he confronted her outside the Food Service Manager's office, and that he had talked to other employees about her being fired from McDonald's. Miller, however, determined that the grievant had not threatened Lowry.

On June 3, 2005, the employer sent the grievant two notices. One informed him that a pre-disciplinary conference was scheduled for June 6, 2005, and that he was charged with violating rules #12 and #18 of the Performance Track of the Standards of Employee Conduct (Joint Exhibit 7). The second notice indicated that he was being placed on administrative leave (Union Exhibit 1).

The pre-disciplinary conference was held as scheduled. Four days later, Debbie Tinsley, the hearing officer, found that the grievant had violated rule #12 by using profanity when he questioned Lowry about a missing tool and by talking to other employees about her previous employment. She dismissed the alleged violation of rule #18.

On June 17, 2005, the grievant visited Dr. James R. Hagen, a clinical psychologist. The disability application that Dr. Hagen sent to Lachona Mckee, the Personnel Director, indicated that the grievant told him that he was very stressed, had trouble sleeping and eating, and felt suicidal (Union Exhibit 2). Dr. Hagen diagnosed the grievant as having an adjustment disorder with physical symptoms and acute reaction to

stress. He requested the employer not to contact the grievant by telephone and to limit any contact with him until he determined whether it exacerbated his stress disorder.

On June 29, 2005, Timothy Brunsman, the Warden, sent the grievant a memo. He informed the grievant that on June 22, 2005, the Central Office had signed an order for his removal but he indicated that "there is another option that we are willing to discuss" (Joint Exhibit 3). Brunsman told the grievant that because Dr. Hagen had requested the employer not to contact with him, it would be up to him to contact Mckee or Bobby Johnson, the Labor Relations Officer, to set up a meeting to discuss the option to removal. He warned the grievant that if he failed to make contact by July 12, 2005, the removal order would stand.

On the same day, Brunsman sent the grievant a letter (Joint Exhibit 13). He indicated to the grievant that he had received his request for disability leave. Brunsman told the grievant that he was being placed on disability leave as of June 17, 2005, and that his leave balances would be used to cover the mandated waiting period.

Both the letter and the memo were sent to the grievant by certified and regular mail. The items sent by certified mail were returned as unclaimed. The items sent by regular mail, however, were not returned. A copy of the memo, without the Notice of Discipline, was also given to Craig Hardesty, the Chapter President, on the date it was sent to the grievant..

On July 1, 2005, Dr. Hagen sent another letter to the employer (Joint Exhibit 14). He stated that he had met with the grievant that day and that he would continue to treat him for a stress condition. Dr. Hagen repeated his request to the employer not to contact the grievant by telephone and added that it should have no communication with him in

any form until he determined if such contact would aggravate his stress disorder.

On July 13, 2005, Johnson sent a memo to Brunsman (Joint Exhibit 5). Johnson told Brunsman that the grievant had not contacted him or Mckee about setting up a meeting to discuss the alternative to his removal. On that basis, he advised Brunsman that the removal order should be enforced.

The grievant was on vacation in Florida from July 13, 2005, through July 29 or 30, 2005. When he arrived home, he examined a paycheck that had arrived and discovered what he believed was an error. The grievant called Donna Bryan at CCI and learned that he had been removed. He immediately contacted David Park, the Chapter Vice President.

On August 24, 2005, Hardesty filed a grievance on behalf of the grievant. He charged that the employer's removal of the grievant violated Article 24, Section 24.02, and Article 44, Section 44.03, of the collective bargaining agreement. Hardesty asked the employer to reinstate the grievant and to make him whole for lost wages and benefits. The grievance was heard at step three on September 5, 2005, by David Burrus, who served as the hearing officer. When the grievance was denied, it was appealed to step four.

On January 30, 2006, the union appealed the dispute to arbitration. The hearing was held on May 18, 2006. At the hearing, the employer argued that the grievance was untimely and, as such, was not arbitrable. The Arbitrator indicated that he would reserve judgment on the arbitrability issue and the parties proceeded to the merits of the case. Written closing statements were received on June 19, 2006.

RELEVANT CONTRACT PROVISIONS

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.

Disciplinary action shall include:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. working suspension;
D. one or more fines in an amount of one (1) to five (5) days, the first time an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB;
E. one or more day(s) suspension(s);
F. termination.

