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IN ARBITRATION PROCEEDINGS PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

SEIU DISTRICT 1199

and

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Case Nos. 28-05-061030-02-12-02-12
and 28-05-061030-0213-02-12

Grievant: William Reed

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between SEIU DISTRICT 1199 ("the Union") and THE STATE OF OHIO ("the Employer"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

Hearing was held October 25, 2007 in Columbus, Ohio. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Both parties submitted timely post-hearing briefs to the Arbitrator.

APPEARANCES:

On behalf of the Union:

**JOSHUA D. NORRIS, Administrative Organizer, SEIU
District 1199, 1395 Dublin Rd., Columbus, OH 43215.**

On behalf of the Employer:

**GEORGE LOPEZ, Management Analyst Supervisor I,
ODRC, Division of Parole and Community Services,
1050 Freeway Dr. N., Room 311, Columbus, OH
43229.**

STIPULATED ISSUE

Did the Adult Parole Authority, DPCS, ODRC, violate Articles 6, 6.02, 7, 7.01, 7.06, and 43.19 of the 2006-2009 Collective Bargaining Agreement by participating in, allowing, or failing to address harassment, intimidation, discrimination, retaliation and disparate treatment by management representatives, Angelika Manz and Roger Wilson? If so, what shall the remedy be?

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

June 1, 2006 - May 31, 2009

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ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

ARTICLE 6 - NON-DISCRIMINATION

6.01 Non Discrimination

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual orientation, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States or the State of Ohio. In addition, the Employer shall comply with all the requirements of the federal Americans with Disabilities Act and the regulations promulgated under that Act.

The Employer and Union hereby state a mutual commitment to equal employment opportunity, in regards to job opportunities within the agencies covered by this Agreement.

6.02 Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed, or coerced in the exercise of rights granted by this Agreement.

ARTICLE 7 - GRIEVANCE PROCEDURE

7.01 Purpose

The Employer and the Union recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt, impartial and fair processing of their grievance. Such procedure shall be available to all bargaining unit employees and no reprisals of any kind shall be taken against any employee initiating or participating in the grievance procedure....

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7.06 Grievance Steps

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ARTICLE 43 - WAGES

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43.19 Performance Evaluation

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C. Appeals

An employee may appeal his/her performance evaluation, by submitting a "Performance Evaluation Review Request" to the Management designee (other than the Employer representative who performed the evaluation) within seven (7) days after the employee received the completed form for signature....

If the employee is still not satisfied with the response, the employee may appeal his/her performance evaluation to the Agency designee (e.g.,

Human Resources, Labor Relations).

This level of appeal shall not be available to any employee who has received a rating of "Meets" or "Above," in all categories.

...

...The performance evaluation appeal process is not grievable, except as outlined below:

If an employee is denied a step increase because his/her overall performance is rated "unsatisfactory," the employee may appeal such action directly to Step Three (3) of the Grievance Procedure. If the grievance is unresolved at Step Three (3), appeal may be taken to Step Four (4) of the Grievance Procedure, The Office of Collective Bargaining. No further appeal may be taken....

...

FACTS

The Grievant has been employed as a Parole Officer with the Adult Parole Authority since October 2003.¹ During the period of time covered by these grievances,² he was supervised by Angelika Manz.

Ms. Manz came to the Grievant's office for a discussion on September 1, 2006. In part as a result of this discussion, the Grievant submitted a Special Incident Report dated September 19, 2006 regarding what he

¹ Before transferring to the Adult Parole Authority, the Grievant was employed by the Ohio Department of Rehabilitation and Corrections with a seniority date of March 23, 1998.

² There are two grievances being handled together. Their texts are set out below.

characterized as "Hostile work environment: supervisor retaliation after employee reported misconduct." The Report provides in pertinent part:

On September 1, 2006, Supervisor Angelika Manz knocked on my...office door....She presented two documents that I had submitted, a Request for Leave and a Contact Sheet, both dated August 7, 2006. The Request for Leave should have been voided because I worked during the time that I requested off, but that wasn't clear until I searched my email calendar....

