#1937

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF PUBLIC SAFETY

AND

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

Grievant: Joseph Eichhorn

Case No. 15-02-060623-0132-01-04

Date of Hearing: March 29, 2007

Place of Hearing: OCSEA Office – Columbus, Ohio

APPEARANCES:

For the Union:
Advocate: William Anthony, Jr., OCSEA Staff Representative
Witnesses:
Grievant: Joseph Eichhorn
Thomas Brown, Information Technology
Michelle Crughan, Assistant Chief of Operations
Brent Rawlins, Chief of Operations

For the Employer:
Advocate: Mary L. Brown, Labor Relations Officer
2nd Chair: Matt Banal, Office of Collective Bargaining
Witnesses:
Cheryl Henry, Network Administrator 2
Larry Evans, Network Administrative Supervisor
Jennifer Tipton, Management Analyst Supervisor
Krista Weida, Attorney
Richard Nagel, Assistant HR Administrator

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 1, 2007

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009, between the State of Ohio Department of Public Safety ("DPS") 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 the removal of the Grievant, Joseph Eichhorn ("Eichhorn") for violating the Ohio Department of Public Safety Works Rule 501.01(C)(10)(b), Neglect of Duty.

The removal of the Grievant occurred on June 21, 2006 and was appealed in accordance with Article 24 of the CBA. This matter was heard on March 29, 2007 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about April 21, 2007.

BACKGROUND

Eichhorn was removed for violation of DPS Work Rule 501.01(C)(10)(b), Neglect of Duty. Eichhorn was employed as a Network Administrator 1 as part of the Personal Computer Technical Support Unit in the Information Technology area. Eichhorn had been employed for twenty four years with the State of Ohio.

For twenty one years, Eichhorn had no disciplinary problems but due to a series of personal crises beginning in 2003, absenteeism issues surfaced as well as work performance problems. The result being at the time of removal Eichhorn's deportment record for absenteeism related offenses included: verbal reprimand; written reprimand; one (1) day fine; three (3) day fine; five (5) day fine; and a ten (10) day suspension. Eichhorn also had a ten (10) day suspension for dishonesty.

Two of the incidents relating to Eichhorn's removal occurred on March 24, 2006 and on March 31, 2006. On March 24, 2006 Eichhorn was assigned to install card swipes by Cheryl Henry ("Henry"), the lead worker. From March 27, 2006 through April 4, 2006 Henry was off from work on bereavement leave. As of April 5, 2006, Eichhorn had not completed the directive and did not notify either Henry or Larry Evans ("Evans"), Network Administrative Supervisor that he was having problems with this task.

On March 31, 2006, Evans assigned Eichhorn the responsibility of resolving a trouble ticket which was designated as top priority. The Grievant was unable to complete this task and on April 5, 2006 the trouble ticket was reassigned to Henry.

The Grievant violated DPS ". . . work rules when he failed to complete assigned job tasks on March 24, 2006 and March 31, 2006." (DPS Post Hearing Statement, p. 9).

Additionally, Eichhorn was also removed for the following reasons: leave without pay status for 1.8 hours on April 25, 2006; absent without leave on May 1, 2006; and a failure to call in within thirty minutes of your start time on May 23, 2006. (Joint Exhibit (JX) 4(A); DPS Post Hearing Statement, pp. 5-6). Both parties agree that the Grievant's deportment record contains a history of missing work, utilizing all available leave and ongoing failure to comply with DPS Work Rules regarding proper protocol for excused absences.

The Employer on May 30, 2006 conducted three (3) administrative investigations ("AI") on the conduct cited above. On May 31, 2006 Evans, the Administrative Investigator submitted his findings and concluded that Eichhorn's conduct violated DPS Work Rules (Management Exhibits (MX) 1, 2 & 3).

The Union has maintained that the Employer waited an inordinate amount of time to perform an investigation on the March 2006 assignment incidents; the Employer conducted the three (3) AIs to stack the charges; and despite documented medical proof concerning the Grievant's emotional disorders the Employer refused to consider a variety of alternate options except removal. Specifically, on April 25th, May 1st and May 25th, Eichhorn's medical condition was the reason for each of the infractions. Mitigating circumstances were ignored by the Employer even though in the past leave without pay was granted to Eichhorn. (Union's Post Hearing Statement, p. 5).

