ARBITRATION DECISION

January 11, 2010

In the Matter of:

State of Ohio, Department of Rehabilitation and Correction, Correctional Reception Center	)	
	)	Case No. 27-05-20090224-0020-02-11
and	)	Robert Dalton, Grievant
Service Employees International Union, District 1199	)	

APPEARANCES

For the State:

Marissa Hartley, OCB Labor Counsel
Kristen Rankin, OCB General Counsel
Chris Lambert, DR & C Labor Relations Officer
Linda Coval, DR & C Deputy Chief Inspector
Buffy Andrews, Labor Relations Officer
Marilyn Christopher, Registered Nurse
James Kovinchick, Correction Officer
Shane Black, Legal Intern

For the Union:

Cathrine Harshman, First Chair
Josh Norris, Second Chair
Robert Dalton, Grievant
Neil Neidhardt, Witness
Neil Nolan, Labor Relations Officer
Leah Davis, Organizer

Arbitrator:

Nels E. Nelson

BACKGROUND

The issue before the Arbitrator is the termination of the grievant, Bob Dalton. He was hired by the Department of Rehabilitation and Correction on December 5, 2005, as a Psychology Assistant 2 at the Mansfield Correctional Institution and was subsequently transferred to the Correctional Reception Center at Orient, Ohio. The grievant is represented by Service Employees International Union, District 1199, and since the spring of 2007, was a union delegate. In that capacity, he filed grievances and unfair labor practice charges and represented the union at labor-management committee meetings.

The grievant was the subject of disciplinary actions on three occasions prior to his termination. The first discipline was a written reprimand he received on June 20, 2008. According to the union, the incident arose out of a labor-management meeting and involved an allegation that the grievant failed to file a report about concerns expressed by a number of bargaining unit members. It is not clear whether the grievant filed a grievance.

The second disciplinary action was the result of an incident report filed by Robin Cooper-Munyz concerning emails she received from the grievant on June 17, 2008, regarding the posting of a mandatory overtime list. When Jon Fausnaugh, an Investigator, interviewed the grievant on July 10, 2008, the grievant argued that he was protected by his status as a union delegate. Fausnaugh disagreed and recommended that disciplinary action be taken against him. As a result, the grievant received a two-day suspension.

The grievant filed a grievance protesting his suspension. It was heard in the non-traditional arbitration process on May 26, 2009. Arbitrator Robert Stein held that "the grievant was acting in his capacity as an advocate" and that "advocacy requires the freedom to engage in direct, frank and respectful debate as an equal." (Union Exhibit 13) He concluded that there was not just cause for discipline.

The grievant also filed an unfair labor practice charge relating to the incident. On June 4, 2009, the State Employment Relations Board issued a complaint and directed a hearing to determine whether the state violated Sections 4117/11(A)(1) and (4) of the Ohio Revised Code by disciplining the grievant for engaging in protected activity. However, on September 18, 2009, the parties entered into a settlement agreement where the state agreed to post a notice acknowledging that SERB had issued a finding of probable cause and indicating that it was not contesting SERB's finding.

The third disciplinary action began when the grievant emailed the Director of DR & C about an incident he believed violated CRC directives and policies. In the subsequent investigation, the grievant refused to provide the name of the employee who had complained to him. As a result, on November 5, 2008, the grievant was suspended for five days for failing to cooperate in an investigation and insubordination.

The grievant filed a grievance protesting his suspension. On June 30, 2009, the dispute was heard in non-traditional arbitration by Arbitrator Stein. He sustained the charge that the grievant had failed to cooperate in an investigation but directed the state to remove the insubordination charge from his personnel record. Arbitrator Stein noted that the grievant's prior two-day suspension had been removed and reduced his five-day suspension to two days.

The three charges leading to the grievant's discharge grew out of his prior discipline. At the grievant's July 10, 2008, interview regarding his two-day suspension related to the posting of a mandatory overtime list, the grievant made a number of statements that Fausnaugh believed indicated that he was involved in partisan political activities. On that basis, Virginia Lamneck, the Warden of CRC, requested the permission of Gary Croft, the Inspector General, to access the grievant's email.

When Fausnaugh reviewed the grievant's email, he discovered an email exchange between the grievant and Juanita Murphy, who had been terminated for harassing Marilyn Christopher, a co-worker and her former partner. In one email, the grievant told Murphy that he planned to contact Christopher to see if he could get her to "soften" her testimony against her at the upcoming arbitration hearing challenging her termination. Fausnaugh contacted Janet Tobin, a Labor Relations Officer at MANCI, and learned that the grievant had telephoned Christopher and asked her to modify her testimony against Murphy.

On October 28, 2008, the investigation was turned over to Linda Coval, the Deputy Chief Inspector. She indicated that during the course of the investigation she received an incident report written by James Kovinchick, a Correction Officer at MANCI, regarding an incident at Murphy's arbitration hearing. In the report, Kovinchick stated that after testifying for the state, the grievant asked him if he had received anything in exchange for his testimony.

Coval issued her report on December 29, 2008. She found that the grievant used his state email for non-work related matters, including personal correspondence and political activities; engaged in political activities on state time; and attempted to get

Christopher to change her testimony during an official proceeding. Coval concluded that the grievant's actions violated the Standards of Employee Conduct.

A pre-disciplinary hearing was held on January 21, 2009. The grievant was charged with violating Rule 5(B) by misusing the state email system; Rule 15 by engaging in political activity in violation of Section 124.57 of the Ohio Revised Code; and Rule 24 by threatening, intimidating, or coercing another employee. The next day Neil Nolan, a Labor Relations Officer at CRC, who served as the hearing officer, concluded that the grievant violated all three rules and that there was just cause for discipline. On February 18, 2009, the grievant was removed from his position by Lamneck for violating of the Standards of Employee Conduct.

The arbitration hearing was held on October 26, 2009. Post-hearing briefs were received on November 25, 2009. The union provided copies of the cases it cited on November 30, 2009, and a copy of the portion of the hearing that was transcribed arrived on December 7, 2009.

ISSUE

The issue as agreed to by the parties is:

> Was the Grievant, Robert Dalton, removed from his position of Psychology Assistant 2 for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 3
Union Rights

* * *

3.01 Delegates and Organizers

The right of the Union to appoint a reasonable number of delegates is recognized. The delegates appointed shall have completed their initial probationary period. Delegates are Union stewards as that term is generally used.

In addition to their regular work duties, the duties of the delegates during work time shall be limited to the investigation and presentation of bargaining unit employees' grievances and representing said employees in meetings with the agency.

Delegates/organizers may receive and discuss complaints and grievances of employees on the premises and time of the agency provided it does not interfere with the necessary operation of the facility. Delegates may use a reasonable amount of time to perform delegate duties. Delegates shall notify their supervisors when working on authorized union business. The notification shall be given as far in advance as is practical, according to the circumstances…

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3.08 Mail Service

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When feasible, and where equipment is currently available, Union delegates may utilize electronic mail and/or facsimile equipment solely for contract enforcement and interpretation and grievance processing matters. Such transmissions will be primarily to expedite communication regarding such matters, will be reasonable with respect to time and volume, and limited to communications with the grievant, if any, appropriate supervisors and employee’s staff representatives…

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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.

