

**OPINION AND AWARD**

**IN THE MATTER OF THE ARBITRATION BETWEEN OHIO  
DEPARTMENT OF REHABILITATION AND CORRECTION  
-AND-  
STATE COUNCIL OF PROFESSIONAL EDUCATORS**

**APPEARANCES**

**For SCOPE**

Mark E. Linder, Attorney for SCOPE  
Shawn Masters, Grievant

**For DRC**

Jackie Milson, Labor Relations Specialist, DRC  
Michelle Silvus, Investigator  
Luietta Wade, School Administrator  
Venita S. White, Labor Relations Officer III DRC  
Keiva C. Wyatt, Labor Relations Officer II

**Case-Specific Data**

Hearing Held

April 26, 2011

Grievance Number

27-08-20110107-001-06-10

Case Decided

August 21, 2011

Subject: Improper Relationship With Inmate

**Decision**

Grievance: **SUSTAINED IN PART AND DENIED IN PART**

Arbitrator: Robert Brookins, J.D., Ph.D.

## TABLE OF CONTENTS

I.	The Facts. . . . .	3
A.	Disciplinary/Procedural History. . . . .	5
II.	The Issue. . . . .	6
III.	Relevant Contractual Provisions and Work Rules. . . . .	6
IV.	Summaries of the Parties' Arguments. . . . .	8
A.	Summary of DRC's Arguments. . . . .	8
B.	Summary of the Association's Arguments. . . . .	8
V.	Preliminary Considerations. . . . .	8
A.	Evidentiary Burdens. . . . .	8
B.	Breadth of Rule 45A. . . . .	9
C.	Relationship Between Rules 7, 18, 45A, and Other Policies/Regulatory Provisions. . . . .	9
VI.	Analysis and Discussion. . . . .	10
A.	Proper Measure of Persuasion. . . . .	10
B.	Violation of Rule 18. . . . .	11
C.	Remaining Charges Against the Grievant. . . . .	12
D.	Allowing Inmate Moore to Track Her Class Attendance. . . . .	12
1.	The Director's Mandate. . . . .	13
2.	Rule 45A. . . . .	13
E.	Inaccurate Attendance Records and Unearned Credit. . . . .	14
F.	Allowing Inmate Moore to Prematurely Become a Career-Tech Aide. . . . .	15
VII.	The Penalty Decision. . . . .	16
A.	Aggravative Factors. . . . .	17
B.	Mitigative Factors. . . . .	17
C.	Proper Measure of Discipline. . . . .	17
VIII.	The Award. . . . .	17

**I. The Facts**

The parties to this dispute are the State of Ohio Department of Rehabilitation and Correction (“DRC” or “Employer”) and the State Council of Professional Educators OEA/NEA (“SCOPE” or “Association”),<sup>1</sup> representing Mr. Shawn Masters (“Grievant”) in this dispute. SCOPE is the duly recognized collective-bargaining representative for teachers, guidance counselors, librarians, etc. employed by DRC.<sup>2</sup>

In June 2000, the DRC employed the Grievant in its Lima Correctional Facility as a Teacher I responsible for supervising and teaching female inmates. In June 2003, the Grievant was transferred to the Franklin Pre-release Facility where he taught vocational drafting, computer drafting, 3D software, board drafting and character education. Later in June 2003 the Grievant was promoted to Teacher II, to Teacher III in 2007, and ultimately to Teacher IV in January 2011.

At the Franklin Pre-release Correctional Facility, the Grievant began by teaching a one-year morning course as part of the Career Development Program. Subsequently, he reduced the length of the morning course and added a five-week, afternoon course in the Career Enhancement Program. Ultimately, he dropped the five-week course and added an afternoon session of the original morning course in the Career Development Program.

The instant dispute arose when DRC removed the Grievant based on the following charges: (1) Rule 7–Failure to follow post orders, administrative regulations, policies or written or verbal directives; (2) Rule 18–Threatening, intimidating, or coercing another employee; (3) Rule 45A–Without express authorization, giving preferential treatment to any individual under the supervision of the Department.

