

In the Matter of Arbitration Between the	:	Grievance Number: DRC-2016-01914-3
	:	
STATE OF OHIO, DEPARTMENT OF	:	
REHABILITATION AND CORRECTION,	:	
OHIO REFORMATORY FOR WOMEN,	:	Grievant: Kenneth Rausch
	:	
Employer	:	
and the	:	
	:	Date of Hearing: August 16, 2017
OHIO CIVIL SERVICE EMPLOYEES	:	
ASSOCIATION, AMERICAN	:	
FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES,	:	Howard D. Silver, Esquire
LOCAL 11, AFL-CIO,	:	Arbitrator
	:	
Union	:	

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: State of Ohio, Department of Rehabilitation and Correction,
Ohio Reformatory For Women, Employer

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For: Ohio Civil Service Employees Association, American Federation
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PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing at 9:00 a.m. on August 16, 2017 in a conference room at the Ohio Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The arbitration hearing concluded at 2:00 p.m. on August 16, 2017 and the evidentiary record was closed at that time.

Post-hearing briefs were received from both parties by the arbitrator by September 15, 2017 and exchanged between the parties by the arbitrator on September 16, 2017.

This matter proceeds under a collective bargaining agreement in effect between the parties from July 1, 2015 through February 28, 2015, Joint Exhibit 1.

No issue as to the arbitrability of the grievance has been raised. Under the language of the parties' collective bargaining agreement, Joint Exhibit 1, the arbitrator finds the grievance arbitrable and properly before the arbitrator for review and resolution.

STIPULATED ISSUE STATEMENT

Was the Grievant, Kenneth Rausch, removed from employment for just cause?

If not, what shall the remedy be?

JOINT STIPULATIONS

1. Grievant was classified as a correctional officer.
2. Date of Hire: June 19, 2000.
3. Date of removal: May 6, 2016.
4. The Grievant had a written reprimand on his record at the time of removal.

JOINT EXHIBITS

1. 2015-2018 .
2. Grievance Trail
3. Disciplinary Trail
4. (1) CD-RW
5. Standards of Employee Conduct (SOEC)
6. Grievant training records

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Department of Rehabilitation and Correction, Ohio Reformatory for Women, hereinafter the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter the Union, are parties to a collective bargaining agreement in effect from July 1, 2015 through February 28, 2018, Joint Exhibit 1. Within the parties' Agreement in Article 24, section 24.01 the Employer is prohibited from imposing discipline upon a bargaining unit member except for just cause.

The grievant in this proceeding, Kenneth Rausch, was hired by the Ohio Department of Rehabilitation and Correction on June 19, 2000 to work as a Correctional Officer at the Ohio Reformatory for Women in Marysville, Ohio. Mr. Rauch continued in this employment at the Ohio Reformatory for Women as a Correctional Officer until his removal effective May 6, 2016 through an order of removal addressed to Mr. Rausch and provided to a Union representative on May 6, 2016.

The written order removing Correctional Officer Kenneth Rausch from his employment

with the State of Ohio, Department of Rehabilitation and Correction cites four Standards of Employee Conduct Rules as having been violated: Rule 5b – Purposeful or careless acts which result in damage, loss, or misuse of State property to include but not limited to vehicles and telephones, for which a first offense calls for a range of discipline from a written reprimand to a one day suspension; Rule 18 – Threatening, intimidating, or coercing another employee or a member of the general public, for which a first offense calls for a range of discipline from a two-day suspension to a removal; Rule 37 – Any act or failure to act that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee, for which a first offense calls for a range of discipline from a two-day suspension to a removal, and Rule 38 – Any act, or failure to act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public.

On May 12, 2016 the Union filed a grievance with the Employer on behalf of Mr. Rausch. The grievance charged that the Employer removed the grievant effective May 6, 2016 without just cause. The grievance filed on behalf of Mr. Rausch notes that Mr. Rausch had no discipline on file and it is charged in the grievance that the discipline imposed upon Mr. Rausch is procedurally defective as Correctional Officer Rausch received notification of his discharge over the telephone on May 9, 2016 but was never served the termination documents. The Union asks that Mr. Rausch be returned to duty and made whole through paying Mr. Rausch for all lost wages and benefits.