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Article 8
Discipline

8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

A. Verbal Reprimand

B. Written Reprimand

C. A fine in an amount not to exceed five (5) days pay

D. Suspension

E. Reduction of one step. This shall not interfere with the employee's normal step anniversary. Solely at the Employer's discretion, this action shall only be used as an alternative to termination.

F. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

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STATE POSITION

The state argues that there was just cause for the grievant's termination. It charges that he violated three separate rules under the Standards of Employee Conduct. The state adds that he was a short-term employee with a written warning and a two-day suspension on his record.

The state contends that the grievant violated Rule 5(B) of the SOEC by misusing state property. It points out that DR & C Policy 05-OIT-10 specifically addresses the misuse of email. The state notes that the grievant admitted during the administrative investigation that he was aware of the policy.

The state maintains that it offered extensive evidence of the grievant's inappropriate emails. It indicates that Coval testified that the grievant and his wife exchanged more than 200 personal emails. The state reports that the grievant also exchanged emails with a former union staff representative that were not related to DR & C business or permitted under Article 3.08 of the collective bargaining agreement. It adds that he communicated by email with other workers regarding the Blackwell and Strickland race for Governor.

The state rejects the grievant's claim that the personal emails were done on break time. It reports that the email policy has no exceptions for personal usage during break times. The state further complains that the grievant did not offer this defense prior to the arbitration hearing, which it asserts undermines the credibility of the grievant's claim.

The state dismisses the union's argument that one-third of the emails the grievant sent and received occurred prior to the date he signed the receipt acknowledging that he got a copy of the email policy. It observes that the union's claim still leaves two-thirds of the inappropriate emails. The state reports that the grievant had switched institutions during his career at DR & C and had signed the same acknowledgment at another institution.

The state acknowledges the union's argument that the grievant was the first employee at CRC to be disciplined for a Rule 5(B) violation. It responds that Nolan

testified that the grievant's discipline was the result of "an agency-wide crackdown on inappropriate use of email." (State Post-Hearing Brief, page 3) The state observes that the grievant testified that his supervisor had warned him that "they are getting ready to batten down the hatches." (Ibid.)

The state disputes the union's argument that an email from the warden asking people to remove personal files from their computers proves that everyone used their state computers for personal business. It claims that "this email cannot be interpreted to mean that DR & C disregards its own policy on computer usage, nor can it be used to prove that other or all DR & C employees use their work computers for personal use." (Ibid.) The state stresses that "the only conclusion that can be garnered from this email is that personal files shall be removed from all employees' computers." (Ibid.)

The state charges that the grievant violated Rule 15 of the SOEC by engaging in political activities in violation of the ORC. It states that the emails between the grievant and Neil Neidhardt, a candidate for Delaware County Commissioner, show that the grievant was involved in a political campaign. The state claims that "these emails are hard evidence and substantial proof that the Grievant was in fact doing work for the candidate for political office." (State Post-Hearing Brief, page 4)

The state contends that the grievant's statements during the administrative investigation support this charge. It points out that he told Fausnaugh that he was involved in a political campaign in Delaware County. The state notes that the grievant did not deny his political involvement until the arbitration hearing.

The state questions Neidhardt's testimony. It acknowledges that he testified that the grievant did not work on his campaign but states that his testimony conflicts with the

emails he exchanged with the grievant. The state insists that Neidhardt's testimony should be dismissed "as a friend trying to help a friend." (Ibid.)

The state rejects the union's argument that since the grievant did not violate Ohio's Little Hatch Act, he did not violate Rule 15. It accuses the union of taking the rule out of context. The state asserts that Policy 31-SEM-05 and a Political Activity Policy issued by Kent Marcus, the Chief Legal Counsel to the Governor, indicates "what [the grievant] could and could not do as a State employee." (State Post-Hearing Brief, page 5)

The state maintains that the grievant failed to take affirmative action as required by Marcus's Political Activity Policy. It observes that the document states that "if an employee receives an email or phone call related to political activity, the employee has an affirmative obligation to respond that he or she should not be contacted on state time and on state equipment." (Joint Exhibit 4, page 27) The state reports that the grievant admitted that he never sent such an email to Neidhardt.

The state asserts that the grievant's testimony demonstrates his lack of respect for DR & C rules. It indicates that he testified that he would have liked to have participated in Neidhardt's campaign but his wife had just had a baby. The state asserts that the grievant's statement "demonstrates his willingness to disregard DR & C rules to assist Mr. Neidhardt had [his] life circumstances been different at the time." (State Post-Hearing Brief, pages 5-6)

The state argues that the grievant violated Rule 18 by threatening, intimidating, or coercing Christopher. It states that when the grievant was second chair in the arbitration challenging Murphy's termination for intimidating and harassing Christopher, he

contacted Christopher, who was scheduled to testify against Murphy, by email and stated "if you don't feel comfortable or aren't interested [in talking to me], I completely understand and respect your decision and will make no further comment." (Joint Exhibit 4, page 146) The state reports that when Christopher did not respond, the grievant called her and, according to her testimony, stated:

> I just want to discuss with you what the Union's stand is on this upcoming arbitration. Our stand is that we don't believe in tarnishing one employee to save another.

It observes that Christopher testified that she regarded his comments to be intimidation and harassment.

The state contends that the testimony offered by Buffy Anderson, the state's advocate in the Murphy arbitration, supports its charge against the grievant. It indicates that she testified that DR & C employees must be able to trust and depend on their co-workers to maintain safety and security. The state reports that she also stated that "the Grievant's conduct was especially egregious because Christopher was already the victim of one case of intimidation and harassment and here [the grievant] was exacerbating the situation with more intimidation and harassment." (State Post-Hearing Brief, page 7)

The state characterizes the grievant's assertion that he was contacting Christopher to see if she needed union representation as an "excuse." It points out that he did not include the offer of union representation in his email to her and notes that in any event, he was not a union delegate at MANCI. The state adds that it would be inappropriate for the grievant, who was sitting second chair in the Murphy arbitration, to represent both the accused employee and the victim.

The state contends that the grievant also harassed Kovinchick. It states that the grievant approached him after he testified at Murphy's arbitration hearing and asked him if he received anything in exchange for his testimony. The state claims that "this is another example of [the grievant] failing to recognize the rules set by DR & C and instead choosing to act in a manner that is intolerable at a para-military organization." (State Post-Hearing Brief, page 8)

The state rejects the union's argument that it cannot use the grievant's email to Christopher as evidence against him because it is a communication between a union delegate and a member and, as such, is privileged. It argues that the union has no law to support its claim and the fact that SERB found probable cause in one of the seven unfair practice charges submitted by the union does not establish that the communication between the grievant and Christopher is privileged.