---

<sup>1</sup> Hereinafter referred to collectively as “the Parties.”

<sup>2</sup> See Joint Exhibit 1, Appendix G, at 216-224 for all classifications contained in SCOPE.

1 On July 12, 2010, Officer Briggs filed an incident report, claiming that the Grievant had attempted to  
2 intimidate her about removing an electric fan from his class.<sup>\3</sup> That incident report triggered a DRC  
3 investigation of the Grievant.<sup>\4</sup> On July 20, 2010, the Grievant submitted an Incident Report, alleging that  
4 Captain Fields had subjected him to workplace violence, harassment, and discrimination.<sup>\5</sup> On July 21, 2010,  
5 the Grievant supplemented that Report, alleging that Captain Fields was “aggressive and loud towards him,”  
6 and the Grievant wrote another Incident Report about Sergeant Williamson, Officer Bridges and Inmate  
7 Gardner.<sup>\6</sup> On July 21, 2010, DRC placed the Grievant on administrative leave for approximately 5 months.<sup>\7</sup>

8 On or about July 27, 2010, Ms. Luietta Wade, School Administrator, entered the Grievant’s work area  
9 (while he was on administrative leave) to get the Grievant’s Monthly Attendance Records (Form 4299) to  
10 complete the July 2010 Earned Credit Worksheet.<sup>\8</sup> Ms. Wade did not find an attendance sheet for Inmate  
11 Moore, who was one of the Grievant’s students. Therefore, Inmate Moore received no earned credits for  
12 July 2010. On or about August 5, 2010, Inmate Moore asked Ms. Wade why she had received no earned  
13 credits for July 2010, and Ms. Wade told Inmate Moore that she had no July attendance reports. Inmate  
14 Moore then claimed that the Grievant allowed her to keep her own attendance records. Viewing this as a  
15 policy violation, Ms. Wade filed an Incident Report against the Grievant.<sup>\9</sup>

---

<sup>\3</sup> Joint Exhibit D, at 21.

<sup>\4</sup> *Id.*, at 6.

<sup>\5</sup> *Id.*, at 1.

<sup>\6</sup> *Id.*

<sup>\7</sup> Joint Exhibit D, at 78.

<sup>\8</sup> *Id.*

<sup>\9</sup> *Id.*, at 78.

1 On August 16, 2010, Ms. I. Jones submitted a fact-finding report on the Rule-7 incident, essentially  
2 concluding that the Grievant intimidated Officer Briggs as alleged.<sup>\10</sup> On February 25, 2010, the Grievant  
3 emailed Ms. Wade, requesting permission to “add . . . [Inmate Moore’s] afternoon hours to her total for  
4 graduation.”<sup>\11</sup> Ms. Wade claimed that the Grievant wrote her another e-mail, which is not in the arbitral  
5 record. Ms. Wade claimed that the alleged second e-mail requested her to reclassify Inmate Moore to a  
6 Career-Tech Tech Aide, and Ms. Wade did, which ultimately caused DRC to charge the Grievant with  
7 favoritism toward Inmate Moore. On October 21, 2010, Investigator/Inspector Michelle Silvus submitted the  
8 results of her fact-finding investigation, essentially concluding that the Grievant had violated Rules 7, 18, and  
9 45A.<sup>\12</sup>

#### 10 A. Disciplinary/Procedural History

11 Officer Briggs’ Incident Report, Ms. Wade’s Incident Report, and the Grievant’s Incident Reports,  
12 caused DRC to launch an investigation, culminating with DRC charging the Grievant with having violated  
13 Rules 7, 18, and 45A.<sup>\13</sup> A Pre-disciplinary Conference was held on November 30, 2010, and on December  
14 16, 2010, the Hearing Officer found just cause to discipline the Grievant for having violated the foregoing  
15 Rules.<sup>\14</sup> On January 5, 2011, DRC notified the Grievant that he was being removed from his position as a  
16 Teacher IV at the Franklin Pre-release Correctional Facility effective January 6, 2011 for having violated  
17 Rules 7, 18, and 45A.<sup>\15</sup> The Grievant had accumulated approximately 7 years of service with the State of  
18 Ohio when he was terminated.