* * *

24.05 - Imposition of Discipline

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If a final decision is made to impose discipline, the employee and Union shall be notified in writing.

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Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

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Article 25 - Grievance Procedure

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Section 25.02 - Grievance Steps

Layoff, Non-Selection, Discipline and Other Advance-Step Grievances

* * *

A grievance involving a layoff, non-selection or a discipline shall be initiated at Step Three (3) of the grievance procedure within fourteen (14) days of notification of such action.

ISSUES

The issues as agreed to by the parties are:

1) Is the grievance procedurally arbitrable?

2) If the grievance is procedurally arbitrable, was the Grievant, Shawn Turner, removed for just cause? If not, what shall the remedy be?

ARBITRABILITY

EMPLOYER POSITION - The employer argues that the grievance is not procedurally arbitral. It points out that Article 25, Section 25.02, requires a removal grievance to be initiated at step three of the grievance procedure with the filing of the grievance at the Central Office. The employer stresses that the contract requires disciplinary grievances to be filed within 14 days of the disciplinary notice.

The employer charges that the instant grievance was not timely filed. It states that the "alternatives memo," with an attached removal notice and a disability notice, were sent to the grievant by certified and regular mail on June 30, 2005. The employer indicates that since the post office attempted to deliver the certified letters on July 1, 2005, the grievant would have received the letters sent by regular mail the same day. It stresses that the grievance was not filed until August 24, 2005.

The employer contends that even if the grievant did not receive his removal notice until July 12, 2005, the grievance is still untimely. It points out that Hardesty testified that when he spoke to the grievant sometime prior to July 12, 2005, the grievant told him that he had received the removal notice from the employer. The employer observes that based on the July 12, 2005, date the grievance should have been filed on July 26, 2005, but it was not filed until 29 days later.

The employer rejects the union's claim that the grievant never received a notice of his removal. It acknowledges that the notice the grievant got was not dated but maintains that when the notice is read in conjunction with the "alternatives memo," the grievant and the union were clearly put on notice that the removal order would stand unless it heard from the grievant. The employer accuses the grievant of trying to avoid notice of his removal by having his doctor request that it have no contact with him. It insists that the grievant should not be rewarded for attempting to use disability benefits to avoid the disciplinary process.

The employer contends that even if the facts are viewed in the most favorable light for the grievant, the grievance is still untimely. It observes that the grievant testified that he realized on July 29 or 30, 2005, that he had been fired but the grievance form was not filled out until August 15, 2005. The employer claims that the situation is aggravated by the fact that the Bureau of Labor Relations did not receive the grievance form until August 24, 2005. It indicates that the union offered no explanation for the delayed receipt of the grievance. The employer stresses that even if the grievance form was received on August 15, 2005, the day it was filled out, the grievance would still have been received two or three days beyond the contractual time limit.

The employer reports that Arbitrators have held that untimely grievances are not procedurally arbitrable. It cites State of Ohio, Department of Rehabilitation and Correction, Ohio State Penitentiary and Ohio Civil Service Employees Association, AFSCME Local 11; Case No. 27-33-20030902-1040-01-03; September 5, 2005, and Ohio Civil Service Employees Association, AFSCME Local 11 and State of Ohio, Department of Agriculture; Case No. 04-00(91-10-07)-0059-01-07; October 5, 1993, which were decided by this Arbitrator. The employer also cites The Ohio Department of Corrections/Ross Correctional Institute and The Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO; Case No. 27-23-020415-1044-01-03, July 2004, where Arbitrator Robert Stein held that there is no flexibility in the contract for grievances that are late.

The employer concludes that the grievance is untimely and must be denied on that basis.

UNION POSITION - The union argues that Hardesty became aware of the grievant's removal when Park told him about the grievant's conversation with Bryan. It acknowledges that Hardesty testified that on June 29, 2005, Johnson gave him a copy of the memo giving the grievant until July 12, 2005, to contact him but points out that no removal notice was attached to it. The union notes that Hardesty had several conversations with Johnson regarding the grievant's rights under the Family Medical Leave Act and Dr. Hagen's June 17, 2005, letter requesting the employer to have no contact with the grievant. It insists that the employer never told Hardesty that the grievant had been removed and that he never received a removal notice with an effective date.