The state discounts the unfair practice charges filed by the union. It acknowledges that SERB found probable cause in two of the cases but indicates that in one case a settlement agreement was reached without it making any admission of guilt and in the other case, which the union claims makes the grievant's communications privileged, no complaint had been issued up to the time of the arbitration hearing. The state asserts that "no law or SERB opinion currently exists that creates a privilege for the grievant's communications [and that] it is outside the realm of this arbitration to determine whether such a privilege exists." (State Post-Hearing Brief, page 9)

The state accuses the union of seeking an "outrageous application" of Article 3.08 of the contract. It recognizes that the provision states that "union delegates may utilize electronic mail and/or facsimile equipment solely for the purposes of contract

enforcement and interpretation and grievance processing matters." The state claims, however, that "the Union cannot be contending that the Grievant's attempt to get a witness to 'soften her stance' when she testifies falls under the realm of this language." (State Post-Hearing Brief, page 10)

The state rejects the union's argument that the grievant did not violate Rule 18 because he did not violate the coercion statute. It points out that Rule 18 does not refer to the statute so it does not need to prove that the grievant violated it. The state asserts that the testimony that Christopher felt intimidated and Kovinchick felt harassed is sufficient to establish a violation of Rule 18.

The state dismisses the union's contention that it failed to use progressive discipline. It indicates that progressive discipline is not necessary where an employee's conduct is "so egregious that it warrants more stringent disciplinary action." (Ibid.) The state notes that the SOEC disciplinary grid provides for termination at any step for a violation of Rule 18. It adds that in any event, the grievant had two prior disciplines and a third offense under Rule 18 calls solely for removal.

The state argues that the union did not meet its burden of proving that the grievant was the subject of disparate treatment. It points out that in Ohio Civil Service Employees Association v. Ohio Department of Mental Health, Case No. 23-06-891113-0121-01-03 (1989), Arbitrator Rhonda Rivera explained the process of proving disparate treatment as follows:

> Where an employer has shown a prima facie case of just cause for an employee's discipline, the allegation of disparate treatment shifts the burden of proof to the Union . . . the Union must, at a minimum, provide evidence that other employees in a similar situation to Grievant were treated differently. Showing a 'similar

> situation' involves showing a number of important factors:
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> > Step 1. The Union must show that other employees have (a) committed the same or a very closely analogous offense and (b) have received different discipline.
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> > Step 2. Once the proof of employees with similar offenses being disciplined differently has been shown, the question becomes do relevant factors exist (aggravating or mitigating) which rationally and fairly explain the different treatment.
> >
> > These factors could include, but are not limited to, the following:
> >
> > a. The degree of the employee's fault
> > b. The employee's length of service
> > c. The employee's prior discipline
> >
> > Factored into this appraisal must be some recognition that absolute homogeneity of discipline in a work force is impossible.

The state claims that this suggests that "even facially similar offenses can result in markedly different discipline due to variations in circumstances, both aggravating and mitigating." (State Post-Hearing Brief, page 11)

The state contends that the disciplinary letters submitted by the union for employees who were found to have violated Rules 5(B), 15, or 18 do not make a case for disparate treatment. It states that the letters do not provide enough of the facts to show that the employees committed the same or similar offenses as the grievant; that they were not all from the same institution as the grievant; that they do not provide any information regarding mitigating or aggravating circumstances; and that they do not state whether the employees had any prior discipline.

The state maintains that any argument that the grievant was treated discriminatorily must be supported by evidence. It cites New York Racing Association, 43 LA 129 (1964), where Arbitrator Schreiber stated that such a charge cannot rest on mere "surmise, inference or conjecture." The state also offers American Transp. Corp., 81 LA 318 (1983), where Arbitrator Luella Nelson held that Arbitrators require clear proof to sustain charges of discrimination.

The state argues that the grievant is subject to the same discipline as other employees. It indicates that "the Union cannot insist that a Union delegate be treated the same as all other employees on one hand and on the other argue that he is not subject to the same rules as all other employees." (State Post-Hearing Brief, page 12)

The state rejects the union's claim that the grievant is being held to a higher standard than other employees. It acknowledges that Nolan wrote in his pre-disciplinary report that as a union delegate the grievant should have known the rules. The state observes that when Nolan was asked about this statement at the arbitration hearing, he testified that he wrote it that way in response to the grievant's claim that his conduct was privileged because he was a union delegate.

The state dismisses the union's complaint that the grievant received discipline only after he became a union delegate. It points out that the grievant was a short-time employee who had been a delegate for most of his employment. The state notes that the union failed to provide testimony from any other union members or delegates regarding anti-union animus. It characterizes the union's argument as a "red herring."

The state discounts the union's argument that it waited to take action against the grievant until after the Murphy arbitration hearing in order to entrap him. It observes that

when Christopher complained in July 2008 about the grievant's improper communication with her, it did not know what role, if any, he would play in the Murphy arbitration and could not have anticipated that an employee at CRC would be sitting as second chair at MANCI. The state claims that "the ramifications of his email and telephone call to Marilyn Christopher were not apparent until her testimony during the Murphy hearing … when [she] was clearly intimidated by the Grievant." (State Post-Hearing Brief, page 13) It insists that it "was timely in its investigation and issuance of discipline." (Ibid.)

The state maintains that the preponderance of the evidence is the applicable standard of proof. It points out that Elkouri and Elkouri's How Arbitration Works states:

> Concerning the quantum of required proof, most arbitrators apply the 'preponderance of the evidence' standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a "clear and convincing evidence" standard. (State Post-Hearing Brief, page 14)

It notes that it is not alleging that the grievant committed any criminal act so the proper standard of proof is the preponderance of the evidence. It claims, however, that it did show by clear and convincing evidence that it had just cause to terminate the grievant.

The state concludes that the union did not disprove the findings of facts that led to the grievant's termination, failed to meet its burden of proving disparate treatment, and did not establish the existence of anti-union animus. It asks the Arbitrator to deny the grievance.

UNION POSITION

The union argues that there was not just cause to terminate the grievant. It acknowledges that at the time the grievant was terminated he had a written warning, a two-day suspension, and a five-day suspension. It claims that under the collective

bargaining agreement written reprimands are not subject to mediation or arbitration; that the two-day suspension was overturned in arbitration and the unfair labor practice filed in the case was settled when the state agreed not to challenge SERB's probable cause finding; and that the five-day suspension was reduced in arbitration to a two-day suspension and the alleged violation of Rule 24 (insubordination) was found unjustified. The union stresses that "because [the grievant's] termination was based on the progressive discipline of a written reprimand, a 2-day suspension, and a 5-day suspension, it would stand to reason that the elimination or reduction of any of those disciplines would result in an overall reduction in the discipline levied in this matter." (Union Post-Hearing Brief, page 14)

The union contends that under the doctrine of merger and bar many of the alleged incidents cannot be used to justify the grievant's termination. It points out that the merger and bar rule in Ohio Civil Service law at Section 124-3-05(A) of the Ohio Administrative Code states:

> All incidents which occurred prior to the incident for which a non-oral disciplinary action is being imposed, of which an appointing authority has knowledge and for which an employee could be disciplined, are merged into the non-oral discipline imposed by the appointing authority. Incidents occurring after the incident for which a non-oral disciplinary action is being imposed, but prior to the issuance of the non-oral disciplinary order, are not merged and may form the basis for subsequent discipline.