---

<sup>\10</sup> Joint Exhibit D, at 11. Ms. Jones did not attend the arbitral hearing.

<sup>\11</sup> *Id.*, at 105.

<sup>\12</sup> *Id.*, at 42.

<sup>\13</sup> *Id.*, at 5-10.

<sup>\14</sup> *Id.*, at 1-4.

<sup>\15</sup> Joint Exhibit C, at 1-4.

On January 7, 2011, SCOPE timely filed Grievance No. 27-08-20110107-001-06-10, challenging the Grievant's removal as not for just cause.<sup>\16</sup> The Parties held a Step-2 Hearing on January 19, 2011, after which DRC denied the Grievance on February 2, 2011.<sup>\17</sup> Thereafter, the Parties reached impasse in the instant dispute, the Association demanded arbitration, and the parties selected the Undersigned to hear and resolve the matter. The Undersigned held a hearing on April 26, 2011.

At the outset of that hearing, the Parties agreed that the dispute was properly before the Undersigned. Throughout the arbitral hearing, the Parties had a full and fair opportunity to present admissible evidence and arguments supporting their positions. Specifically, the Parties' advocates made opening statements and introduced documentary evidence and testimony to support their respective positions in this dispute. All documentary evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-examination. At the close of the hearing, the Parties agreed to submit post-hearing briefs instead of oral arguments. The Parties submitted their post-hearing briefs, and the Undersigned closed the record.

## II. The Issue

Whether the Grievant was discharged for just cause, and if not what shall be the remedy?

## III. Relevant Contractual Provisions and Work Rules

### Rule 7

Failure to follow post orders, administrative regulations, policies, or written or verbal directives.

### Rule 18

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

### Rule 45A

Without express authorization, giving preferential treatment to any individual under the supervision of the Department, or following their release from custody or supervision of the Department, but not limited to:

---

<sup>\16</sup> Joint Exhibit C, at 6.

<sup>\17</sup> *Id.* at 5.

A. The offering, receiving, or giving of favor.

Career Technical Education Programs (57-EDU-12)

\* \* \* \*

VI. PROCEDURES

\* \* \* \*

F. Program Completion

\* \* \* \*

8. Only career technical education program completers, who complete a career technical program within their current incarceration, shall be considered for the institutional job classification of Career-Tech Aide.<sup>\18</sup>

Earned Credit for Productive Program Participation (80-INC-02)

\* \* \* \*

IV. DEFINITIONS.

\* \* \* \*

Unexcused Absence

Any failure to appear for a scheduled work or program session without a valid, verified excuse for the absence. Arrival for a scheduled work or program session *more than 15 minutes* after the start of the session without a valid, verified excuse shall also be considered as an unexcused absence.<sup>\19</sup>

\* \* \* \*

VI. PROCEDURES

\* \* \* \*

B. Inmate Eligibility for Earned Credit

\* \* \* \*

8. The Inmate must attend 75% of the available program sessions during the month, regardless of the reason for absence.<sup>\20</sup>

Earned credit will not be granted for any month in which the Inmate obtains one or more unexcused absences to the program, as defined in this policy.<sup>\21</sup>

\* \* \* \*

d. The Inmate must exhibit acceptable behavior that complies with institutional rules and regulations while participating in the program. An Inmate who exhibits behavior considered (sic) being a hindrance to the program, such as excessive noise, disruption, sleeping, or *tardiness*, shall be issued a conduct report by the program facilitator.<sup>\22</sup>

---

<sup>\18</sup> Joint Exhibit E, at 8.