The union maintains that Park was not aware of the grievant's removal until the grievant called him after talking to payroll. It acknowledges that Park received a copy of Johnson's July 13, 2005, memo to Brunsman recommending the grievant's removal order be enforced and that a copy of the grievant's removal order was attached. The union stresses, however, that the removal order was undated.

The union asserts that the grievant was not made award of his removal in a timely fashion. It claims that he became aware of it only when he called payroll to inquire about his check. The union indicates that when he learned that he had been removed, he immediately called the union office and talked to Park. It emphasizes that the grievant testified that he never received a removal order with an effective date on it.

The union charges that the employer did not comply with the contract. It points out that Article 24, Section 24.05, states that "if a final decision is made to impose discipline, the employee and the Union shall be notified in writing." The union claims that it never received official notification of the grievant's removal. It adds that the grievant was never asked to turn in his uniform, identification, and man-down alarm or offered forms or information about his options with respect to COBRA or PERS.

The union asserts that at the time the grievance was filed, it was not aware of the date the grievant was removed. It observes that at the step three hearing, the employer claimed that the removal date was June 3, 2005, the date the grievant was placed on administrative leave. The union reports that the employer also identified June 29, 2005, and July 12, 2005, as the dates of removal. It insists that when it filed the grievance on August 15, 2005, it still was not aware of the effective date of the grievant's removal.

The union concludes that there are no procedural defects with respect to the

timeliness of the grievance. It asks the Arbitrator to hear the merits of the case.

MERITS

EMPLOYER POSITON - The employer argues that there was just cause for the grievant's removal. It charges that he made inappropriate and abusive statements to Lowry. The employer maintains that the grievant's actions violated rule #12 of the Standards of Employee Conduct, which prohibits employees from "making obscene gestures or statements, or false, abusive or inappropriate statements."

The employer contends that the grievant's personal bias toward Lowry was apparent throughout May 5, 2005. It claims that sometime after lunch the grievant tried to belittle her by telling her that only people with ten years of seniority were allowed to smoke on the dock and began to shut the door to the dock in her face. The employer states that later in the day when Lowry was trying to wash tools in the dish room, the grievant yelled at her and told her, "Get the hell out of my dish room, you're in my guys' way." It asserts that the grievant's behavior was especially outrageous because inmates were present to witness the grievant's disrespect of Lowry.

The employer maintains that the grievant's most egregious behavior occurred after dinner when the food service staff believed a tool was missing. It reports that the grievant felt that Lowry lost the tool and expressed his animosity toward her when he inappropriately questioned her about the missing tool. The employer claims that the grievant screamed in Lowry's face, "How could you make such a stupid fucking mistake?" It adds that the grievant waived his arms and got in Lowry's face to the point where she felt frightened and intimidated.

The employer argues that the grievant's behavior toward Lowry on May 5, 2005,

was both abusive and inappropriate. It observes that the American Heritage Dictionary, Second College Edition, 1985, defines "abuse" as "to assail with contemptuous, coarse, or insulting words; revile" and "inappropriate" as "not appropriate; unsuitable or improper." The employer states that the grievant's act of questioning Lowry was "unsuitable and improper" because he was not her supervisor and had no authority to question her.

The employer contends that Lowry's testimony is supported by the testimony of the other witnesses. It points out that Hill, who was present for the entire conversation outside the Food Service Manager's office, reported the same comments as Lowry. The employer notes that King confirmed that the event took place but left the area soon after it began so he could not testify one way or the other about the grievant's behavior.

The employer discounts the testimony of Keith Detty, who was the acting Food Service Manager on May 5, 2005. It acknowledges that he testified that he did not hear the grievant yell at Lowry but emphasizes that he was in the tool room behind a closed door where he would not have been able to hear the grievant. The employer indicates that this means that the grievant has only his own self-serving statements.

The employer challenges the union's attempt to minimize the seriousness of the grievant's behavior. It acknowledges that David Burrus, a Labor Relations Officer, may have used profanity at the step three grievance hearing. The employer emphasizes, however, that Burrus, unlike the grievant, did not raise his voice, get in anyone's face, or wave his arms in an intimidating or threatening manner.

The employer rejects the union's attempt to challenge the validity of the incident reports written by Lowry and Hill. It admits that the reports were not turned in on the

day of the incidents but states that the department does not expect them to be turned in prior to the end of an employee's shift. The employer further notes that Hill testified that she had only worked at the institution for a few months and did not know to whom she should give her report and that Lowry stated that she wanted to give her report to Lloyd Turner, the Food Service Manager, who was not at work on the day of the incidents.