After I discovered the reason for the conflicting documents and explained the situation to Ms. Manz, she turned and closed my office door....She ranted on about the times I documented on my Contact Sheets and accused me of falsifying them. I explained that I never write down a bad time.

Ms. Manz laughed and continued to accuse me of falsifying the documents, saying, "I'm always here [early morning]³ and you are never here...I reminded her that I sign in each morning when I enter the Courthouse where we lock up our weapons, and there are cameras to verify when I enter and leave the building. The time that I write down on the County log is the same time I write on my Contact Sheets.

...She threatened in a sarcastic tone that she would watch me closer in the future. She threw the Request for Leave in my trash can and stormed out of my office.

...

³ A hole-punch in the exhibit has deleted the hour from the Report.

[Description of a September 11 meeting among the Grievant, Mr. Brooks, and Ms. Manz.]⁴

⁴ In an e-mail dated September 11, 2006 from Ms. Manz to her boss, Roger Wilson, Regional Administrator, regarding a meeting she'd had with the Grievant and his Union representative that morning, she wrote:

Roger—I met with Will and Jason Brooks this morning. Considering how accommodating I have been of Will regarding his schedule and the timeliness of his reports, I was surprised by his list of grievances. We addressed his boundary issues, his feeling that his job was threatened, my alleged motives, and his intent to record all closed door conversations. At the end of the conversation, Will did not believe that the issues were resolved and feels there's a need for third party intervention. I suggested a meeting with you present, but he said he wasn't sure what he wanted to do. Will is very quick to resort to his union rights and I'm not sure he isn't being egged on by Slanoc. I think he's going to try resurrecting some old issues that existed downtown before he even got here.

FYI—Will gave me an Alternative Work Option Request on 8/23/06 asking to work at home on Wednesdays and Fridays. I told him at the time that I would recommend it if he could show that he consistently completed his reports on time. He has been completing reports on time for the past 2 weeks. Since *quality* and *timeliness* are the standards I use for recommending anyone for work-at-home privileges, I can't very well deny Will, although this latest stunt makes me want to. I'm tempted to post a sign-in sheet for the whole unit or pull work-at-home altogether. It would be a lot easier.

One thing I've noticed about Will is that he operates under the motto of "It's easier to apologize than ask permission." Also, when I ask him about something or point something out to him, he challenges me on it. It's a tactic he uses to steer the conversation away from the real issue. For example, I pointed out that the info in his PSI didn't support his recommendation for prison....I had to explain to him several times why he needed to support his recommendation. He knew exactly what I needed him to do, but he just wanted to intellectualize it. I finally dropped the report on his desk and told him to re-do it. He's big on "past practice" and finds out from everyone else what bare minimum standards are [and] he sets his bar to that standard. He seems to know what

(continued...)

[Description of a September 13 meeting among the Grievant, Mr. Brooks, Ms. Manz, and Mr. Wilson, where a settlement was reached.]⁵

On 9/15/06, just two days after the settlement, Ms. Manz summoned me into her office....Jason [Brooks] and I met Ms. Manz in her office. She presented a PSI that I submitted 3 days early. She pointed out that the report was turned in before it was complete, and she made it clear that this practice was unacceptable.

The practice Ms. Manz described is commonly used by PSI writers to meet deadlines. It has not only

⁴(...continued)

everyone else in the unit is doing and won't do one ounce more than that.

(Emphasis original.) Mr. Wilson responded by e-mail:

Ange, make sure the work at home request does not leave the unit without appropriate coverage. I would avoid having staff off on the same day if possible.