<sup>\19</sup> Joint Exhibit F, at 1 (Hereinafter cited as 80-INC-02(IV)).

<sup>\20</sup> *Id.*, at 4 (Hereinafter cited as 80-INC-02(VI)(B)(8)).

<sup>\21</sup> *Id.*, at 8.

<sup>\22</sup> *Id.*, at 4-5.

#### IV. Summaries of the Parties' Arguments

##### A. Summary of DRC's Arguments

1. Statements of eye witnesses and of Officer Briggs, the victim, establish that the Grievant sought to intimidate Officer Briggs.
2. Records of Inmate Moore's attendance together with her statements to Ms. Wade demonstrate that the Grievant failed to hold Inmate Moore accountable for some of her absences.
3. The Grievant sought to reclassify Inmate Moore to a Career-Tech Aide before she completed one year of classes.

##### B. Summary of the Association's Arguments

1. The measure of persuasion required in the instant dispute is clear and convincing evidence rather than preponderant evidence.
2. The Employer lacked just cause to terminate the employment of the Grievant. To establish just cause, DRC must establish that the Grievant engaged in misconduct. Second, DRC must show that discipline is warranted, which requires satisfaction of the seven tests of just cause. As set forth below, DRC failed to establish any of its charges against the Grievant. DRC failed to:
  - a. Conduct a full and fair investigation.
  - b. Prove a violation of Rule 18.

The Employer offers no persuasive evidence that the Grievant either threatened or intimidated Officer Briggs.
  - c. Prove a violation of Rule 7.

DRC's claim that the Grievant violated Rule 7 turns on a derivative violation of 80-INC-02(VI)(B)(8)<sup>23</sup>, which, as a prerequisite to receiving earned credits, requires Inmates to attend 75 percent of the scheduled job sessions for each month of classes.
  - d. Prove a violation of Rule 45A.

DRC failed to establish that the Grievant violated Rule 45A or 57-EDU-12 by allowing Inmate Moore to become a Career-Tech Aide before she completed the pre-requisite year as a student.

#### V. Preliminary Considerations

##### A. Evidentiary Burdens

Because this is a disciplinary dispute, DRC has the burden of proof or measure of persuasion, which means that DRC must establish the alleged misconduct by a preponderance of the evidence in the arbitral record as a whole. And because DRC has the burden of persuasion with respect to demonstrating the Grievant's misconduct, doubts about the existence of that misconduct shall be resolved in the Grievant's

---

<sup>23</sup> Joint Exhibit F, at 1. Observe that 80-INC-02(VI)(B)(8) is derivative of OH ADC 5120-2-06(K), which states: "Regardless of the reason for absence, an Inmate must attend seventy-five per cent of the scheduled program/job sessions for any month in order to receive earned credit for that month."



1 favor. The Association shoulders the burden of persuasion regarding its affirmative defenses, doubts about  
2 the existence of which shall be resolved against the Association.

3 **B. Breadth of Rule 45A**

4 Except for the Rule-18 charge, all charges against the Grievant in this dispute involve misconduct that  
5 to some extent implicate Rule 45A's prohibition of preferential treatment or favoritism. Rule 45A does not  
6 define "preferential treatment." Nor is that phrase defined elsewhere in the arbitral record. Yet, to be  
7 applied in this dispute, "preferential treatment" must be functionally defined. Therefore, the Arbitrator accords  
8 that phrase its traditional definition: Treating **similarly situated** individuals **differently**.<sup>124</sup> Thus defined,  
9 "preferential treatment," in the instant case, covers the remaining allegations, all of which claim that the  
10 Grievant somehow treated Inmate Moore differently relative to her fellow students by affording her certain  
11 privileges.