The employer argues that the grievant received progressive discipline. It reports that at the time of the incidents, he had been disciplined three times for performance related offenses. The employer indicates that his prior discipline included a ten-day suspension less than a year prior to the incidents at issue. The employer maintains that there is no reason to believe that another fine or suspension would have a corrective effect.

The employer contends that the "aggressive nature" of the grievant's conduct justifies his termination. It points out that his disability application states that he is prone to "anger" and "impulsive temper outbursts." The employer notes that the grievant's disability application indicates that the grievant told his doctor that he felt "like hurting myself or someone else." It states that the grievant made no claim during the arbitration hearing that he was "cured" of his mental health issue.

The employer concludes that the grievant has repeatedly demonstrated his unwillingness to conform to its standards of conduct. It asks the Arbitrator to hold that there was just cause for the grievant's removal and deny the grievance.

UNION POSITION - The union argues that May 5, 2005, was just another work day for the grievant. It points out that he was scheduled to work in the dish room from 5:00 a.m. to 1:00 p.m. supervising approximately 15 inmates. The union notes that

during the morning, management decided that someone from the first shift would have to work overtime to cover the second shift. It indicates that the grievant volunteered to work so that it would not be necessary to order a less senior employee to work.

The union contends that the grievant did not know that Lowry had any problems with him in the dish room. It states that when Lowry started to wash utensils in a sink designed for washing pots and pans, the grievant asked her to move out of his crew's way and to use another sink. The union indicates that Lowry moved to another sink, washed her tools, and left without saying anything to the grievant.

The union questions the alleged incident near the loading dock. It claims that the grievant was smoking on the dock when Bowman and Lowry approached the door to the dock. The union reports that the grievant said jokingly to them that they needed to have ten years of seniority to smoke on the dock and pretended that he was shutting the door to the dock. It claims that Bowman knew that the grievant was joking but Lowry turned and walked away even after the grievant told her that he was just joking.

The union challenges the employer's account of the events outside the Food Service Manager's office. It reports that at approximately 6:40 p.m., a tool used by Lowry was reported missing so the food service area had to be locked down while the staff searched for the tool. The union indicates that when the grievant met Lowry in front of the Food Service Manager's office, he questioned her about where she had been with the tool. It acknowledges that the grievant used a few "cuss words" but notes that Lowry did not report any misconduct by the grievant to the shift supervisor and that no reports were filed until the next day.

The union questions the employer's failure to take action against Lowry. It points

out that the loss of a tool in a correctional facility is a very serious matter. The union notes, however, that there is no record that Lowry was disciplined or even counseled. It complains that management is more concerned about a few "cuss words" used by the grievant than security in the food service area.

The union disputes Hill's testimony. It notes that she testified that the grievant's comment about needing ten years of seniority to smoke were made outside the officers' dining room rather than by the loading dock. The union states that when Lowry was questioned regarding the difference in her testimony and that of Hill, she testified that she had forgotten about the conversation reported by Hill. It claims that it is very likely that the event reported by Hill never happened.

The union also relies on the testimony of King. It points out that he stated that he was present when the grievant questioned Lowry about the missing tool but that Hill was not there. The union notes that King testified that the grievant spoke to Lowry in a "forthright" manner but that he did not hear him use any profanity.

The union claims that the testimony of Detty, who was serving as the Food Service Manager on May 5, 2005, also supports the grievant's version of the events. It observes that he stated that he was in the tool room with Hill while other employees were looking for the lost tool. The union reports that he testified that if a loud discussion had taken place between the grievant and Lowry by the Food Service Manager's office, he would have heard it because the tool room is only about 25 feet away.

The union maintains that the grievant worked well with other employees. It reports that all of the witnesses testified that they worked with the grievant before and after May 5, 2005, without any problems. The union notes that management allowed the

grievant to work with Lowry for almost 30 days after he allegedly intimidated and harassed her and made her fear for her life. It stresses that Lowry testified that she did not have any problems working with the grievant before or after May 5, 2005.

The union contends that the grievant's evaluations support its position. It observes that the grievant's supervisors rate him as meeting or exceeding expectations. The union notes that their comments include, "knows the job and does it," "works well with others," and "his communication skills are very good with his coworkers."