The grievance remained unresolved between the parties and was moved to final and binding arbitration at the direction of the Union on or about September 29, 2016.

The arbitration hearing herein began and concluded on August 16, 2017. Post-hearing briefs from the parties were received by September 15, 2017.

SUMMARY OF TESTIMONY

Michelle Thomas

Michelle Thomas is employed by the Ohio Department of Rehabilitation and Correction as a Correction Records Management Officer. Ms. Thomas has provided over nineteen years of service to the department.

Ms. Thomas identified Joint Exhibit 3, page 31 as an incident report prepared and signed by Ms. Thomas on January 6, 2016. The incident reported reads as follows:

Upon returning to work on 12/18/2015 I had a message on my work phone from the night before at 9:00pm on 12/17/2015. The phone call was from my ex husband Ken Rausch who also works for the Ohio Department of Corrections at the Ohio Reformatory for Women and active on STAR/SRT. The phone call was of a personal nature, he proceeded to say, "You are a complete piece of shit parent to my son Joe, you are violating all kinds of fucking custody agreements. You narcissistic (sic) piece of shit."

At that time I did not report the phone call. I share a child with Mr. Rausch and try very hard to maintain peace for my son's sake and I have never wanted our personal life to be brought into work or jeopardize anyone's employment. On Monday 1/04/2016 Mr. Rausch texted my personal cell phone in the evening and made derogatory/racial statements about my current husband, Rick Thomas who also works for the Department of Corrections (at FMC). Calling my husband, "Nigger". He also stated, "Die bitch, die bitch, I will make sure". My ex husband and I have always had issues in trying to effectively communicate and get a long since I have worked here at Operation Support Center in 2012, but has never spilled over into the work place and affected my work until recently. I believe this all started shortly after I got married to Mr. Thomas and after Mr. Rausch had claimed that my husband's ex wife Amanda Moon (who also works for the department) has been talking with him and trying to convince him to help her in her custody battle against her ex husband. Apparently Ms. Moon sees Mr. Rausch when she is at the Ohio Reformatory for Women working. I know it is difficult to leave personal issue outside of the work environment when I have an ex spouse, current spouse, and my husband's ex spouse all working with the same department. I am concerned that this will interfere with my job and would like it addressed now before it goes any further.

Ms. Thomas was referred to Joint Exhibit 3, page 54, the transcription of a telephone

message left on a work telephone extension assigned to Michelle Thomas, received on December 17, 2015 at 9:09 p.m. that reads as follows:

Michelle Thomas you are a complete piece-of-shit parent to my son, Joe. You're violating all kinds of fucking custody agreements that we have. He is supposed to talk to me every freaking night. But, you choose to only do what you want to do because you think you are the only person that's important in any kind of relationship. You are a very narcissistic piece-of-shit and my son is way more important than you are and he will contact me every day per our agreement. And if you continue to violate that, then I will take you back to court. So, you have a very good day and I hope my son has a better day with me than he does you because he loves being with me way more than you. Have a nice day.

Ms. Thomas stated that the above transcribed recorded telephone message from her ex-husband, Kenneth Rausch, was left on her state telephone.

Ms. Thomas was referred to Joint Exhibit 3, page 71, a photograph of Ms. Thomas's office telephone displaying the date, time, and telephone number corresponding to a voice mail message left by Kenneth Rausch. The photograph displays a telephone number - 19372431605 and shows the call was missed at 9:08 p.m. on 12/17/15. Ms. Thomas testified that she first heard this recorded message on December 18, 2015. Ms. Thomas testified that the number appearing on the screen of her state telephone in the photograph was the telephone number of Kenneth Rausch's telephone.

Ms. Thomas was asked why she had waited to report the telephone message she had received from her ex-husband on December 18, 2015. Ms. Thomas testified that she was hoping to end the discord between them and wanted the bickering to stop for the sake of her son. Ms. Thomas stated that later text messages from her ex-husband became more threatening and were viewed as more serious.

Ms. Thomas identified Joint Exhibit 3, page 51 as presenting text messages from Mr. Rausch received by Ms. Thomas from January 4, 2016 to January 6, 2016. These texts were

received after the voice mail message that Ms. Thomas had heard on December 18, 2015.