12 **C. Relationship Between Rules 7, 18, 45A, and Other Policies/Regulatory Provisions**

13 Rules 7 is a broadly-worded, global catch-all provision, which contemplates any conduct that violates  
14 other Rules, policies, and regulatory provisions.<sup>125</sup> Thus, "preferential treatment" that violates Rule 45A also  
15 violates Rule 7.<sup>126</sup> Similarly, allowing Inmates involvement with educational records violates the Director's  
16 Mandate specifically and Rule 7 derivatively. Ultimately, then, because of the lack of specificity in Rule 7's

---

<sup>124</sup> Even violations of the Director's Mandate could violate Rule 45A and, hence, Rule 7, if it is shown that only Inmate Moore was allowed to access educational records. Observe, also, that preferential treatment is much broader than unlawful discrimination ( a subset of preferential treatment), which focuses on whether a similarly situated person has been treated differently **because of** a legally protected characteristic such as **gender, age**, etc.

<sup>125</sup> Rule 7 sanctions: "Failure to follow post orders, administrative regulations, policies or directives. Thus, conduct that violates Rule 18 above also violates Rule 7.

<sup>126</sup> Rule 45A prohibits: "Without express authorization, giving *preferential treatment* to any individual under the supervision of the Department or following their release from custody or supervision of the Department, but not limited to: . . . A. The offering receiving or giving of favor."

provisions, there can be no stand-alone violation of that Rule; It is either violated derivatively by violations of other rules, or not at all.

## VI. Analysis and Discussion

### A. Proper Measure of Persuasion

The threshold issue is whether clear and convincing evidence is the proper measure of persuasion in the instant case. The Association argues that clear and convincing rather than preponderant evidence is the proper measure of persuasion. In support of its position, the Association maintains that the Grievant's termination in this case constitutes capital punishment, permanently stigmatizes him, and deprives him of his seniority/bargaining-unit rights. DRC proffers no argument on this issue.

For the reasons set forth below, the Arbitrator holds that clear and convincing evidence is contraindicated in this dispute. First, the Association correctly argues that stigma is a basis for elevating a measure of persuasion. However, the mere existence of stigma, without more, in a discharge case does not necessarily justify enhancing a measure of persuasion because stigma factors into any case involving removal.

A heightened measure of persuasion is indicated where the stigma is **substantial**, i.e., highly likely to become pivotal in an employee's future employment opportunities. If the mere *presence* of any magnitude of stigma could invoke a heightened measure of persuasion, then preponderant evidence—the “workhorse” in arbitral disputes—would effectively vanish, and removing employees for just cause would become substantially more difficult, since elevated measures of persuasion demand greater certainty of guilt. The element of substantiality militates against this outcome. Adding substantiality as a second element usually limits the elevation of measures of persuasion to cases involving sexual harassment, theft, and drug abuse, none of which permeate the instant dispute. Consequently, the Undersigned holds that preponderant (rather than clear and convincing) evidence is the proper standard in the instant dispute.

**B. Violation of Rule 18**

The issue here is whether the Grievant violated Rule 18 by either intimidating or seeking to intimidate Officer Briggs on July 8, 2010.<sup>\27</sup> During the arbitral hearing, DRC introduced three written statements to support this charge: (1) A statement by Officer Briggs, alleging that the Grievant **attempted** to intimidate her;<sup>\28</sup> and (2) Statements by Inmates Booker<sup>\29</sup> and Anderson,<sup>\30</sup> essentially tracking Officer Briggs' allegation. The Association challenged these written statements on at least two fronts. First, it objected to the statements as constituting rank hearsay. Second, under direct and cross-examination, the Grievant flatly denied either invading Officer Briggs' personal space or engaging in any other conduct reasonably calculated to intimidate her, a position which essentially tracked the Grievant's statement to Ms. Silvus.<sup>\31</sup>

The Association prevails on this issue because DRC's evidence lacks persuasive force. Standing alone, hearsay evidence lacks sufficient probative value to establish the existence of a disputed fact, such as the Grievant's alleged intimidation of Officer Briggs. Uncorroborated hearsay evidence carries little, if any, probative value because it is untested for truthfulness by either cross-examination or any other means of truth testing, such as application of an exception to the hearsay rule. Some independent, corroborative evidence is usually present to rehabilitate hearsay evidence.