The Employer seeks affirmance of Eichhorn's removal, whereas the Union seeks rescission with back pay, reinstatement and other appropriate benefits.

ISSUE

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

RELEVANT PROVISIONS OF THE CBA AND THE DPS 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 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).

ARTICLE 2 – NON-DISCRIMINATION

2.01 – NONDISCRIMINATION (In Part)

> The Employer may also undertake reasonable accommodations to fulfill or ensure compliance with the Americans with Disabilities Act of 1990 (ADA) and

corresponding provisions of Chapter 4112 of the Ohio Revised Code. Prior to establishing reasonable accommodation which adversely affects rights established under this Agreement, the Employer will discuss the matter with a Union representative designated by the Executive Director.

DPS WORK RULES

RULE 5.01(C)(10)(b) (In Part)

10. Employee Discipline – Employees of the Department of Public Safety are expected to maintain good behavior and efficient service while employed. Employees will not be reduced in pay or position, suspended or removed unless such action is for just cause, and or in accordance with the applicable collective bargaining unit agreement. Types of misconduct which can result in disciplinary action are:

- insubordination,
- neglect of duty,
- dishonesty,
- incompetence,
- inefficiency,
- under the influence of drugs (including alcohol, see paragraph II.D.13),
- immoral conduct,
- discourteous treatment of the public,
- violation of the rules, policies and procedures of the Department,
- any other failure of good behavior or acts of misfeasance, malfeasance, or nonfeasance in office.

The categories and types of misconduct specified in this section are not intended to constitute an exclusive or exhaustive list of offenses subject to disciplinary action. Referenced above and listed below are examples, categories, and types of misconduct occurring most frequently which may subject the employee to the discipline process.

b. Neglect of duty – Failure to perform job duties as specified; failure to appear for work without notification to, or approval of, the employee's supervisor; absenteeism; tardiness; excessive use or abuse of sick leave; leave without pay, without an approved leave of absence.

POSITION OF THE PARTIES

THE EMPLOYER'S POSITION

Eichhorn was removed after three (3) AIs were conducted on five (5) separate violations regarding his neglect of duty, covering incidents on March 24th, March 31st, April 25th, May 1st and May 23rd.

On March 24th and March 31st, Eichhorn failed to complete job tasks assigned to him by Henry and Evans respectively. Regarding the installation of the card readers, Henry testified that Grievant's work assignments came from her and she was unaware of any other assignments he was working on from March 24th until March 31st. Henry admits that Eichhorn was not given a deadline to complete the installation nor was a "trouble ticket" assigned to this task. If a "trouble ticket" accompanies a task, specific directions are attached and progress activities are monitored electronically. However, while Henry was on bereavement leave until April 5th the card swipes were not installed by the Grievant.

Evans added that the May 31st assignment dealt with the Deputy Registrar's Office, and was tagged as a "trouble ticket." Eichhorn was trained to trouble shoot this problem, but did little if any work, and after six (6) days Evans had to assign this task to Henry. Evans testified that Eichhorn on April 5, 2006 accessed the ticket, but Grievant only left a message on the ticket, without any further action indicating the process he undertook to resolve the problem. The record also indicates that between March 27, 2006 and April 4, 2006, Eichhorn worked on eleven (11) other tickets for a cumulative time of less than eight (8) hours. Eichhorn failed to work on the assignment and did not annotate what action he undertook or document any progress. Evans finally testified that Eichhorn's failure to complete the assignment was indicative of his performance.

Regarding the absenteeism related issues on April 25th, May 1st and May 23rd, the evidence is undisputed that Eichhorn was solely responsible for each of the policy violations. During the administrative investigations, Eichhorn admits that on April 25th, he had exhausted all of his Family Medical Leave Act (FMLA) benefits; on May 1st he was absent without leave; and on May 23rd he failed to notify the Employer within thirty (30) minutes prior to or after the start of his shift of his absence. Therefore, did mitigating circumstances exist to explain Eichhorn's behavior due to his medical condition?