Joint Exhibit 3, page 51 begins with a text message from Ms. Thomas to Ms. Rausch that reads: “Quit txtng me.” This text message is followed by the following text messages from Mr. Rausch to Ms. Thomas:

“YOU WILL NOT FUCK ME OVER EVER AGAIN!!”

“Die bitch”

“Die bitch”

“BAHAHAHA!!!!!!”

“I Will make sure you”.

Ms. Thomas stated that she reported the above texts because they scared her.

Ms. Thomas identified Joint Exhibit 3, pages 45, 47, 48, 49, and 50 as pages presenting text messages between Ms. Thomas and Mr. Rausch, with some sent prior to December 17, 2015 and some sent after that date. All of these text messages were reported on the same date, January 6, 2016. Joint Exhibit 3, page 45 presents a text from Mr. Rausch that reads: “I promise you don’t know what I’m capable of..” followed by the response: “Good to know,” followed by “Yep Back off... NOW!!!!” and “No bitch you back off,” followed by: “Is that how you were raised never to trust anyone including family??”

Joint Exhibit 3, page 47 presents text messages that begin with: “Bitch I hope you fucking die, I fucking hate you. You are a worthless piece of shit,” followed on the next day by: “Act like an adult and a parent stop acting like this,” “I need a copy of the shared parenting agreement,” “No support until you get a copy to me,” and “Bitch you are just.” This was followed by: “Good night nigger bitch,” followed by “Are you serious about Rick Thomas I need to know before I hurt

someone??? Or are you playn (sic) withe (sic) ?? 'Cause I'm telling you I'm gonna find him an (sic) hurt him." "That's funny 'cause his ex got a job working under Ed vorhees (sic) !!" "Ah, you girls can compare notes!!!" "Ha I guess right now its sucks to be him! Just."

Joint Exhibit 3, page 49 presents the following texts from Mr. Rausch: "Damn Rick Thomas is the definition of a DRC whore!!!" "Good job!!!! You got another shelton!!! People will never stop talkin about you!!!" "Whore." "Excuse me ... DRC Whore." "You can't ignore me!! It's not late enough!!!! You are a stupid.,, stupid whore!"

Joint Exhibit 3, page 50 presents the following texts from Mr. Rausch: "Oh an (sic) your 'boyfriend' is going to get his dick stomped into the ground when I see him! Night baby cakes!! Michelle I'm sorry for the agony I caused you..I just want the pain to go away. I don't want to feel hurt anymore...I don't want to feel jealousy anymore. Please help me. I need help. I know I won't help myself and I won't ask for help...I've almost ended my life because of guilt and jealousy because of."

Ms. Thomas testified that when she received these texts she became fearful for her life and her husband's life.

Ms. Thomas identified Joint Exhibit 3, page 75 as a Civil Order of Protection she secured from the Court of Common Pleas of Franklin County, Ohio, Division of Domestic Relations pursuant to Ohio Revised Code section 3313.31. This protective order demanded that Kenneth Rausch be restrained from committing acts of abuse or threats of abuse against Michelle Thomas and other protected persons named in this order. This order became effective January 19, 2016.

The terms of the January 19, 2016 civil protection order are presented at Joint Exhibit 3, page 76. These terms include a prohibition against Mr. Rausch entering or interfering with the residence, school, business, place of employment, day care centers, or child care providers for

protected persons named in this order; Mr. Rausch is required to stay at least five hundred (500) feet from any protected persons; Mr. Rausch is ordered not to initiate or have contact with the persons named in the protective order or their residences, businesses, places of employment, schools, day care centers, or child care providers.

Ms. Thomas testified that she secured the civil protection order because she feared violence from her ex-husband and had feared that it could occur in the workplace. Ms. Thomas stated that the threats made by her ex-husband to her and her husband frightened her.

Under questioning by the Union's representative, Ms. Thomas agreed that the transcribed December 17, 2015 voice mail message did not include a threat of violence and agreed that Mr. Rausch on this one occasion had left a personal message for Ms. Thomas on her state telephone.

Ms. Thomas confirmed that the text messages appearing in Joint Exhibit 3, pages 45 – 53 were sent during evening hours and not during work hours. Ms. Thomas confirmed that the text messages appearing at Joint Exhibit 3, pages 45 – 50 were sent prior to January 26, 2014.