DRC presented several pieces of hearsay evidence that addressed the issue of whether the Grievant intimidated Officer Briggs. Unfortunately, uncorroborated hearsay evidence is not cumulative. That is, it cannot cumulate to establish the existence of a disputed fact. Several pieces of uncorroborated hearsay

---

<sup>\27</sup> Joint Exhibit C, at 2.

<sup>\28</sup> Joint Exhibit D, at 21 the Arbitrator uses the term "attempted" because Officer Briggs' statement declares that, despite the Grievant's alleged efforts to intimidate her, she was not thereby intimidated.

<sup>\29</sup> Joint Exhibit D, at 19.

<sup>\30</sup> *Id.*, at 20.

<sup>\31</sup> *Id.*, at 16-17.

1 evidence have no more probative value than a single piece, since individually and collectively they have the  
2 same defect—untested for truthfulness. Beyond uncorroborated hearsay, DRC offered no evidence to support  
3 the allegations in the foregoing three written statements. Nor is there any apparent reason that Officer Briggs  
4 did not testify in her own behalf and present herself for cross-examination.<sup>132</sup> The failure to produce at least  
5 one of the three authors/declarants deprives the Grievant of his procedural right to confront his accusers.  
6 Consequently, the three statements are neither probative nor dispositive of whether the Grievant either  
7 intimidated or attempted to intimidate Officer Briggs. Accordingly, the Arbitrator holds that DRC failed to  
8 establish its charge against the Grievant.

### 9 **C. Remaining Charges Against the Grievant**

10 DRC also alleges that the Grievant violated Rules 7, 45A, the Administrative Directive and other rules  
11 by: (1) "[Allowing] Inmate Moore to track her own hours . . . [and] records offenders for earned credit at  
12 50 percent instead of the required 75 percent as per AR 5120-2-06-(K); (2) "[Giving] preferential treatment  
13 to Inmate Moore by not consistently tracking her tardiness and not issuing a conduct report"; (3) "[Allowing]  
14 Inmate Moore to track her own hours for earned credit"; and (4) "[Allowing] Inmate Moore to become a  
15 Career-Tech Aide without completing a full year as a student, which is in direct violation of policy 57-EDU-12  
16 and the Earned Credit Policy." These charges are discussed respectively below.

### 17 **D. Allowing Inmate Moore to Track Her Class Attendance**

18 Ms. Wade testified that Inmate Moore told her that the Grievant allowed her (Inmate Moore) to keep  
19 her own class attendance and to record that data on a computer. Thus, DRC specifically charged the  
20 Grievant with violating Rule 7, and, by implication, Rule 45A due to the implicit favoritism.

---

<sup>132</sup> Occasionally, an employer withholds a key witness, such as an informant, to preserve that person's future utility. That, however, is not a consideration in the instant dispute,

1 In contrast, the Association established that the Grievant created his personal daily attendance sheet,  
2 which he allowed Inmate Moore to use for her daily attendance in the Grievant's course. The Grievant kept  
3 his own personal daily attendance records, which he periodically transferred to a spreadsheet on his computer.  
4 That computer spreadsheet was the source for the Grievant's official, monthly attendance report, which was  
5 mandated<sup>33</sup> and which he submitted to Ms. Wade at the end of each month, per applicable regulations. Nor  
6 did DRC specifically allege that Inmate Moore was involved in any way with either the Grievant's daily or  
7 monthly attendance records. In addition, the Association established that DRC only required the Grievant to  
8 keep a *monthly* (as distinguished from a daily) attendance record and that DRC had no official daily  
9 attendance sheet.