The Employer indicates that it considered the Grievant's personal issues, but concluded that no evidence was on file to link the Grievant's conduct on the days in question to a specific FMLA certified condition.

Evans and Henry testified that in 2004/2005, they observed Grievant on several occasions in a disoriented or "zombie-like" state. Also, they indicated that Eichhorn had reported to work in various mental states which caused them concern for his health and safety. Evans was also aware that Eichhorn had FMLA on file since 2003 covering various conditions such as depression, panic disorder and migraines. (JXs 5(a), 5(b), 5(c), 5(d) and 5(e)).

Concerned for his health, Eichhorn's supervisors contacted Human Resources for assistance in early 2006. Krista Weida ("Weida"), attorney, testified that on February 15, 2006 she notified Eichhorn that he "may be suffering from a qualifying disability under the Americans With Disabilities Act (ADA)." (Employer Post Hearing Statement, p. 2). Eichhorn submitted documents from his physician which indicated that he could perform his job duties. Weida further added that DPS in reliance on Eichhorn's physician had to deny any accommodation.

Another example of DPS' attempt to assist Eichhorn occurred the week of May 3 - May 10, 2006. Evans observed Eichhorn in a "disoriented, lethargic state" and decided that he was

unable to work. (MX 2). Evans drove Eichhorn home and informed Eichhorn not to return to work without a doctor's verification. Eichhorn returned to work on May 10th, but he was in a leave without pay status for that week. The Employer did not discipline Eichhorn because his physician provided documentation that he was "totally incapacitated." (MX 2, p. 14). DPS accepted this incapacitation diagnosis as being a mitigating circumstance not warranting discipline.

The Employer responded to other arguments by the Union raised at the arbitration hearing: namely that DPS denied the Grievant donated leave; DPS failed to enter a last chance agreement; and DPS failed to allow Eichhorn to enter the transitional return to work (TWP) program. The Employer argues that no evidence was offered to indicate that co-workers were denied the opportunity to donate leave or that the Union made an official request for a LCA. Moreover, Eichhorn was not eligible for TWP, because an Employee must have the potential to return to his job within ninety calendar days. Eichhorn's documents indicated that he would not be able to perform his job for six to twelve months. (MX 7, pp. 3-4).

In summary, the Grievant was aware of DPS Work Rules, the FMLA process and leave policies but has a long history of missing work. Grievant's ongoing personal problems do not obviate his responsibility to follow DPS Work Rules. DPS was unaware of any medical condition on file to indicate medications could necessitate late call in. Finally, considering his deportment record of active discipline, removal was the only option.

THE UNION'S POSITION

The Employer combined the results of three (3) AIs in a "stacking" effort to get the Grievant. The Union points to the March 24th and March 31st incidents and wonders why DPS waited until May 30th to notify the Grievant of these violations. It was unreasonable to wait for

fifty-five (55) days to notify Eichhorn of these allegations since disciplinary actions are required to be initiated "as soon as reasonably possible" but in no event beyond forty-five (45) days. (Union Post Hearing Statement, pp. 1-2). The Employer added these incidents because the leave without pay charges and the thirty (30) minute notification incidents were flawed.

The Employer knew of Eichhorn's medical condition (psychiatric disability) and had observed him disoriented and zombie-like. The Union points out that due to Eichhorn's lack of concentration and memory loss, the AIs are inaccurate by questioning the Grievant concerning events that occurred almost sixty (60) days ago, considering his medical condition.

The Grievant admits that he did not complete the March 24th assignment from Henry prior to her return to work, but at no time was he aware of a deadline. The Union argues that Henry did not label this assignment as a trouble ticket and consequently, Grievant worked on other assignments. Henry testified that as a lead worker for seven years, Eichhorn had never refused an assignment.