Ms. Thomas confirmed that the text messages that appear at Joint Exhibit 3, page 45 were attached to an email from Ms. Thomas dated January 26, 2014 concerning threats from Mr. Rausch, and the text messages at Joint Exhibit 3, page 47 were attached to an email from Ms. Thomas dated January 26, 2014.

Ms. Thomas testified that the text messages at Joint Exhibit 3, page 45 were directed to Kevin Whaley on January 7, 2016. Ms. Thomas testified that she had not reported the text messages attached to the January 26, 2014 emails at the time they were received.

Ms. Thomas was referred to Joint Exhibit 3, page 39 part of an interview of Ms. Thomas that occurred on January 7, 2016 by investigator Kevin Whaley that presents the following:

Whaley: How threatened do you feel? Like, do you feel he would do anything to

you?

Thomas: I would like to say “no” but I don’t know at what point his triggers are gonna be that sends him over the edge. When I talked to the people at the city prosecutor’s office today they were like, “Wow, he has a lot of stuff.” I mean, he’s a former – not that this makes a difference or that this makes people like this but he’s a former marine – a sergeant in the Marine Corps. He – and I don’t think he is active on STAR anymore. I don’t know that for a fact ‘cause that’s what Rick and I were talking about. Might not be. He might be inactive or – ‘cause I know at one point he had back problems. He obviously has weapons at home ‘cause he’s a hunter too. He hunts avidly and – but as far as him coming to my house, he’s not done that yet. He just makes threats to do stuff or there’s been times where he’s said, “Well, I’m coming over to your house. I’m gonna bash the door in.” So...

Ms. Thomas was asked whether she had felt threatened by the text messages attached to the January, 2014 emails and Ms. Thomas had said that she had been scared but had not felt threatened at that time. Ms. Thomas confirmed that there had been no threats from Mr. Rausch since the issuance of the January 19, 2016 civil protection order.

Ms. Thomas stated that she had had no reason to interact with her ex-husband professionally but said she feared that the situation was turning into something worse that could affect her job and her job performance. Ms. Thomas was asked if she continues to feel threatened at the time of her testimony in this proceeding, to which Ms. Thomas answered: “No.”

Ms. Thomas was referred to Joint Exhibit 3, page 96 that presents text messages that begin with Ms. Thomas texting: “We out at a movie ... he will call in the morning,” followed by the text: “Listen I’m not sure what’s got into you but I’m not really in the mood for you! FU.” “Ha ha!! Me too!! So go to child support and get me off arrears....” Ms. Thomas denied in her testimony that she had used the term “FU.”

Ms. Thomas was referred to Joint Exhibit 3, page 88 that includes the text message line: “Night asshole.” Ms. Thomas does not recall having sent this text message.

Under redirect questioning by the Employer’s representative Ms. Thomas testified that the

text messages appearing at Joint Exhibit 3, page 53 that include: “Die bitch” occurred after the telephone message received on December 17, 2015. Ms. Thomas testified that at the time of these texts she had been in fear of Mr. Rausch.

Ms. Thomas testified that she married Rick Thomas on October 10, 2015.

Kevin Whaley

Kevin Whaley has been employed by the State of Ohio for twenty-one years and at the time of his testimony in this proceeding was employed as a Labor Relations Officer 3 by the Ohio Department of Job and Family Services. For a few years Mr. Whaley had served as a Juvenile Correction Officer within the Ohio Department of Youth Services and from there moved to the Adult Parole Authority where he served in an investigative unit.

Mr. Whaley served in a variety of positions within the Ohio Department of Rehabilitation and Correction, with his last position with the department being a Program Administrator in the Office of Equal Employment Opportunity (EEO). Mr. Whaley served within the Ohio Department of Rehabilitation and Correction for fifteen years.

Mr. Whaley identified Joint Exhibit 3, page 19 as the first page of an investigative report dated February 2, 2016 prepared by Kevin Whaley, ODRC/EEO Section directed to the Warden of the Ohio Reformatory for Women, Ronette Burkes. This first page of the investigative report presents the subject of this investigation as Kenneth Rausch.

Mr. Whaley testified that the text messages presented within Joint Exhibit 3, pages 45, 47, 48, 49, 50, 51, and 52 are from Mr. Rausch.