The union claims that while this rule may not be directly applicable to the instant proceeding, it encompasses traditional notions of just cause. It states that the rule means:

> An employer cannot discipline someone for one event, while holding back on discipline for other known events that occurred earlier in time, just to come back with more discipline later (stair-stepping the discipline) for events that were known about when the first disciplinary action occurred. (Union Post-Hearing Brief, page 15)

The union indicates that the Arbitrator applied this principle in Putman County Sheriff's Dept., 106 LA 528 (1996).

The union charges that the state withheld discipline so that offenses could be stacked on top of each other in order to increase the punishment. It indicates that the state knew about the grievant's June 30, 2008, telephone call to Christopher and his email exchanges with Murphy and Neidhardt as well as many of his personal and political emails before his July 10, 2008, investigatory interview and his two-day suspension on September 9, 2008. The union adds that the grievant's telephone call to Christopher and his July 2008 emails were also known at the time of the grievant's September 3, 2008, incident and when he was suspended for five days on November 5, 2008.

The union requests the Arbitrator not to consider the events that occurred prior to September 3, 2008. It indicates that this would exclude the grievant's March 2008 email to Christopher and his June 2008 telephone conversation with her, the July 2008 email exchanges with Neidhardt and Murphy, and all of the grievant's alleged personal and political emails prior to September 3, 2008. The union asserts that the remaining events are not sufficient to establish just cause for the grievant's termination or any discipline at all.

The union argues that the state must prove its case by clear and convincing evidence. It cites a number of Arbitrators' decisions indicating that the preponderance of the evidence standard of proof is rarely used in arbitration and that the clear and convincing standard should be applied in discharge cases and ones involving sexual harassment. The union claims that in the instant case, "the state's evidence does not rise

to the level of the preponderance of the evidence - let alone the standard of clear and convincing proof." (Union Post-Hearing Brief, page 19)

The union maintains that the grievant's alleged violation of Rule 5 does not justify his termination. It claims that since the state's investigator gained access to the grievant's email on or about July 21, 2008, and the grievant was suspended on September 3, 2008, pursuant to the merger and bar doctrine no emails prior to September 3, 2008, can be considered. The union indicates that "this would eliminate … the February 2008 emails from Neil Neidhardt, the string of emails in 2006 between [the grievant], Juanita Murphy and Deanne Osgood regarding Strickland and Blackwell, the February 2007 email regarding the Clintons, and all but 21 of the emails between [the grievant] and his wife." (Union Post-Hearing Brief, page 20, footnote 5)

The union argues that the grievant used the state's email system for personal business just like other employees. It observes that bargaining unit members, supervisors, and managers sent personal email messages and pictures and played games on their computers. The union asserts that the email the warden sent to employees on October 29, 2009, advising them to remove all non-work related materials from their computers to free up storage space on the server reveals the practice at the institution regarding the personal use of computers.

The union complains that the grievant was not warned that the personal use of email was no longer acceptable. It points out that no employee had been disciplined for a Rule 5 violation in the three years prior to the grievant's termination. The union notes that after the grievant's termination approximately 60 employees received written warnings regarding their use of email, which provided them with notice that their

behavior was not acceptable. It asserts that the only warning to the grievant was a "pink slip."

The union suggests that the state's argument that the grievant engaged in serious misconduct is undermined by its own actions. It reports that the state allowed the grievant to continue to use its email system for almost one-half of a year after it learned about his computer use. The union observes that "the State never said a single word to him about his conduct during the investigation, discipline, or hearing related to other matters that occurred after some or all of the personal mail was sent or received." (Union Post-Hearing Brief, page 22)

The union maintains the state's conduct violated two of the seven tests of just cause outlined by Arbitrator Carroll Daugherty in Enterprise Wire, 46 LA 359 (1966). It accuses the state of failing to warn the grievant of the discipline that could result from his email activities. The union further complains that the state failed to apply it rules, orders, and penalties evenhandedly and without discrimination.

The union disputes any claim that the System Access Request signed by the grievant on February 5, 2008, constitutes notice that personal email usage would result in discipline. It charges that "the State would prefer to hand employees a stack of papers, memos, policies and Ohio Revised Code provisions, and put them 'on notice' of the myriad of conduct for which they might one day (perhaps even months or years in the future) be punished." (Ibid.) The union claims that the state's behavior does not comport with the requirements of just cause.

The union argues that the state did not establish that the grievant violated Rule 15. It points out that the notice of disciplinary action states the charges against the grievant

are:

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> 1. You were involved in the advocacy for election of the US Presidential Candidate. Mr. Muhammad had requested information prior to the 2008 presidential election from SEIU/1199 members. Mr. Muhammad had emailed you asking for help in organizing members to serve as Member Connectors for the purpose of soliciting from membership who they support in the Presidential Primary election and to report the information back to him by 2 pm on February 21st and in turn you sent an email to Mr. Muhammad stating your concerns. The spreadsheet had the 1199 membership listed as well as the question Mr. Muhammad wanted answered. The spreadsheet showed several CRC 1199 members' responses to questions asked. During the investigation you acknowledge the emails with Mr. Muhammad as well as you admitted that it would be considered political to go around and ask individuals who they were planning on voting for.
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> It is further noted that you were personally involved in communicating with a candidate for partisan political office. You stated during an interview with Mr. Fausnaugh that you were personally involved in a political campaign in Delaware County to replace a republican office holder. Emails were discovered between Mr. Neil Neidhardt, who was a Democratic candidate for County Commissioner in Delaware County. The emails revealed that you were working on a webpage for Mr. Neidhardt as well as responding to Mr. Neidhardt on your work computer.
>
> Further emails found on your computer were political in nature and not work related.
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> ***
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> (Joint Exhibit 3, page 3)

The union admits that the state issued rules regarding political activities in memorandums sent by Markus and Greg Trout, the DR & C's Chief Legal Counsel. It states that while some of the prohibitions in the memorandums are from Section 124.57 of the ORC, others are not and therefore, are not violations of Rule 15 since it refers specifically to the statute. The union complains that "because the appointing authority never testified at the arbitration, there is no indication whether the Warden made any differentiation between what she believed to be 'political activity' and those activities

which actually are prohibited under the Little Hatch Act." (Union Post-Hearing Brief, page 25)

The union charges that there was a great deal of confusion regarding what activities are prohibited under the Little Hatch Act. It points out that Nolan admitted that he never saw Section 124.57 of the ORC prior to the arbitration hearing. The union observes that this means that he "never took the actual Code provision into consideration when determining that there was 'just cause' to find [the grievant] committed a violation of the Code." (Ibid.)