Regarding the March 31st assignment, the Grievant informed Evans on March 31st that he was working on the assignment but did not have a timeframe for completion. (MX 1, p. 7). The email exchanges between Eichhorn and Evans between 9:14 a.m. and 12:08 p.m. demonstrates that the Grievant was working on this assignment which contradicts Evans, who accused the Grievant of never doing anything to resolve this issue. The Union also points out that Henry received the assignment on April 6, 2006 but did not solve the problem until June 29, 2006. The facts indicate that Henry was not disciplined; so where's the urgent priority?

Regarding the leave without pay and failure to call in properly, the heart of these issues are associated with the Grievant's serious medical issues of which the Employer was well aware. Henry, Evans and Brent Rawlins ("Rawlins") in January 2006 wrote memorandums to the

Human Resources Department expressing concerns about Grievant's performance while at work, etc. because of his medical conditions. (Union Exhibit (UX) 1, 3, 5 and 6).

The Union points out that Grievant's medical provider, in completing the ADA forms sent to Eichhorn from Weida, thought that his disabilities would last between six (6) and twelve (12) months, thus eliminating Eichhorn's access to the ADA's reasonable accommodation as well as the TWP. The Union understands these proceedings are limited in providing a remedy under federal law but opines the Employer could have utilized these facts in fashioning a fair accommodation.

The Union argues that EEOC guidelines and interpretations of the ADA's Psychiatric Disability Regulations should be considered as persuasive authority regarding Eichhorn's behavior. Eichhorn's medical conditions are why his FMLA leave was depleted; moreover they caused his memory problems and prevented him from calling in within thirty (30) minutes.

The Employer allowed Eichhorn leave without pay for the May 3rd-10th absence, yet denied him on three (3) occasions for similar incidents. The Employer has selectively applied its rules to Eichhorn's detriment.

DISCUSSION/CONCLUSIONS

Based upon the sworn testimony at the arbitration hearing, exhibits and the post hearing statements, the grievance is granted, in part, my reasons are as follows:

The Grievant was removed for essentially two reasons: (1) failure to complete work assignments; and (2) failure to follow rules regarding leaves without pay/proper call in to notify DPS of his absence.

1. WORK ASSIGNMENTS

The March 24, 2006 assignment to install the card swipes was given to the Grievant on a Friday afternoon at 3:42 p.m. (MX 1, p. 8). Upon Henry's return from bereavement leave on April 5, 2006, this assignment had not been completed. The Grievant indicated that he began to work on the card swipes on Monday (March 27th) but did not complete it because he was "probably working other tickets." (MX1, p. 4). The Employer refutes this assertion, by concluding from March 27, 2006 through April 4, 2006, the Grievant had six (6) full work days, but his log indicated the he worked on eleven (11) other tickets for a total of 7.75 hours. (MX1, p. 4). The Union contends that if the Employer wanted to track the progress of this assignment electronically, Henry could have assigned this task as a trouble ticket (MX 1, p. 6).

No evidence was offered by the Employer to demonstrate that the Grievant was notified of a deadline, or because Henry was not at work, the Grievant was required to create a trouble ticket for this task. Henry testified that the Grievant could have created a trouble ticket on this assignment in her absence. However, the record contains no evidence that the Grievant was required by policy or practice to create a trouble ticket. The undisputed evidence is that the Grievant worked on at least eleven (11) other tickets during those six (6) days, and no evidence exists to infer the particular circumstances under which the Grievant was required to create a trouble ticket.

Finally, Henry testified that for seven (7) years, the Grievant never refused a work assignment. Given the Grievant's tumultuous work period from 2004-2006, the Employer admits that when at work the Grievant's performance was satisfactory (DPS post-hearing statement, p. 5). I agree. Therefore, all of the evidence of the alleged failure of the Grievant to

complete the March 24th assignment is insufficient to find a violation of DPS Work Rule 501.01 (C)(10)(b), Neglect of Duty.

Regarding the March 31st assignment from Evans, the evidence indicates the following:

1. At 12:08 p.m. Evans states in an email to make this assignment, top priority. (MX 1, p. 7).

2. On April 5th at 11:04 a.m. the Grievant accessed the ticket, but failed to show what action was taken to complete the task.