Mr. Whaley testified that the January 19, 2016 civil protection order brought to the Employer’s attention the text messages between Ms. Thomas and Mr. Rausch. Mr. Whaley stated that the Employer had had no prior knowledge of these text messages. Having been apprised of

what was communicated by Mr. Rausch to Ms. Thomas, Mr. Whaley testified that the threats against Ms. Thomas and her husband, two state employees, could not be ignored.

Mr. Whaley testified that the text messages at Joint Exhibit 3, page 53 begin with Ms. Thomas's text message at 9:18 p.m. on January 4, 2016: "Quit txtng me," followed by Mr. Rausch's texts on that date directed to Ms. Thomas that begin with: "YOU WILL NOT FUCK ME OVER EVER AGAIN!!" at 9:18 p.m.; "Die bitch," at 9:19 p.m.; "Die bitch," again at 9:19 p.m.; "BAHAHAHA!!!!!" at 9:20 p.m., and "I Will make sure you" at 9:20 p.m.

Under questioning by the Union's representative, Mr. Whaley confirmed that Rick Thomas is a Labor Relations Officer at the Department's Franklin Medical Center (FMC).

Mr. Whaley testified that the telephone messages at Joint Exhibit 3, page 45 include Mr. Rausch's text message directed to Ms. Thomas that reads: "I promise you don't know what I'm capable of .." was sent on or before January 24, 2014.

Mr. Whaley testified that text messages at Joint Exhibit 3, pages 47, 48, and 49 were directed by Mr. Rausch to Ms. Thomas sometime around January 24, 2014. Mr. Whaley confirmed that these text messages from January, 2014 had not been reported at the time they were received by Ms. Thomas (then Ms. Rausch). Mr. Whaley testified that he thought the text messages in 2014 had been threatening to Ms. Thomas as they had included such messages as: "Bitch I hope you fucking die, I fucking hate you. You are a worthless piece of shit." This text message was sent at 2:13 a.m.

Mr. Whaley was referred to Joint Exhibit 3, page 64, a page in the transcript of the interview of Mr. Rausch by Mr. Whaley that occurred on January 20, 2016, an interview that was also attended by OCSEA Union Steward James Doss. At the 22:04 mark in this interview Mr. Doss said: "Right. I'm not trying to imply that. I'm just trying to establish one-sidedness of the text

messages.” Mr. Whaley is reported to have responded:

No, I realize that and there was something in here that even says – it’s obvious that she texted something else and deleted it and then – I mean, it’s obvious that’s what happened. I’m not saying that everything in here – this is a complete and accurate picture of the whole conversation. I know it’s not. I mean, it’s common sense.

At Joint Exhibit 3, page 64, at the 21:13 mark of the January 20, 2016 interview of Mr. Rausch by Mr. Whaley, Mr. Rausch is presented as saying the following:

Okay, well let me clarify this. I would just never send anything out of the blue. I got better things to do with my life than just sit there and get mad and send shit to her. It’s when we’ve been communicating through text she makes me mad. She does – she says something to set me off. I’ve never – I don’t – I’m not just threatening her, harassing her, saying stuff for no – she’s triggered me.

Mr. Whaley was asked whether Ms. Thomas had sent incendiary text messages to Mr. Rausch prompting some of the angrier texts sent by Mr. Rausch. Mr. Whaley testified that he did not think that Ms. Thomas had sent triggering text messages to Mr. Rausch.

Mr. Whaley was referred to Joint Exhibit 3, page 34 from the interview of Michelle Thomas by Mr. Whaley on January 7, 2016 at the 5:55 mark wherein Ms. Thomas had said:

Recently, I know what has sparked – or I *believe* what has sparked it is obviously me getting married to Rick. And then, Rick’s ex-wife, Amanda Moon and my ex-husband talking I *believe* at the reformatory. ‘Cause all he said is “she came up and asked me if I have copies of our custody agreement.”