⁵ According to the Grievant in a memo he wrote, Mr. Wilson instructed Ms. Manz and Mr. Brooks at the conclusion of the September 13 meeting to draft an agreement providing:

1. The events of 9/1/06 must be documented. If no other means of documenting the incident can be agreed upon, then it will be in the form of an incident report.
2. A fair evaluation. With respect to the timeliness of reports, if any statement is made about late reports it must be made in the context of the workload, and it must include a statement about the progress Officer Reed has made since 8/9/06. If percentages are used in Officer Reed's evaluation, they must also be used in the evaluation of other officers in the unit....
3. Work at home days that were agreed upon prior to the events of 9/1/06 shall be granted. Officer Reed's schedule will reflect an 8:30 am start time. He shall be permitted to arrive early and leave early without prior approval from his supervisor.

been permitted in the writing units, it has been encouraged by Ms. Manz in the past if I was unable to obtain documents prior to the due date. The difference she pointed out on this day was that I ordered the Municipal files on the day I submitted the report. Rather than argue, I told Ms. Manz I understood the practice was no longer acceptable.

Ms. Manz turned her attention away from the report and told me she didn't think I was ready for the items we settled on in our agreement with Mr. Wilson, specifically a flexible schedule and work-at-home days. She explained that the issue was no longer about timeliness of reports, now it's a question of quality. I told her that I thought we had reached an agreement through the mediation process with Roger Wilson, but she was making it clear she did not intend to honor that agreement....

Ms. Manz explained...that she did not appreciate the way I made her look in front of her supervisor....

...

Prior Incidents of Disparate Treatment

...

Ms. Manz has routinely confronted and harassed me in a way that seems very personal to her. She has treated me disparately within the unit with regards to the distribution of privileges and the enforcement of policies. She has wrongly accused me of falsifying documents and continuously harassed me about practices she ignores from the female officers in Unit 6. My work can easily be compared to the other PSI writers by reports provided by the County. Anyone that looks at those reports will see that I have performed at nearly the same level as the seasoned officers in my unit....

Moreover, Ms. Manz has made it clear that she intends to continue this behavior if only because I reported it to her supervisor.

In response to the Grievant's Special Incident Report, the Employer conducted an internal investigation. In a memo dated November 17, 2006 concluding that investigation, the appointed investigator set out his interviews and document reviews, summarized the investigation, and recommended and that no action be taken:

Summary

After reviewing all of the information and interviewing Parole Services Supervisor Angelika Manz, it is evident that there has not been a violation of standards of Employee Conduct. There is no evidence that Angelika Manz engaged in pattern of disparate treatment toward Officer William Reed, accused him of falsifying his contact sheets, had any inappropriate encounters with Officer Reed, and denied him any privileges enjoyed by other members of the Columbus Unit 6 or provoked any retaliation. It is apparent that Officer Reed has been denied work at home privileges however Angelika Manz['s] decision seems to be reasonable since Officer Reed has had some issues with his work and getting to work on time. Supervisor Manz appeared to be very honest, cooperative and forthcoming during the interview. Also, [t]he Columbus Unit 6 and William Reed['s] prior Supervisors have all been very open and approachable however a few of them have brought up the concerns about this report being viewed by William Reed. It also appears that the working environment between Supervisor Manz and Officer is a bit strained.

Recommendation

Based on the information contained in this report, disciplinary action is not warranted and it [is] recommended that no such action be pursued. It is recommended that Angelika Manz address any work related issues in a quicker fashion by giving corrective counseling or discipline in the future.

In a document prepared by the Grievant to show the comparative report submission records of his colleagues and of himself, he states in pertinent part:

These documents [Adult Probation records at the Franklin County Courthouse] show that every officer within Unit 6 has turned in a late report. Ms. Manz claimed that I was the only one. It accurately reveals that I turned in 48 late reports (others shown on this document were not submitted late, but rather delayed by the method of delivery). It also reveals that [Employee "A"], an officer with 13 years writing experience, turned in nearly the same number of late reports: 42.