The union contends that it is helpful to look at the Code. It reports that Section 124.57(A) states in part:

> No officer or employee in the classified service of the state….shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription or contribution for any political party or candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting, any such assessment, contribution, or payment from any officer or employee in the classified service of the state….; nor shall any officer or employee in the classified service of the state… be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express free political opinions.

The union notes that Section 123:1-46-02 of the Ohio Administrative Code indicates that the permissible or prohibited activities are as follows:

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> (B) The following are examples of permissible activities for employees in the classified service:
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> (1) Registration and voting;
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> (2) Expression of opinions, either oral or written;
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> (3) Voluntary financial contribution to political candidates and

organizations;

(4) Circulation of nonpartisan petitions or petitions stating views on legislation;

(5) Attendance at political rallies;

(6) Signing nominating petitions in support of individuals;

(7) Display of political materials in the employee's home or on the employee's property;

(8) Wearing political badges or buttons, or the display of political stickers on private vehicles; and

(9) Serving as a precinct election official under section 3501.22 of the Revised Code.

(C) The following activities are prohibited to employees in the classified service:

(1) Candidacy for public office in a partisan election;

(2) Candidacy for public office in a nonpartisan general election if the nomination to candidacy was obtained in a partisan primary or through the circulation of nominating petitions identified with a political party;

(3) Filing of petitions meeting statutory requirements for partisan candidacy to elective office;

(4) Circulation of official nominating petitions for any candidate participating in a partisan election;

(5) Service in an elected or appointed office in any partisan political organization;

(6) Acceptance of a party-sponsored appointment to any office normally filled by partisan election;

(7) Campaigning by writing for publications, by distributing political material, or by writing or making speeches on behalf of a candidate for partisan elective office, when such activities are directed toward party success;

> (8) Solicitation, either directly or indirectly, of any assessment, contribution or subscription, either monetary or in-kind, for any political party or political candidate;
>
> (9) Solicitation of the sale, or actual sale, of political party tickets;
>
> (10) Partisan activities at the election polls, such as solicitation of votes for other than nonpartisan candidates and nonpartisan issues;
>
> (11) Service as, witness or challenger, for any party or partisan committee;
>
> (12) Participation in political caucuses of a partisan nature; and
>
> (13) Participation in a political action committee which supports partisan activity. (Union Exhibit 26, page 2)

The union suggests that the grievant's activities are not prohibited. It observes that the OAC does not prohibit sending emails that are political and not work related and, in fact, indicates that expressing one's opinions is permissive. The union reports that the Code does not prohibit asking individuals their political opinions or volunteering one's time for a political candidate as long as one is not engaged in activities that are specifically prohibited.

The union rejects any suggestion that the email the grievant received from Kevin Muhammad, one of its representatives, justifies the grievant's discipline. It acknowledges that the email included a spreadsheet showing the political preferences of some employees. The union indicates that the notice of discipline does not charge that the grievant had any role in completing the spreadsheet and that the email only suggested that it would be "political" to ask employees who they were planning to vote for.

The union dismisses any suggestion that the grievant had anything to do with putting employees' political preferences on the spreadsheet. It points out that Muhammad sent the email and spreadsheet to the grievant at 11:36 a.m. on February 20,

2008. The union notes that at that time the spreadsheet showed the political preferences for four employees and indicated that they were surveyed on Monday, February 18, 2008. It observes that February 18 was Presidents' Day so that employees would not have been at work to survey. The union adds that none of the state's investigators asked the employees whether the grievant had contacted them and that one of the individuals was no longer an employee at the time she was allegedly surveyed.

The union contends that the grievant's email to Muhammad on February 20, 2008, does not establish a violation of Rule 15. It states that in the email the grievant told Muhammad that he did not believe the Member Connection program should be used as he suggested; that there was too little notice to provide the requested information; and that a co-worker told him that it was none of the union's business who she voted for.

The union discounts any suggestion that the grievant did anything wrong when he contacted a member about Muhammad's email. It insists that he did not ask the employee about her political opinion but what she thought of Muhammad's request. The union indicates that Coval admits that she never asked the grievant the name of the person he contacted and never talked to her. It adds that "even if the State could actually provide proof that [the grievant] had surveyed anyone about their political preferences, it would still have a major difficulty in justifying a Rule 15 charge since such actions would not have violated the Little Hatch Act in the first place." (Union Post-Hearing Brief, page 30)

The union maintains that the emails between the grievant and Neidhardt are not a violation of Section 124.57 of the ORC. It acknowledges that they may have violated DR

& C or state policy regarding political activity. The union indicates, however, that a violation of Rule 15 requires a violation of the Little Hatch Act.

The union argues that the state did not establish that the grievant worked on Neidhardt's campaign. It observes that the state made no attempt to contact Neidhardt to see if the allegations against the grievant were true even after the grievant denied them. The union notes that at the arbitration hearing Neidhardt testified that the grievant did not work on his campaign. It adds that "even if the State could prove [the grievant] worked for Mr. Neidhardt, there is still the little problem of proving it would actually be a violation of Ohio Rev. Code 124.57." (Union Post-Hearing Brief, page 31)

The union contends that the state did not meet its burden of proving the grievant violated Rule 18. It acknowledges that he sent an email to Christopher on March 14, 2008; had a telephone conversation with her on June 30, 2008; talked to Kovinchick at Murphy's November 7, 2008, arbitration hearing; and exchanged several emails with Murphy in July 2008. The union claims, however, that the Arbitrator can only consider the conversation between the grievant and Kovinchick because the other incidents occurred prior to September 3, 2008, the date of the incident that led to the grievant's five-day suspension and are barred by the merger and bar doctrine.

The union challenges the use of the emails between the grievant and Murphy. It points out that Article 3.08 of the contract indicates that the union has the right to use the state's email system for contract enforcement and the grievance process. The union reports that at the time of the email exchange, Murphy was a grievant and the grievant was her delegate.

The union accuses the state of violating the intent of Article 3.08. It indicates that the parties never intended for the provision to allow the state to "wade through emails involving Union business for exhibits and possible disciplinary infractions." (Union Post-Hearing Brief, pages 33-34) The union asserts that the state's action "smacks of bad faith and patent unfairness." (Union Post-Hearing Brief, page 34)

The union maintains that SERB agrees with its position. It observes that the grievant filed an unfair practice charge after the state used the emails at issue in the Murphy arbitration. The union reports that SERB issued a probable cause determination and the matter is going to hearing.

The union argues that in any event, the emails are of little relevance to the alleged violations of Rule 18. It points out that whatever was discussed between the grievant and Murphy was never shown to Christopher prior to Murphy's November 7, 2008, arbitration hearing. The union claims that this means that "they would have little, if any, bearing on whether Ms. Christopher would have been objectively intimidated or coerced by [the grievant's] conduct." (Ibid.)

The union contends that even if the Arbitrator considers the grievant's March 8, 2008, email to Christopher and his July 2008 telephone call to her, the state was still unable to show that the grievant was terminated for just cause. It observes that the testimony at Murphy's arbitration hearing revealed that she and Christopher had been involved in a long term relationship that ended badly as Christopher found a new partner who was applying for a job at Murphy's location. The union states that the record clearly establishes that Murphy harassed Christopher at work using software to disguise her voice and that she lied to investigators about it.