#### 10 1. The Director's Mandate

11 In light of the foregoing evidence, the Arbitrator holds that the Grievant did not violate the Director's  
12 Mandate by allowing Inmate Moore to use the Grievant's personal, daily attendance sheet to record her class  
13 attendance. The rationale here is that the Director's Mandate addresses Inmate involvement in either **official**  
14 educational records, or information used to create official educational records. The Grievant's personal daily  
15 attendance sheets were not official educational records. Moreover, DRC did not establish that Inmate  
16 Moore's attendance sheets either directly or indirectly influenced the Grievant's official monthly attendance  
17 record.

#### 18 2. Rule 45A

19 Here, the issue is whether the Grievant violated Rule 45A by allowing Inmate Moore to use his  
20 personal attendance sheets. For the following reasons, the Arbitrator holds that the Grievant violated Rule

---

<sup>33</sup> "All career technical education instructors will be responsible for maintaining a Monthly Attendance Record (DRC 4299) for Inmates assigned to their career technical education programs." 57-EDU-12 (VI)(B)(9), Joint Exhibit E, at 5.

1 45A. First, the Grievant admitted that he allowed Inmate Moore to use his personal, daily attendance sheets.  
2 Second, nothing in the record suggests that the Grievant afforded the remainder of his students the same or  
3 similar privilege. Therefore, by definition, Inmate Moore received some degree of preferential treatment in  
4 violation of Rule 45A's sweeping language. Moreover, as noted above, conduct that violates Rule 45A also  
5 violates Rule 7, and so it is here.

6 **E. Inaccurate Attendance Records and Unearned Credit**

7 The issue here is whether the Grievant overlooked some of Inmate Moore's absences and improperly  
8 awarded her earned credit. DRC alleges that the Grievant awarded earned credit to students (especially  
9 Inmate Moore) who had attended his class only 50 percent of the time, instead of 75 percent as required  
10 under 80-INC-02(VI)(B)(8).<sup>34</sup>

11 The Association offers several arguments in rebuttal. First, the Association stresses that DRC failed  
12 to establish whether either Inmate Moore or other students were *actually* late for class. In this respect, the  
13 Association stresses two pivotal points. Section 80-INC-02(IV) (Unexcused Absences) provides that only  
14 students who report to class *more than 15 minutes* after the class starts will be charged with an unexcused  
15 absence. Next, the Association points out that DRC never established whether the instances in which it  
16 considered Inmate Moore to have been late actually involved her reporting to class more than 15 minutes late.  
17 Second, the Association established that even if a student violated the 15-minutes Rule, the Grievant, as the  
18 instructor, had discretion to determine whether the absence was justified and, hence, excused. Third, the

---

<sup>34</sup> Section 80-INC-02(VI)(B)(8) provides: "The Inmate must attend 75% of the available program sessions during the month, regardless of the reason for absence. ("75-percent Rule") Observe, also, that DRC actually cited Section AR 5120-2-06(K), which the Undersigned did not find in the arbitral record. Still, the Undersigned did find OH ADC 5120-2-06(K), which seems to track AR 5120-2-06(K), providing: "*Regardless of the reason for absence, an Inmate must attend seventy-five per cent of the scheduled program/job sessions for any month in order to receive earned credit for that month.*"

1 Grievant offered unrequited testimony that he thoroughly investigated and verified each student's excuse for  
2 being late.

3 Finally, the Association raised significant doubt about the propriety of DRC's interpretation/application  
4 of the 75-percent Rule. During direct examination, Ms. Silvus adopted a microscopic interpretation of the 75-  
5 percent Rule, i.e., that it focused microscopically on the percentage of time that students spent in each  
6 individual class rather than macroscopically on the percentage of time students spent in the total number of  
7 classes held during any given month. Ms. Silvus reluctantly relinquished her embrace of the microscopic  
8 interpretation of the 75-percent Rule, after the Association emphasized that, on its face, the 75-percent Rule  
9 expressly reflects the macroscopic perspective. Therefore, it is unclear whether DRC properly interpreted  
10 the 75-percent Rule when applying it to the Grievant. Yet, DRC must shoulder the burden of persuading the  
11 Undersigned by preponderant evidence that it properly interpreted/applied the 75-percent Rule to the Grievant.  
12 Because DRC has the burden of persuasion on this issue, doubts are resolved against DRC. Consequently,  
13 the Arbitrator holds that DRC failed to establish that the Grievant failed either to keep accurate attendance  
14 records or to award earned credit.