It should also be noted that all of my reports were brought up to date by the end of August 2006, prior to the implementation of an improvement plan by Ms. Manz. In addition, throughout the 90-day duration period of the improvement plan, all of my reports remained up to date and were never submitted late.

(Emphasis original.)

The Grievant received a written Performance Review for the period September 15, 2005 through September 14, 2006. The Grievant disagreed with numerous parts of the Review, and submitted a Performance Evaluation

Review Request dated October 6, 2006. In a memo dated October 18, 2006,

Mr. Wilson responded to the Grievant's request:

I have reviewed your appeal of your performance evaluation prepared by supervisor Angelika Manz covering the review period of 9/15/05-9/14/06. I find the evaluation to be an accurate reflection of your performance during the review period. Due to the nature of the commentary relative to the various dimensions I have recommended a performance improvement plan be developed by your supervisor.

The Union filed two grievances dated September 30, 2006. The first grievance states in pertinent part:

Statement of Grievance In retaliation against me, for reporting disparate treatment and a hostile work environment, Angelika Manz continues to harass and intimidate me through antagonistic emails, constant unwarranted criticism, disparate treatment within the unit, and continuously issuing progressively more restrictive work instructions.

...

Resolution Requested: To be made whole in every way, including: Relief from Manz' supervision by transfer to Unit 9 or by her removal from Unit 6; a fair evaluation; reinstatement to PACE; removal of the action plan; equal treatment in terms of benefits, privileges and enforcement of policies.

The Step 3 Response to the first grievance provides in pertinent part:

The Contract does not provide the relief the grievant seeks. There is no contractual right to having a supervisor reassigned. The Contract is clear on how bargaining unit members can transfer to other work

locations and in order to satisfy such a remedy, the rights of others would be violated. The grievant's involvement with PACE is voluntary and may be terminated by the Employer at any time for any reason. The action plan at issue is a legitimate means of increasing performance and as it was tied to an evaluation for which the grievant received "meets," there is no contractual mechanism for appealing this. There exists no evidence that benefits or privileges have been inappropriately denied to the grievant and in contravention of the Contract. An assignment that includes working at home is by mutual agreement only. In this case the Employer has not agreed to allow this for the grievant and denied the request without violating the Contract.

The second grievance states in pertinent part:

Statement of Grievance RA Roger Wilson further perpetuated a hostile work environment and continuing harassment by participating in my recent performance evaluation with Manz, denying me a fair and objective review, instructing Manz to implement an action plan only after I sought review, and ordering her to remove from the PACE Program. Moreover, Wilson failed to produce documents that are relevant and pertinent to an active grievance against Manz, despite numerous formal requests from the Union.

The remedy requested was the same as stated in the first grievance. The

Step 3 Response to the second grievance provides in pertinent part:

The Contract provides specific provisions for the appeal of a Performance Evaluation in the face of ratings in the "Below" range. The grievant received "Meets" in all categories and as a result does not have a means of appealing the evaluation in question

under the Contract. Additionally, the Employer may provide an employee with a Performance Improvement Plan at any time and such a plan does not have to be tied to an evaluation or sub-standard performance.

An employee's participation in PACE is subject to the approval of the Employer and as such, may be terminated at any time.

If any member has not received requested documentation, and those documents actually exist, the member may renew the request to the appropriate authority or agency designee.

POSITIONS OF THE PARTIES

Union Position

The Grievant was treated disparately. He was unduly denied privileges he had earned. The Grievant upheld his end of the deal in improving the timeliness of his reports. He also positively addressed any and all quality issues brought to his attention. Yet these accomplishments were rewarded not with the promised privileges, but instead with harassment, verbal abuse, retaliation, and further disparate treatment.

The record evidence proves the allegations of the grievances. The Grievant wanted to be afforded the same privileges as the other writers in his unit. On numerous occasions, he asked how to earn these privileges. Every time he attained the purported standard, however, management held

the carrot higher. The Grievant was performing the same quality and quantity of work as his colleagues within the same time frames, yet he was not afforded the same privileges.