Mr. Whaley identified Joint Exhibit 3, page 30 as presenting the conclusions reached based on the investigation conducted by Mr. Whaley. Mr. Whaley found Officer Rausch had violated Standards of Employee Conduct rules by sending threatening text messages to his ex-wife and to her husband, Rick Thomas, both employees of the Ohio Department of Rehabilitation and Correction. Mr. Whaley referred to Joint Exhibit 3, page 106, page one of the Ohio Department of

Rehabilitation and Correction's Standards of Employee Conduct. Joint Exhibit 3, page 108 presents page 5 of the Standards of Employee Conduct and states under "Illegal Activities" that the Ohio Department of Rehabilitation and Correction demands that its employees be held to the highest standards of conduct at all times, including personal and business affairs. This policy provides that illegal conduct on the part of any employee, whether on or off duty, is unacceptable. This language also provides: "In the event the Employer pursues disciplinary action against an employee for such conduct, a reasonable nexus (tie) to job performance must be established."

Mr. Whaley testified that some of the text messages from Mr. Rausch directed to Ms. Thomas were threatening. Mr. Whaley was asked whether the telephone message received on December 17, 2015 at 9:09 p.m. by Ms. Thomas from Mr. Rausch to Ms. Thomas's state telephone had included any threat of violence, to which Mr. Whaley responded that it had not. Mr. Whaley also confirmed that no criminal charge was lodged against Mr. Rausch and there had been no charge of illegal activity under the civil protection order secured by Ms. Thomas on January 19, 2016.

Ronette Burkes

Ronette Burkes is the Warden of the Ohio Reformatory for Women and has been serving in this capacity since 2013. Warden Burkes testified that it is important that staff working at the Ohio Reformatory for Women feel safe in their workplace.

Warden Burkes testified that a substantial percentage of inmates at the Ohio Reformatory for Women have been the victims of domestic violence. Because of the increased incidences of trauma due to domestic violence among inmates at the Ohio Reformatory for Women, staff members at this institution receive specialized training so as to reduce as much as possible any additional trauma to inmates while they serve their terms of incarceration at this facility.

Warden Burkes was referred to Joint Exhibit 3, page 53 wherein some of the text messages from Mr. Rausch to Ms. Thomas included: "Die bitch." Warden Burkes testified that these text messages are not to be ignored even if they appear on a private account. Ms. Burkes testified that domestic violence victims do not always report incidents of domestic violence right away. Warden Burkes explained that there is often a cycle of violence that a perpetrator inflicts and a victim rationalizes.

Warden Burkes testified that in a cycle of domestic violence there is often power and control behaviors that arise and progress to the point of violence. Victims try to focus on the good times that had occurred and perpetrators express remorse and promise to mend their ways. This leads to the next cycle of violence and the same mechanisms formerly used to maintain the dominance of the perpetrator and the submission of the victim. Warden Burkes testified that a particularly dangerous time is when one of the parties is preparing to leave.

Warden Burkes testified that she is unable to ignore the text messages from Mr. Rausch to Ms. Thomas and testified that based on those text messages it was not appropriate to bring Mr. Rausch back to work.

Under questioning by the Union's representative, Warden Burkes identified Joint Exhibit 1, page 1 as the order of removal addressed to Kenneth Rausch. Warden Burkes confirmed that the discharge was for violation of Standards of Employee Conduct rule 5b for calling a state telephone and making a threat in that call; rule 18 for threatening and intimidating text messages that were left for Ms. Thomas by Mr. Rausch; rule 37 for compromising the ability of other state employees through threats to effectively carry out their duties as public employees, and rule 38 for the threats from Mr. Rausch directed at two staff members, Mr. and Mrs. Thomas that threatened the security of the facility in which each worked, in this case the Ohio Reformatory for Women,

the Operations Support Center, and the Franklin Medical Center.

Warden Burkes testified that the discharge of Mr. Rausch from his employment by the State of Ohio was reasonable and commensurate with the misconduct engaged in by Mr. Rausch. Warden Burkes confirmed that the rules which are alleged to have been violated provide for a range of discipline to be imposed and Warden Burkes confirmed that she is the person who decided that discharge was an appropriate disciplinary response to the facts of this case. Warden Burkes stated that the behavior engaged in by Mr. Rausch was so egregious that removal became appropriate.

Warden Burkes confirmed that Mr. Rausch served on the SRT (Special Response Team), a unit that is analogous to a SWAT team. Warden Burkes stated that she never observed problems in Mr. Rausch's conduct at the Ohio Reformatory for Women but she testified that it is impossible to predict future behavior. Warden Burkes stated that verbal threats of bodily harm are part of domestic violence.