The union concludes that there was not just cause for the discipline imposed on the grievant. It asks the Arbitrator to return the grievant to work with all lost wages, benefits, seniority, and the leave balances he would have accrued but for this removal.

ANALYSIS

ARBITRABILITY - The first issue is the employer's claim that the grievance is not arbitrable. It argues that the grievance must be denied as untimely because the grievance was not filed within 14 days of the grievant being notified that he was being removed. The union responds that the grievant never received a removal notice with an effective date on it and that it filed a grievance when the grievant was told by payroll that he had been removed.

The Arbitrator does not believe that the employer established that the grievance must be denied as untimely. It is unclear when the grievant was removed. At the step three grievance hearing, the employer asserted that the grievant was removed on June 3, 2005. In its written closing statement, the employer suggested that the grievant was removed on July 12, 2005, when he failed to respond to the memo regarding an alternative to being removed or, alternatively, on July 29 or 30, 2005, when he learned

from payroll that the apparent discrepancy in his paycheck was the result of his having been removed.

Any suggestion that the grievant was notified of his removal on June 3, 2005, must be rejected. While that was the date the grievant was notified of his pre-disciplinary hearing and the date he was told that he was being placed on administrative leave, it is clear that an employee cannot be removed before his or her pre-disciplinary hearing.

The employer's claim that July 12, 2005, was the effective date of the grievant's removal must also be rejected. While the grievant appears to have received the employer's June 29, 2005, memo with an attached removal notice warning him that he had to contact either Johnson or Mckee prior to July 12, 2005, to discuss an alternative to removal, the effective date on the removal notice was left blank. A notice of removal without an effective date has no force or effect.

The Arbitrator understands the employer's frustration when the grievant did not respond by July 12, 2005. However, the grievant appears to have been acting in accord with his doctor's instructions. On June 17, 2005, Dr. Hagen advised the employer that it should not contact the grievant by telephone and should have limited contact by other means until he determined whether it would exacerbate the grievant's stress-related anxiety problem. On July 1, 2005, he told the employer that it should have no contact with the grievant.

The Arbitrator must also reject the employer's contention that the grievant received notice of his removal on July 29 or 30, 2005. While the grievant was informed at that time by payroll that he had been removed, this is not the notification required by the collective bargaining agreement. Article 25, Section 25.02, specifically requires that

the notice be in writing and provided to both the employee and the union.

Based on the above analysis, the Arbitrator must reject the employer's contention that the grievance is not arbitrable.

MERITS - The grievant was terminated for violating rule #12 of the Performance Track of the Standards of Employee Conduct. It prohibits "making obscene gestures or statements, or false, abusive, or inappropriate statements." The grievant's removal notice charges that the grievant violated the rule when he was "disrespectful and cursed/used profanity to Lorrie Lowry" and by "making false or abusive statements about the co-worker."

The charge that the grievant was disrespectful and used inappropriate language is based on the three incidents that took place on May 5, 2005. The first infraction is alleged to have taken place when the grievant was standing by the door to the dock as Bowman and Lowry approached to take a smoking break. The grievant said to them that they needed at least ten years seniority to smoke on the dock and acted as though he was going to close the door to the dock. Bowman proceeded onto the dock but Lowry turned and walked away even after the grievant told her that he was only joking.

The Arbitrator can find no basis for discipline in this sequence of events. It was obvious to Bowman that the grievant was joking and it should have been obvious to Lowry. Nothing in his comments was abusive, inappropriate, or obscene. Surely, rule #12 was not intended to prohibit harmless employee attempts at humor.

The second incident took place in the dish room when Lowry went there to wash a utensil she had used in serving a meal. Lowry testified that the grievant said, "What the hell are you doing in here" and "Get the hell out, you're in my guys' way." The grievant

stated that Lowry was at a sink with water jets that was used to wash pots and pans and that he asked her to use another sink because he was concerned that the jets might break the utensil and because she was in the way of the inmates working in the room. He denies cursing or using profanity.

The Arbitrator understands the seriousness of the allegations against the grievant. If the grievant behaved aggressively and disrespectfully towards Lowry, the inmates present in the dish room would have observed what appeared to be a split between two employees. As Brunsman testified, the inmates who witnessed the incident in the dish room would have been in a position to exploit the apparent rift between two employees, potentially creating a threat to the safety and security of all of the employees.