The Employer would have the Arbitrator believe no remedy exists due to the Grievant's transfer out of the unit. His decision to transfer, however, was not voluntary. It was coerced through fourteen months of relentless harassment in violation of Sections 6.01, 6.02, 7.01, 7.02, and 43.19 of the Agreement. Therefore, the Grievant should be placed in the position he would have been in had Ms. Manz not been permitted to act with malice and treat the Grievant disparately.

Specifically, the Union seeks the following relief:

- An order to place the Grievant in the PSI unit, writing PSI's, at 373 S. High St., Columbus, under the direction of a supervisor other than Ms. Manz, and to grant him all of the usual benefits afforded officers in that unit, i.e., work at home privileges, flexible work schedule, etc.;**
- An order to strike all of Ms. Manz's comments from the Grievant's 2006 and 2007 Performance Evaluations, and change all of the ratings to "Meets" or above, and eliminate the proposed Performance Improvement Plan attached to the 2007 evaluation;**
- An order to eliminate from the Grievant's files any record of the Performance Improvement Plan proposed by Ms. Manz in October 2006, including the extension imposed against the Grievant in January 2007;**

- An order to eliminate from the Grievant's files any record of "Corrective Counseling" issued by Ms. Manz;**
- An order to eliminate from the Grievant's files any record of the "Direct Order" issued by Ms. Manz in June 2007; and**
- An order to reinstate Officer Reed to the PACE program, and allow him to complete the five sessions he missed as a result of being suspended by Ms. Manz.**

Employer Position

The Union failed to demonstrate the Employer denied the Grievant a contractual right. What the Grievant sought from his supervisor were privileges – working from home and flexible scheduling on office days. The record evidence shows, however, the Grievant was not willing to improve his performance to meet the unit's standards for timeliness and work quality necessary to gain those privileges.

The Grievant's supervisor attempted to help the Grievant meet the unit's standards by placing him on a Performance Improvement Plan. The supervisor, however, had to extend the Plan because the Grievant did not meet the standards established in the Plan.

The Grievant was never subjected to any disciplinary action defined in the Agreement. He took issue with his 2006 Performance Evaluation, yet he

received all "meets." He indicated his supervisor's comments on his evaluation were not to his satisfaction, yet he did not demonstrate in the record the timeliness and quality of his work warrants revised comments. Moreover, performance evaluations are not subject to the instant grievance and arbitration process.

Two of the three Union witnesses were not in the unit the same time as the Grievant. The third witness, Mr. Brooks, was present during at least two meetings involving the Grievant. Mr. Brooks testified the Grievant was told he would get work at home privileges once he met the timeliness and quality standards of the unit. The record evidence establishes the Grievant did not sufficiently improve his performance to merit this privilege.

The Employer also demonstrated the PACE Program was a voluntary program. In any event, the Grievant's participation was not revoked but suspended.

OPINION

These are contract interpretation grievances. As such, the Union has the burden of proving the Employer breached the Agreement. The Grievant has alleged management has breached the Agreement by "participating in, allowing, or failing to address harassment, intimidation, discrimination,

retaliation and disparate treatment.” The Grievant has named his supervisor, Angelika Manz and her supervisor, Roger Wilson, as the members of management who engaged in this conduct.

It is clear from the record the Grievant and his supervisor had an extremely poor working relationship. The record demonstrates both contributed to the ongoing situation.

There is no question the Grievant had some performance issues. He needed to improve his interview skills, such as by asking more follow-up questions. His Pre-Sentence Investigation (“PSI”) Reports tended to be sparse because of this. He also needed to become more familiar with medical terminology; e.g., he wrote one offender had hand “trimmers” rather than tremors, and another had “congested,” rather than congestive heart failure. The Grievant also had issues from time to time with his output and with the timeliness of his reports.