The union maintains that the only issue in the Murphy case was its attempt to mitigate the discharge penalty. It acknowledges that on June 30, 2008, the grievant had a brief conversation with Christopher where he told her that "the Union did not believe in tarnishing one employee to save another." (Union Post-Hearing Brief, page 35) The union notes that the grievant testified that "his intent was to let Ms. Christopher know that the Union would not attempt to tarnish Christopher in order to help Ms. Murphy … [and] to reassure her that the Union was there for her as well. (Ibid.)

The union argues that the grievant was trying to get Murphy's job back and to have her transferred to another location. It acknowledges that Christopher testified that the grievant called her and asked her if she would consider "easing up if [she] were asked if [she] felt threatened by Nita [Murphy]." (Union Post-Hearing Brief, page 36) The union notes that Christopher hung up on the grievant and he never called back.

The union contends that despite the fact that the state placed Section 2905.12 of the ORC in the grievant's investigative file, he did nothing that could be considered "coercion" under the statute. It observes that Subsection A states:

> No person, with the purpose to coerce another into taking or refraining from action concerning which the other person has a legal freedom of choice, shall do any of the following:
>
> (1) Threaten to commit any offense;
>
> (2) Utter or threaten any calumny (defamatory remark) against any person;
>
> (3) Expose/threaten any matter tending to subject any person to hatred, contempt, or ridicule, to damage any person's personal or business repute, or to impair any person's credit;
>
> (4) Institute/threaten criminal proceedings.

> (5) Take, withhold, or threaten to take or withhold official action, or cause or threaten to cause official action to be taken or withheld.

The union asserts:

> [The grievant] did not ask Ms. Christopher to refuse to testify. He did not ask her to change her testimony. He did not threaten Ms. Christopher. He did not say there would be any consequence for her actions or inactions regardless of what she said or did or didn't do. He did not call her names or threaten her with physical violence or perpetrate physical violence against her or tell her she was a bad person. (Ibid.)

The union reports that despite the alleged coercion, Christopher did testify at Murphy's arbitration hearing.

The union questions the state's claim that the grievant's conduct was a "big deal." It acknowledges that Andrews and Coval testified that a Rule 18 violation is an extremely serious infraction. The union asks, however, if such is the case, why did DR & C wait from July 1, 2008, until December 17, 2008, to talk to the grievant about his conduct. It adds that even after the grievant's investigative interview, he was allowed to work for another two months.

The union disputes the state's claim that the grievant's exchange with Kovinchick at Murphy's arbitration hearing was a serious matter. It admits that after Kovinchick testified, the grievant asked him if he had received anything in exchange for his testimony against Murphy. The union reports, however, that Kovinchick just said that he had not and the conversation ended. It observes that at the instant arbitration hearing, Kovinchick shook the grievant's hand and wished him good luck. It adds that the state did not approach the grievant about the alleged serious incident for a month after it was reported.

The union maintains that the grievant was treated differently than other employees who violated Rule 18. It points out that the majority of the nine employees who were disciplined under this rule made threats of physical violence or engaged in physical violence and received discipline ranging from written reprimands to terminations. The union notes that two correction officers who got into a physical altercation received written reprimands; one employee who used racially abusive language and violated Rules 12 and 13 as well as 18 was removed; and another employee who threatened to kill multiple staff members was terminated.

The union argues that "the 400 pound gorilla in the room" is that at least part of the motivation for the grievant's termination as well as his prior discipline was his union activities. It indicates that the grievant's two-day suspension, which was overturned in arbitration, involved an attempt to discipline the grievant while he was protected by the "equality rule." The union reports that the five-day suspension, which was reduced in arbitration to a two-day suspension, was the result of an attempt to protect the identity of a bargaining unit member who came to him regarding a violation of DR & C policies and directives. It claims that in the instant case, the grievant's termination is due in part to activities connected with his representation of Murphy.

The union accuses the state of using the grievant's union affiliation against him. It observes that Nolan's pre-disciplinary report cited the grievant's position as a union delegate as an aggravating factor. The union claims that to hold a union representative to a higher standard of conduct than other employees violates a well-established tenant of labor law.

The union concludes that the state did not show by even a preponderance of the evidence that the grievant was terminated for just cause. It asks the Arbitrator to sustain the grievance and reinstate the grievant and make him whole. The union further requests that if the Arbitrator finds that there is just cause for some discipline, the termination be reduced in accordance with progressive discipline and the discipline imposed on other employees.

ANALYSIS

The issue is whether there was just cause for the grievant's termination. The state charged the grievant with violating Rules 5(B), 15, and 18 of the SOEC. Rule 5(B) bars the misuse of state property, including state computers and the email system. Rule 15 prohibits an employee from engaging in political activity in violation of Section 124.57 of the ORC. Rule 18 bans threatening, intimidating, or coercing another employee.

Prior to examining the alleged rule violations, the Arbitrator must comment on the parties' arguments regarding the applicable quantum of proof. The state argues that it should be required to prove its case by a preponderance of the evidence. The union claims that in a termination case an employer should have to supply clear and convincing evidence to support its action.

The Arbitrator does not believe that he needs to rule on the issue of the appropriate standard of proof. This question is most frequently discussed where an Arbitrator must weigh conflicting and incomplete evidence to determine what took place. In the instant case, it is not so much a matter of determining the facts as deciding how to characterize what happened and determining whether the penalty imposed by the employer is proper given all of the circumstances.

Rule 5(B) - The record establishes that the grievant violated Rule 5(B). It is undisputed that he used the state email system to exchange numerous personal emails with his wife and non-business emails of many sorts with co-workers. The grievant also exchanged emails with Neidhardt about his campaign for Delaware County Commissioner and with Muhammad that went beyond the union business provided for by Article 3, Section 3.08, of the collective bargaining agreement.

Despite the fact that the grievant violated Rule 5(B), the Arbitrator cannot uphold any discipline for the grievant's violations of the rule. First, the misuse of email was widespread. The record indicates that after the grievant's termination, approximately 60 employees received written warnings for their improper use of state email. Nolan, a Labor Relations Officer, who served as the hearing officer at the grievant's pre-disciplinary hearing, was among the employees disciplined for his email use. Surely, he did not engage in what he understood to be improper conduct.

Second, Lamneck appears to have violated the rule against the non-business use of email. The record indicates that on January 14, 2009, she sent an email to a long list of employees, including the grievant, describing a Disney promotion, which offered members of the military and military retirees free admission to Disney attractions in Florida and California.

Third, the widespread employee use of computers and the email system for non-business purposes is supported by an email Lamneck sent to employees on January 20, 2009. In the email, she instructed employees to delete personal material from the server to free up space. The union described this request as an annual occurrence.