3. When Henry returned to work on April 5, 2006, the ticket was reassigned to her.

The Employer's position is that the Grievant performed no services to resolve the inability of the Deputy Registrar's Office to log into the server from 12:08 p.m. on March 31st until Henry's return on April 5, 2006. The Grievant presented no evidence to indicate what tasks he undertook to resolve this assignment. Unlike the March 24th assignment, the 'trouble ticket' for the March 31st assignment contains the status of the work. Despite the Union's argument that the Grievant performed work on this assignment prior to 12:08 p.m. – the only relevant inquiry is what did the Grievant do to complete the task *after* 12:08 p.m.?

No evidence was offered by the Union to indicate the Grievant performed any work on this 'top priority' item, after March 31st. I concur that given **only** the facts listed above, just cause would exist to find a violation of DPS Work Rule 501.01 (C)(10)(b), Neglect of Duty regarding the March 31st assignment. However, the Union argues that if the above conduct required discipline, why did DPS wait until May 30, 2006, to conduct an administrative investigation? When Henry returned to work on April 5, 2006, all of the relevant facts regarding the March 31st assignment were known to DPS. The Union argues that the Employer waited

until May 30th or fifty-five (55) days after the incident to notify the Grievant that a problem existed with both the March 24th and 31st assignments. The Union opines that this delay was unreasonable under Article 24.02. I agree.

Given the fragile emotional state of the Grievant as documented by Henry, Evans and Rawlins in January 2006 and thereafter, the delay to investigate these performance based charges is troublesome to this Arbitrator. The facts are undisputed and consistent among his direct supervisors that the Grievant was a good worker. Therefore, any performance based incidents involving the Grievant in 2006 were the exception not the norm. Considering the deportment record of Eichhorn, any conduct which could accelerate his removal should have been investigated in a timely manner. The initiation of the investigation on May 30, 2006 for conduct which occurred on March 24th and March 31st was untimely. The record is silent as to the number of days the Grievant was off work between April 5th and May 30th, which would've prohibited conducting an administrative investigation by DPS on those days only. However, the record indicates the Grievant worked numerous days in April (MX 2, p. 1-9) and May (MX 2, p. 1), indicating that DPS had ample opportunity to initiate the disciplinary process prior to May 30th. In other words, the delay to initiate the disciplinary action on both March assignments wasn't initiated "as soon as reasonably possible," and shall not be considered as grounds to support the Grievant's removal.

2. LEAVE WITHOUT PAY/CALL-IN

The incidents of April 25th (exhausted FMLA), May 1 (absent without approved leave) and May 23rd (failure to call-in within thirty (30) minutes) were proven by exhibits and the testimony of witnesses Evans and Jennifer Tipton (Tipton). The facts are undisputed that (1) Eichhorn had exhausted all of his FMLA benefits and his April 25th absence placed him in a

leave without pay status; (2) Eichhorn did not have approval to be absent on May 1st; and (3) Eichhorn did not follow proper call-in procedures on May 23rd when he notified DPS of his absence beyond the thirty (30) minute requirement. (MXs 4, 2 & 3).

The Union argues that the Grievant's confused mental state is the only reason each of the above violations occurred. DPS on the other hand, urges the Arbitrator to uphold the removal given the lengthy deportment records concerning absenteeism and lack of medical evidence to suggest the Grievant's inability to follow DPS' work rules was due to his medical condition or to medication.

On January 25, 2007, I issued an award attached to DPS' post hearing statement, sustaining the Employer's right to suspend Eichhorn for ten (10) days without pay for certain absenteeism conduct which occurred in October 2005. The underlying medical conditions in that matter are identical, as in this hearing supported by the FMLA forms dated August 12, 2003 (JX 5(e)), August 4, 2005 (JX 5(d)), May 17, 2005 (JX 5(c)), August 4, 2005 (JX 5(b)) and May 5, 2005 (JX 5(a)). Having prior exposure of DPS' expectations and the Grievant's situation has benefited this Arbitrator. The only unresolved issue is whether the incidents cited above are grounds to remove the Grievant.