Despite this fact, the Arbitrator cannot sustain any discipline based on the events in the dish room. While the testimony offered by Lowry would support disciplinary action against the grievant, his testimony provides a version of the events which is unobjectionable. Given the questions about Lowry's view of the incident by the door to the dock, it is impossible to simply accept her testimony about the second incident. Her credibility is also undermined by her failure to report the grievant's alleged misconduct until the next day.

The last of the three incidents on May 5, 2005, took place outside the Food Service Manager's office sometime after dinner. At the time, the food service area was locked down while employees searched for a utensil, which it appeared had been lost by Lowry. Lowry testified that the grievant said, "How could you be so fucking stupid" and "How the fuck could you do that?" She stated that the grievant was "in her face" and that she was afraid that the grievant might hit her. In her supplemental incident report, she

stated, "I feel that my life is being threatened by [the grievant]."

Lowry's testimony was supported by Hill. She testified that the grievant yelled at Lowry, "How could you make such a fucking mistake?" Hill added that the grievant pointed his finger at Lowry and that Lowry appeared "shocked" and "scared."

The grievant provided a different version of the incident. He testified that he asked Lowry a number of questions in an attempt to locate the missing utensil. The grievant stated that he did not remember whether he cursed but he insisted that he did not swear at Lowry. He did acknowledge that he was upset by having to stay at work to search for the missing utensil when he was scheduled to pick up his children from his ex-wife's home.

The Arbitrator believes that the grievant's conduct outside the Food Service Manager's office merits some disciplinary action. Although it is easy to understand why the grievant was annoyed with Lowry, he was out of line when he confronted her in a rude and aggressive manner. If Lowry deserved to be reprimanded, it was the responsibility of supervision, not the grievant.

The Arbitrator, however, feels that it is important to note that the record does not support Lowry's charge that the grievant threatened her life. She never claimed that the grievant said anything that could be construed as a threat. Her charge that the grievant yelled at her and "got in her face," does not establish that he threatened her life. This conclusion is consistent with the conclusion reached by Miller who investigated the charges against the grievant. Her investigation resulted in the employer dropping the charge that the grievant violated rule #18 of the Standards of Employee Conduct, which pertains to threats.

In addition to the three incidents on May 5, 2005, the grievant was also charged with "making false or abusive statements" about Lowry. Hill testified that in April 2005, the grievant told her that Lowry had been fired by McDonald's and that she would do anything to get ahead and advised her not to trust Lowry. The grievant denied telling Hill not to trust Lowry but the record indicates that at the pre-disciplinary hearing he acknowledged that he told Hill that Lowry had problems at McDonald's and had been transferred twice. The grievant also admitted that he told a number of supervisors that his wife had problems with Lowry when they worked together at McDonald's and that he was concerned that Lowry would cause problems for him. He testified, however, that he did not see anything wrong with telling supervision about Lowry.

The Arbitrator does not believe that the employer established that the grievant made false or abusive statements regarding Lowry. Even if Hill's testimony is credited, the grievant's alleged statements regarding Lowry cannot be characterized as abusive and the record does not establish whether they were false. Furthermore, while workplace gossip and derogatory statements about co-workers can be disruptive, they are usually not a matter for employee discipline and are not likely to be accepted as just cause for termination.

The remaining issue is the proper remedy. As indicated above, the only charge against the grievant which is supported by the record is that the grievant acted inappropriately when he confronted Lowry outside the Food Service Manager's office over what appeared to be a missing utensil. While this offense by itself is minor, the employer emphasizes that the grievant received an oral reprimand in April 2002 for a violation of rule #7, a five-day fine in February 2003 for another violation of rule #7, and

a ten-day suspension in September 2004 for a violation of rule #8. It argues that since Standards of Employee Conduct do not require repeated violations of the same rule to justify increasingly severe discipline and since a third violation of rule #12 calls for removal, the grievant's removal was justified.