Warden Burkes was referred to Joint Exhibit 3, page 108, page 5 of the Standards of Employee Conduct of the Ohio Department of Rehabilitation and Correction which includes the following language: "In the event the Employer pursues disciplinary action against an employee for such conduct, a reasonable nexus (tie) to job performance must be established." Warden Burkes testified that the voice mail message left by Mr. Rausch on a state telephone for Ms. Thomas and the text messages that Mr. Rausch directed to Ms. Thomas were connected to the job performance of Ms. Thomas at the Ohio Department of Rehabilitation and Correction and Mr. Rausch's conduct in relation to the state telephone message and text messages may be considered in determining a disciplinary response to the misconduct engaged in by Mr. Rausch.

Leontyne Chrystal Pounds-Alexander

Leontyne Chrystal Pounds-Alexander is an administrator of the Office of Victims' Services within the Ohio Department of Rehabilitation and Correction. Ms. Pounds-Alexander oversees programming that assists victims of crime. Ms. Pounds-Alexander has been working among victims of domestic violence for twenty years. Ms. Pounds-Alexander has talked to hundreds of victims of domestic violence.

Ms. Pounds-Alexander testified that she had talked to Michelle Thomas. Ms. Pounds-Alexander said that domestic violence does spill over into the workplace. Ms. Pounds-Alexander identified Employer's Exhibit 1 as information obtained from the Ohio Domestic Violence Network that presents a definition of abuse that includes verbal insults, emotional abuse, financial deprivation, threats and/or sexual and physical violence as a way to dominate a partner. Examples of abusive behavior appearing on this listing include name calling, threatening to hurt or kill, degrading women in general, apologizing and making false promises to end the abuse, ridiculing, criticizing, blaming, accusing of affairs, and sabotaging work or school.

Ms. Pounds-Alexander identified Employer's Exhibit 2 as a Danger Assessment memorandum from Jacquelyn C. Campbell, Ph.D., R.N. This memorandum presents risk factors that include: Does he own a gun?; Does he threaten to kill you?; Has he ever threatened or tried to commit suicide?

Ms. Pounds-Alexander was referred to text messages from Mr. Rausch directed to Ms. Thomas appearing at Joint Exhibit 3, pages 45, 47, 48, 49, 50, 51, and 52. Ms. Pounds-Alexander found the text message: "I promise you don't know what I'm capable of" to be threatening and testified that these and other comments appearing in text messages from Mr. Rausch should not be ignored even though some of them occurred in 2014. Ms. Pounds-Alexander testified that the voice

mail message left on Ms. Thomas's state telephone on December 17, 2015 should not be ignored nor should other text messages appearing on the above-cited pages. Ms. Pounds-Alexander reiterated that domestic violence can spill over into the workplace.

Under questioning by the Union's representative, Ms. Pounds-Alexander could not recall when she had spoken directly to Ms. Thomas but does recall speaking to Ms. Thomas about the possibility of securing a civil protection order. Ms. Pounds-Alexander believes this conversation occurred more than one year ago. Ms. Pounds-Alexander has been employed by the Ohio Department of Rehabilitation and Correction for five years and testified that the telephone message left on December 17, 2015 by Mr. Rausch upon Ms. Thomas's state telephone is an instance of domestic violence spilling over into the workplace.

Kenneth Rausch

Kenneth Rausch, the grievant in this proceeding, was hired by the Ohio Department of Rehabilitation and Correction on June 19, 2000. Mr. Rausch recalled that while he was serving as a probationary employee in June, 2000 he made application to serve on the Special Response Team (SRT) and subsequently served on the SRT for six years, a unit that is analogous to a SWAT team. Mr. Rausch also served on the Special Tactics and Response (STAR) team, a unit trained in hostage rescue and high risk transportation. Mr. Rausch served eight years on the STAR team but due to back problems had had to retire from it.

Mr. Rausch testified that he received training in critical incident management (CIM) and testified that his performance evaluations while employed at the Ohio Reformatory for Women were excellent, always above average.

As to prior discipline, Mr. Rausch testified that on one occasion he called off late and received a warning for this late call.

Mr. Rausch testified that he married Michelle Rausch in February, 2004 and they divorced in May, 2013. Mr. Rausch testified that he had caught his wife lying and being unfaithful.