As evidenced by the number of FMLA leave certifications, Eichhorn was no stranger to the process. I agree with the Employer that Eichhorn was responsible to track his FMLA leave and I further agree that it was Eichhorn's responsibility to submit timely leave requests. Additionally, I further agree that Eichhorn was required to call in within thirty (30) minutes of the beginning or after the start of his shift. If no other relevant facts were at issue, the Employer would prevail. However, due to the events of early May 2006 it's apparent that the Grievant was going through a difficult period, which required him to be off from work from May 3rd through

May 10th. (MX 2, p. 1). The evidence indicates that the Grievant was totally incapacitated from working (MX2, p. 14) and Evans, Rawlins and Michele Croghan (Croghan) all met with the Grievant on May 3rd and noted that he was disoriented and in a lethargic state. (MX 2, p. 1). Evans, fearing for Eichhorn's safety and due to their concern as to "how he made it to work" (MX 2, p. 1 – footnote), drove him home on May 3rd. The record indicates the Grievant informed Evans on May 3rd that he was having a bad week, and DPS acknowledged same by not disciplining him for the May 3rd week of leave without pay. Sufficient evidence exists to infer that the Grievant's conduct in early May 2006 was directly related to a severe medical condition observed by Evans, Rawlins and Croghan. Therefore, I find that mitigating facts exist surrounding the May 1st incident in which proper approval was not secured nor was the proper leave form submitted by the Grievant. Simply, the Grievant was not in control of his behavior and his failure to obtain proper approval for his May 1st absence was due to his medical condition that resulted in him being declared totally incapacitated immediately thereafter.

However, no mitigating circumstances exist in the record regarding the April 23rd and May 23rd incidents and appropriate discipline is warranted. The facts indicate that as an Employee of the State of Ohio for twenty-four (24) years, the Grievant's leave issues became problematic within the last three (3) years of his employment.

A long term Employee's record must be considered when removal is at issue. Long term service when appropriate can be a mitigating factor, although no hard and fast rule exists as to its application. Generally, if minor misconduct occurred and the Employee's active discipline record is not "bad," long term service is properly taken into account as a mitigating factor. In Re: International Extrusion Corporation and Cabinet Makers and Millmen Local 721, 106 LA 371 (Selvo, 1996). The Grievant's active disciplinary record is a mess and ordinarily the April

23rd and May 23rd incidents would act as final tipping points for his removal. But given my reservations regarding three (3), (March 24th, March 31st and May 1st) of the five (5) reasons for the Grievant's removal and his twenty-one (21) years of apparent good service are mitigating factors against his removal. However, as a long-term Employee this Grievant is knowledgeable about DPS' rules relating to leave and any future violation will act as an aggravating factor warranting his removal.

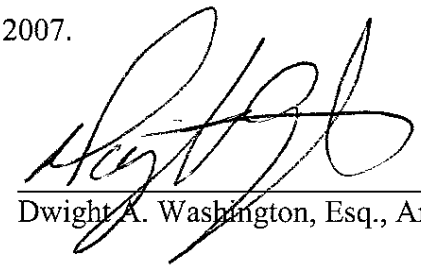
Having decided that DPS met its burden of proof that the Grievant violated DPS' Work Rule 501.01(C)(10)(b), regarding certain conduct on April 23, 2006 and May 23, 2006, I find that discipline is appropriate but not removal. The Grievant will be reinstated with no back pay or other economic benefit. As conditions of reinstatement, I also find that the Grievant must execute a Last Chance Agreement and complete an EAP program to continue the Greivant's path toward rehabilitation.

AWARD

The Grievant is granted, in part, subject to the following:

1. The Grievant is to be reinstated within thirty (30) calendar days of this Award.
2. The Grievant much enter into a Last Chance Agreement with DPS, for a period of two (2) years regarding absenteeism and performance rule violations.
3. The Grievant must enroll within thirty (30) days and successfully complete an appropriate program under the OEAP guidelines.
4. The Grievant is entitled to no back pay or other economic benefit.
5. If the Grievant fails to comply with any of the conditions of reinstatement contained in the Award, he shall be subject to immediate removal.

Respectfully submitted this 1st day of June, 2007.



Dwight A. Washington, Esq., Arbitrator