The Arbitrator must disagree. The Standards of Employee Conduct promulgated by the employer recognize that the schedule of disciplinary penalties cannot be applied in a mechanical fashion. It states:

> The purpose of these work rules is to provide a measure of consistency in [the] application and progression of disciplinary actions. This consistency, however, does not require that the Employer must administer the exact same level of disciplinary action specified in the Standards of Conduct the same way in each and every instance. Each instance of a violation of the Standards turns on its own facts and distinguishing variables such as prior disciplinary history, length of time since the last discipline and mitigating or aggravating circumstances.
>
> * * *
>
> Ultimately, the proper application of the Standards of Employee Conduct Policy will ensure that when discipline is assessed, it is commensurate with the offense and the employee's record with the Employer. (Joint Exhibit 9, page 7)

Furthermore, Article 24, Section 24.02, requires that "disciplinary action shall be commensurate with the offense." In some instances, the strict adherence to the schedule of penalties in the Standards of Employee Conduct would result in a penalty that is not commensurate with the offense and the employee's overall record.

In the instant case, the Arbitrator cannot uphold the grievant's removal. First, the grievant is a 12-year employee with good job evaluations. Long service and good job performance are considered mitigating factors in a discharge case. Second, the grievant's offense on May 5, 2005, can only be characterized as minor. While a straw can break a camel's back, it does not always have that effect.

The Arbitrator believes that his decisions that the grievant must be returned to work is consistent with the employer's own judgment. Its June 29, 2005, memo told the grievant to contact Johnson or Mckee by July 12, 2005, to discuss an alternative to removal. Based on past experience, the Arbitrator believes that the employer was prepared to return the grievant to work on a last chance agreement. Such a remedy reflects both the grievant's poor disciplinary record and at the same time the minor nature of the offense he committed on May 5, 2005. Unfortunately, this solution was never implemented because the grievant failed to contact the employer by the deadline it established.

The question of back pay is more difficult. The Arbitrator believes that the failure of the grievant to contact the employer prior to July 12, 2005, bars him from getting full back pay. Even though the grievant's anxiety and depression problem and the directions from his psychologist may have prevented him from contacting the employer, he was in contact with the union and could have authorized the union to communicate with the employer on his behalf. At the same time, the employer should not escape all responsibility for back pay because it could have raised the possibility of returning the grievant to work on a last chance basis at the third step grievance meeting on September 5, 2005.

The Arbitrator's resolution of the back pay issue is based on the above analysis. The grievant's request for full back pay will be denied based on his failure to contact the employer or to authorize the union to contact the employer on his behalf. However, he will be granted back pay from the date of the third step grievance meeting where the employer should have attempted to implement the alternative to removal it proposed on

June 29, 2005.

The Arbitrator must offer two comments on his back pay award. First, it is not offered as a compromise award but is intended to reflect how the parties should have proceeded. Second, the Arbitrator recognizes that his back pay award may raise a number issues which the parties may be unable to resolve. For that reason, the Arbitrator will retain jurisdiction for 60 days from the date of his award to resolve any questions regarding the implementation of the award.

The final issue to be addressed is the employer's question about the fitness of the grievant to return to work. It points out in its written closing statement that the grievant's psychologist indicated that the grievant is prone to "anger" and "impulsive temper outbursts" and that he told him that he felt "like hurting himself or someone else." The employer noted that the "the grievant made no claim during the arbitration hearing that he has been cured of his mental health issues." (Employer's Written Closing Statement, page 14)

The Arbitrator is very sensitive to the employer's obligation to do all it can to insure a safe workplace. While he does not believe that the record suggests that the grievant's anxiety and depression problem in 2005 raises any questions regarding his return to work, he will direct the employer to have the grievant examined by a psychologist or psychiatrist of its choosing to determine his fitness for work.

AWARD

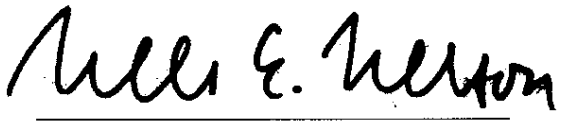
The award of the Arbitrator is as follows:

1. The employer is directed to send the grievant to a psychologist or psychiatrist to determine his fitness to return to work.

2. If the grievant is determined to be fit to return to work, he is to be promptly reinstated to his former position on a last chance basis with no loss of seniority.

3. The grievant is to be given back pay and benefits from September 5, 2005, until he is returned to work. Any interim earnings are to be deducted from his back pay.

4. The Arbitrator will retain jurisdiction for 60 days from the date of his award to resolve any issues that may arise regarding its implementation.



Nels E. Nelson
Arbitrator

July 21, 2006
Russell Township
Geauga County, Ohio