Most importantly, the state's failure to enforce Rule 5(B) meant that the grievant was entitled to notice that in the future the restrictions on the use of the state email system would be enforced. The Arbitrator rejects the state's suggestion that the comment by the grievant's supervisor that "they are getting ready to batten down the hatches" satisfies the notice requirement.

Rule 15 - The state also charged that the grievant engaged in political activity in violation of Rule 15 of the SOEC. It points out that he told a friend in an email that he was helping Neidhardt in a political campaign and that he admitted at his pre-disciplinary hearing that he was involved in political activities. The state adds that the email exchange between the grievant and Neidhardt, including the grievant's advice to Neidhardt that he needed a website, show that he was involved in a political campaign.

Rule 15 prohibits an employee from "engaging in political activity in violation of ORC 124.57." The statute bars an employee from soliciting political contributions, serving as an officer in a political organization, or taking part in politics other than to vote or express political opinions. Section 123:1-46-02 of the OAC attempts to define the limits on political activity by listing permissible and prohibited activities. They are as follows:

***

> (B) The following are examples of permissible activities for employees in the classified service:
>
> (1) Registration and voting;
>
> (2) Expression of opinions, either oral or written;
>
> (3) Voluntary financial contribution to political candidates and organizations;

(4) Circulation of nonpartisan petitions or petitions stating views on legislation;

(5) Attendance at political rallies;

(6) Signing nominating petitions in support of individuals;

(7) Display of political materials in the employee's home or on the employee's property;

(8) Wearing political badges or buttons, or the display of political stickers on private vehicles; and

(9) Serving as a precinct election official under section 3501.22 of the Revised Code.

(C) The following activities are prohibited to employees in the classified service:

(1) Candidacy for public office in a partisan election;

(2) Candidacy for public office in a nonpartisan general election if the nomination to candidacy was obtained in a partisan primary or through the circulation of nominating petitions identified with a political party;

(3) Filing of petitions meeting statutory requirements for partisan candidacy to elective office;

(4) Circulation of official nominating petitions for any candidate participating in a partisan election;

(5) Service in an elected or appointed office in any partisan political organization;

(6) Acceptance of a party-sponsored appointment to any office normally filled by partisan election;

(7) Campaigning by writing for publications, by distributing political material, or by writing or making speeches on behalf of a candidate for partisan elective office, when such activities are directed toward party success;

(8) Solicitation, either directly or indirectly, of any assessment, contribution or subscription, either monetary or in-kind, for any political party or political candidate;

(9) Solicitation of the sale, or actual sale, of political party tickets;

(10) Partisan activities at the election polls, such as solicitation of votes for other than nonpartisan candidates and nonpartisan issues;

(11) Service as, witness or challenger, for any party or partisan committee;

(12) Participation in political caucuses of a partisan nature; and

(13) Participation in a political action committee which supports partisan activity. (Union Exhibit 26, page 2)

The Arbitrator accepts the union's contention that the grievant did not violate Section 124.57 of the ORC or Section 123:1-46-02 of the OAC and, therefore, did not violate Rule 15. The grievant was not an officer in a political organization and was not accused of soliciting political contributions and he did not engage in any of the prohibited activities listed in the OAC. The grievant may have expressed his political views but that is specifically permitted by both the ORC and OAC.

The state argues that the union's contention takes Rule 15 out of context. It asserts that the union ignores Policy 31-SEM-05 and the Political Activity Policy issued on November 7, 2007, by Kent Markus, the Chief Legal Counsel to the Governor. The state asserts that "the Grievant ignored the rules and guidance set forth in these documents and conducted himself in a manner that was in direct conflict with those rules." (Ibid.)

The Arbitrator does not believe that the grievant violated Policy 31-SEM-05. The policy is less than two pages long and most of it is a reiteration of the restrictions on political activity contained in Section 124.57 of the ORC. It also sets forth a procedure for reporting and investigating possible violations of the statute. Since there is no issue relating to the reporting or investigation of the grievant's political activities and the

Arbitrator has already conduced that the grievant did not violate the statute, there is no violation of the policy.

The state also suggests that the grievant violated the Political Activity Policy issued by Markus. The policy indicates that it represents an attempt to provide employees with "an integrated set of administrative policies" on political activities. It also states that it "provides guidance for state employees who want to participate in political activities, make campaign contributions, or run for elected office."

While a significant part of the Political Activity Policy comes from the ORC and OAC provisions discussed above, it also includes sections dealing with other aspects of political activity. Section 1(c) states that "even when state employees may participate in political activities, they may not engage in those activities while on state time, on state property, or using state equipment."

This language does not establish that the grievant violated Rule 15. As indicated above, an employee violates the rule only when he or she violates Section 124.57 of the ORC. The Political Activity Policy goes beyond the statute by banning activity that is permissible under the statute when it involves state equipment and property. This is not a violation of Rule 15 but of Rule 5(B), which bans the misuse of state property, including computers and the email system.

The state charged the grievant with one specific violation of the Political Activity Policy. One of the bulleted items in Section 1(c) of the Political Activity Policy states that "if an employee receives an email or phone call related to political activity, the employee has an affirmative obligation to respond that he or she should not be contacted on state time and on state equipment." It is uncontested that the grievant received

politically oriented emails from Muhammad and Neidhardt and did not request them not to use his state email address to contact him.

The Arbitrator cannot conclude that the grievant's lack of action merits discipline. First, the provision relied upon by the state is in the middle of a detailed, six-page document. It is doubtful that employees read beyond the first section, which deals with Section 124.57 of the ORC, to the portion of the Political Activity Policy, which deals with the use of state property and equipment.

Second, no evidence was offered by the state to suggest that anyone who received a politically-oriented email at work notified the sender not to use their state email address. For example, the grievant sent political emails to a number of employees but there was no indication that those employees were advised that they should have told the grievant not to use their state email addresses.

Most importantly, the Political Activity Policy does not require employees to contact individuals who send them political emails at work. The provision relied upon by the state is one of five bulleted items in a section. The introduction to the bulleted items states that "in order to ensure compliance with state prohibitions against using state time or property for political purposes, employees should take the following measures." The use of the word "should" indicates that the state is suggesting but not requiring that employees take certain action. This is different from other sections of the Political Activity Policy as well as the statute that leave no doubt as to employees' obligations with respect to political activities. Employees are entitled to know what conduct is required and what conduct is forbidden before facing discipline for not complying.

Rule 18 - The state charges that the grievant violated Rule 18 by "threatening, intimidating or harassing" two employees. The record indicates that the grievant sent an email to Christopher, who was called by the state to testify in support of its decision to terminate Murphy. The email states:

> Is there a possibility I could call you (outside of work) and possibly ask you for a favor? It is related to the Murphy case. My cell is 614 975 1675. If you don't feel comfortable or aren't interested, I completely understand and respect your decision and will make no further contact. This is initiated by me, and Murphy has no knowledge of my contacting you. (Joint Exhibit 4, page 146)

Christopher did not call the grievant or reply to his email.