15 **F. Allowing Inmate Moore to Prematurely Become a Career-Tech Aide**

16 Based on an e-mail from the Grievant to Ms. Wade, DRC concluded that the Grievant violated Rule  
17 45A by "allowing" Inmate Moore to become a Career-Tech Aide before she completed the requisite year  
18 of course work. During direct examination, Ms. Wade testified that the Grievant had sent her an e-mail  
19 requesting that she classify Inmate Moore as a Career-Tech Aide. Also, Ms. Wade testified that based on  
20 that request— and without independently verifying Inmate Moore's qualifications—she classified Inmate Moore  
21 as a Career-Tech Aide.

Preponderant evidence in the arbitral record as a whole demonstrates that DRC established one charge against the Grievant: affording Inmate Moore preferential treatment by allowing her to use the Grievant's personal attendance sheets to record her attendance in his class and to enter that data into a laboratory computer. Establishment of this charge warrants some measure of discipline. Assessment of the proper measure of discipline involves an evaluation of the mitigative and aggravative factors surrounding the Company's decision to terminate the Grievant. The Arbitrator shall not modify the Employer's measure of discipline, unless it is unreasonable, arbitrary, capricious, discriminatory, in bad faith, **or** abusive of discretion. Assessment of the propriety of the measure of discipline imposed requires evaluation and balancing of the aggravative and mitigative circumstances surrounding Management's imposition of discipline in this case.

## VII. The Penalty Decision

<sup>\35</sup> Joint Exhibit D, at 105.

<sup>\36</sup> *Id.*, at 103-104.

<sup>136</sup> *Id.*, at 103-104.



**A. Aggravative Factors**

The major aggravative factor in this case is that the Grievant had two episodes of active discipline when DRC fired him: (1) a written reprimand for violating Rule 7 and 12B– Discourteous treatment of the public, volunteers, contractors or fellow employees; (2) a 2-day fine for violating Rule 6– Insubordination, Disobedience, or inappropriate delay in carrying out a direct order of a supervisor.

**B. Mitigative Factors**

The major mitigative factors are (1) DRC proved only one of its four charges against the Grievant; (2) The Grievant had approximately eleven years of service with DRC when he was removed;<sup>\37</sup> and (3) Nothing in the arbitral record suggests that the Grievant was an incompetent teacher, and the Arbitrator, therefore, presumes that the Grievant was a competent teacher.

**C. Proper Measure of Discipline**

The foregoing analysis indicates that removal was *unreasonable*, if not arbitrary, under the circumstances of this case. Accordingly, the Arbitrator holds that a 30-day suspension should effect sufficient general and specific deterrence to chill any teacher’s penchant for preferential treatment of his/her students.

**VIII. The Award**

For all of the foregoing reasons, the Grievance is hereby **SUSTAINED IN PART AND DENIED IN PART**. The Undersigned hereby reduces the removal to a 30-day suspension. Accordingly, DRC shall implement this award forthwith by reinstating the Grievant without loss of seniority or any other job-related benefits to which he would have been entitled but for his wrongful removal. In the event of a dispute on the issue of entitlements, the Grievant will have the burden of proving his entitlement to lost job-related benefits.

---

<sup>\37</sup>

Joint Stipulation.

1 The Grievant shall receive back pay for the time that he was wrongfully removed, less any wages that he  
2 either earned or, with due diligence, could have earned during his wrongful removal.

*Robert Brookins*

Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.