The Grievant’s supervisor dealt with the Grievant’s performance issues; however, she dealt with them in a suspect manner. For example, she gave the Grievant the grade of “meets” in all sections of his performance evaluation; yet, soon after the evaluation, she put him on a Performance Improvement Plan (“PIP”). Similarly, though the Grievant and his supervisor and others had a meeting where an agreement was reached on several

issues, including work-at-home privileges for the Grievant, a few days after the meeting, Ms. Manz repudiated the agreement, claiming the Grievant's performance had changed for the worse.

Ms. Manz appears to have engaged in "moving target" supervision of the Grievant. I.e., he would ask her what he had to do; she would tell him and he would do it; and then she would change the standard and say he had not met her expectations. Additionally, while Ms. Manz would withhold work-at-home and flex-time privileges on the grounds the Grievant's quality and quantity of work were lacking, she granted these privileges to other employees she supervised who had performance issues.

Ms. Manz reacted very negatively after the Grievant involved Mr. Wilson, her supervisor, in the situation. Ms. Manz referred to this as a "stunt" in an e-mail to Mr. Wilson, despite the Grievant having the right to do this.

Mr. Wilson did not take an active role in these matters, despite being aware of them. The record shows Mr. Wilson accepted anything and everything Ms. Manz said about the Grievant, and discounted any evidence to the contrary.

There was an internal investigation conducted regarding the Grievant's complaints regarding Ms. Manz. The investigator concluded no action was

necessary. The investigator concluded that, however, without having interviewed the Grievant's coworkers or other employees who had been supervised by Ms. Manz. Rather, the investigator focused on interviewing the Grievant's past supervisors. If the investigation had been more comprehensive, it would have become apparent the Grievant was not the only employee who had seriously negative experiences while being supervised by Ms. Manz.

The record shows Ms. Manz got along well with some of her subordinates. There is no question, however, she unnecessarily intimidated others. She also spoke negatively about some employees to other employees. Such conduct on her part was unprofessional.

Both Ms. Manz and Mr. Wilson testified disingenuously about the Grievant's participation in the "PACE" mentoring program. Though they did not permit the Grievant to continue participation in the program, they claimed they had only "suspended" his participation, even though they had said and written at other times they had terminated his participation.

The Agreement does not permit an employee to appeal a performance evaluation that contains all "meets." The Arbitrator finds it suspect the Grievant's supervisor would grade him with all "meets," yet continue to criticize his work.

The Employer contends there has been no breach of the Agreement because the Grievant was not denied "rights," he was denied only "privileges." However, the record shows the Grievant was denied privileges in an inconsistent and sometimes arbitrary manner. Such supervision violates Article 6.02 which provides:

No employee shall be discriminated against, intimidated, restrained, harassed, or coerced in the exercise of rights granted by this Agreement.

When the Grievant involved Mr. Wilson, Ms. Manz became even harsher with the Grievant. When the Grievant involved his Union representative, Ms. Manz reacted negatively. While it is clear both Ms. Manz and the Grievant contributed to their poor working relationship, it was Ms. Manz's responsibility, as the Grievant's supervisor, to work consistently with the Grievant to try and improve matters.

Though the Grievant has been able to bid to another position, it is a field position rather than a PSI unit. The Grievant wants to remain in a PSI unit; it is clear, however, the working relationship between him and Ms. Manz has deteriorated beyond repair.

AWARD

For the reasons set out above, the grievances are granted in part and denied in part. The Employer is ordered to:

1. use its best efforts to place the Grievant in a PSI unit under the direction of a supervisor other than Ms. Manz;
2. remove from the Grievant's personnel records any Performance Improvement Plans, Corrective Counselings, and Director Orders generated by Ms. Manz to the Grievant; and
3. reinstate the Grievant to the PACE program.
4. The Arbitrator has no jurisdiction over the Grievant's Performance Evaluations.

DATED: February 8, 2008


Susan Grody Ruben, Esq.
Arbitrator