Despite the grievant's promise not to contact Christopher, he called her prior to Murphy's arbitration hearing. Christopher testified that her conversation with the grievant was as follows:

Grievant: Marilyn, this is [the Grievant]. I don't know if you remember me. I used to be at MANCI with you. Did I catch you at a bad time?

Murphy: Yes. Really you did. What do you want?

Grievant: I just want to discuss with you what the Union's stand is on this upcoming arbitration. Our stand is that we don't believe in "tarnishing one employee to save another."

Murphy: I am not worried about being tarnished.

Grievant: All we're trying to do is get Nita [Murphy] a job back where she can be moved to another Institution like RICI or NCCI.

Murphy: Look, I really don't want to talk about this with you.

Grievant: Would you consider easing up if you were asked if you felt threatened by Nita [Murphy]?

Murphy: I am really not supposed to talk to you at all.

Grievant: Who told you that -- management?

Murphy: It doesn't matter who told me that. It's really not in my best interest to talk to you.

Grievant: So can we count on you at the arbitration?

Murphy: I am really not trying to piss you off, but I have to go. (Joint Exhibit 4, page 147-148)

The grievant does not dispute that Christopher's testimony reflects the essence of their conversation.

The Arbitrator rejects the union's claim that the merger and bar doctrine precludes any consideration of the grievant's email to Christopher or his telephone call to her because both occurred before he received his five-day suspension on November 5, 2008. First, the merger and bar doctrine is very seldom argued as such in arbitration. The usual issue is whether the alleged misconduct was investigated and discipline imposed in a reasonable period of time. The Arbitrator believes that this standard was met in the instant case.

Second, the grievant was not disadvantaged by the process followed by the state. The union made no such claim and the Arbitrator is unaware of any problem created by the time it took the state to complete its investigation of the grievant's alleged Rule 18 violations and to impose discipline.

The Arbitrator believes that the grievant violated Rule 18 when he asked Christopher to "ease up" and "soften" her testimony against Murphy. The evidence shows that when the grievant sent Christopher an email on March 14, 2008, asking her to call him, he said that he would respect her wishes if she did not want to talk to him. However, on June 30, 2008, he telephoned her and even though she told him that she did not want to talk to him, he pressed her to modify her testimony against Murphy.

The Arbitrator rejects the union's argument that the grievant's conversation was not coercive because it did not constitute "coercion" under Section 2905.12 of the ORC. While Coval included a copy of the statute in her investigatory file, Rule 18 contains no reference to the ORC as opposed to Rule 15. The Arbitrator believes that it is more appropriate to use the ordinary definition of the term rather than the more restrictive statutory definition.

The Grievant is also accused of violating Rule 18 when he spoke to Kovinchick after he testified at Murphy's arbitration hearing. The grievant does not challenge Kovinchick's testimony that he asked him what he got in exchange for his testimony against Murphy. If the grievant believed that Kovinchick offered his testimony in return for some consideration from the state, he could have had the question asked by the union's advocate at the hearing. By posing the question outside of the hearing room, it became nothing more than harassment for his testimony against Murphy.

The remaining issue with respect to Rule 18 is the proper penalty for the grievant's violation of the rule. The SOEC suggests a two-day suspension or a reprimand for a first offense, a five-day suspension or reprimand for a second offense, and removal for a third offense. The SOEC, however, states that the standard list of violations "allow[s] the Appointing Authority to consider circumstances, which may mitigate or aggravate a penalty" and that "the penalties imposed for violating a rule or rules are determined by considering all relevant circumstances."

In the instant case, the grievant's violations of Rule 18 were relatively minor. His email to Christopher asking her to contact him was not inappropriate. While the grievant's telephone conversation with her is properly characterized as "coercive," he

merely requested her to shade her testimony in Murphy's favor. When she ended the call by hanging up, the grievant made no attempt to contact her. Furthermore, there is nothing in the record to suggest that the grievant made any coercive or harassing comments to Christopher at Murphy's arbitration hearing.

The grievant's question to Kovinchick cannot be viewed as anything more than a minor incident. When the grievant asked him if he received anything in exchange for his testimony against Murphy, he said no and walked away. Kovinchick simply followed the standard procedure when he filed an incident report.

The Arbitrator's conclusion that the grievant's remarks to Christopher and Kovinchick were not serious violations of Rule 18 is consistent with the state's response to them. The state learned about the grievant's remarks to Christopher on July 1, 2008, and his comments to Kovinchick on November 12, 2008. However, it did not discuss them with the grievant until his investigatory interview on December 17, 2008, and then it allowed him to continue to work until February 18, 2009.

The Arbitrator agrees with the union that the state's decision to terminate the grievant for violating Rule 18 amounted to disparate treatment. The state provided the union with information regarding nine employees who were disciplined for violating this rule between December 18, 2008, and September 17, 2009. In two cases, the employees received written reprimands even though both cases involved physical violence. Five employees got two-day suspensions but all involved physical violence or threats of physical violence. Two cases resulted in removals but in one case the employee violated three rules and made offensive racial comments and in the other case, the employee threatened to kill five staff members.

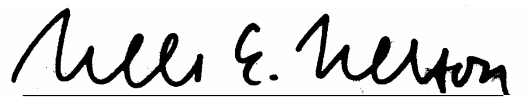
The Arbitrator rejects the state's argument that the union failed to follow the procedure for showing disparate treatment as outlined by Arbitrator Rivera in Ohio Civil Service Employees Association v. Ohio Department of Mental Health, Case No. 23-06-891113-0121-01-03 (1989). He believes that when the union introduced the records of the discipline imposed for Rule 18 violations, which were supplied by the state, it made a prima facie showing of disparate treatment. At that point, the burden shifted to the state to show that the nine cases cited involved less severe violations or different disciplinary records that justified the minor discipline imposed in all but two of the cases.

The Arbitrator believes that the appropriate penalty for the grievant's violation of Rule 18 is a five-day suspension. This conclusion is based on the minor nature of his violation of the rule. It also takes into account the grievant's disciplinary record, which, after an Arbitrator's removal of a two-day suspension and his reduction of a five-day suspension to a two-day suspension, consists of a written reprimand and a two-day suspension.

Conclusion - The Arbitrator concludes that there was not just cause for the grievant's removal. First, the state was barred from disciplining him for his violation of Rule 5(B) for the non-business use of the state email system because it failed to advise him that the rule, which had not been enforced in the past, would be in the future. Second, the grievant did not violate Rule 15 by engaging in political activity in violation of Section 124.57 of the ORC. Third, the grievant violated Rule 18 by coercing or harassing Christopher and Kovinchick. Based on the minor nature of the grievant's violation, his disciplinary record, and the penalties imposed on other employees who violated the rule, the appropriate penalty is a five-day suspension.

AWARD

The state is directed to reinstate the grievant with back pay less a five-day suspension and to make him whole for the other losses he suffered as a result of his removal. The Arbitrator will retain jurisdiction to resolve any dispute over the interpretation and implementation of his award.



Nels E. Nelson
Arbitrator

January 11, 2010
Russell Township
Geauga County, Ohio