Mr. Rausch was referred to Joint Exhibit 3, page 54 from the transcript of a telephone message recorded on Ms. Thomas's work telephone on December 17, 2015 at 9:09 p.m. Mr. Rausch testified that these were his words and he had recorded them because under the custody agreement that applied to Ms. Thomas and Mr. Rausch, their son was to telephone Mr. Rausch before going to bed in the evening. Mr. Rausch testified that he had been adamant about this daily communication with his son and recalled that on two or three occasions no call from his son had been received, a breach subsequently explained to Mr. Rausch as having been caused by Mr. Rausch's son falling asleep before making the telephone call. Mr. Rausch testified that he found it difficult to understand why the telephone call that was required under the court-approved custody agreement was not occurring as agreed. Mr. Rausch testified that his son's bedtime at the time the telephone message was left on December 17, 2015 had been 8:30 p.m.

Mr. Rausch testified that lack of nighttime calls from his son pushed Mr. Rausch to the boiling point. Mr. Rausch's heightened temper was then aggravated by his calls to his ex-wife that were being blocked, leaving Mr. Rausch unable to confirm that his son was safe.

Mr. Rausch testified that his ex-wife had threatened to move to Mansfield, Ohio and take Mr. Rausch's son with her. Mr. Rausch testified that the voice mail message left on December 17, 2015 had been Mr. Rausch's attempt to get the point across to Ms. Thomas that Mr. Rausch was to talk to his son every day. Mr. Rausch stated that there was nothing threatening about this message; it had been an angry, direct communication concerning the nighttime calls from his son to which Mr. Rausch had been entitled under the court-approved custody agreement.

As to why Mr. Rausch had left the voice mail message on a state telephone, Mr. Rausch

was referred to Joint Exhibit 3, page 56 at the 5:49 mark of the interview of Mr. Rausch by Mr. Whaley that had occurred on January 20, 2016. At this point in the interview Mr. Rausch had said:

Well, you have read – you’re aware of the verbiage in there? He’s, by court order - by our custody agreement, he’s supposed to talk to me every night within a reasonable time. I supposed to call him within a reasonable time. He’s eight-years-old. To me, a reasonable time is 8 to 8:30. And that’s been discussed verbally that if he doesn’t call me before 8:30 then I call there. Well, she told – she never answered her phone and I couldn’t get ahold of her. Apparently she had turned her phone off or it was completely dead. I tried to call her home phone, left a message. He never – my son never called me back. So, I left a voicemail on her work phone.

As to calling the mother of his son a “piece-of-shit parent” in the December 17, 2015 voice mail message, Mr. Rausch testified at the hearing herein that Ms. Thomas is a good mother to their son, describing her as a very good mother.

As to the text messages that are presented at Joint Exhibit 3, pages 51 and 52 that include “YOU WILL NOT FUCK ME OVER EVER AGAIN!!” and “Die bitch” and “Ha ha!!!! If your husband is getting his feelings hurt because he is a nigger then maybe he should confront me!!If he is a tough guy then he should see me in person.” Mr. Rausch testified at the hearing herein that he believes he sent the above-referenced texts at some time in December, 2015 and January, 2016.

When asked why he sent the message at Joint Exhibit 3, page 52 and left the voice mail message found at Joint Exhibit 3, page 54, Mr. Rausch stated that they were all sent for the same reason. The text messages presented at Joint Exhibit 3, page 51 that included “Die bitch” were all sent on the same day.

Mr. Rausch testified that the text message “Die bitch” does not constitute a threat and although it was an ignorant thing to communicate, Mr. Rausch testified that he had been so aggravated that he had become too emotional and therefore directed these text messages to Ms. Thomas. Mr. Rausch now understands that it was wrong to do so and testified that he would never

do so again.

Mr. Rausch testified that the text message that referred to Ms. Thomas's husband as a "nigger," presented at Joint Exhibit 3, page 52, was not a text message sent on the same day the text messages presented on Joint Exhibit 3, page 51 that had included "Die bitch" had been sent.

The text messages that were attached to emails that appear in the hearing record as Joint Exhibit 3, pages 45 – 49 were text messages sent in either 2013 or 2014. Mr. Rausch testified that there were texts from Ms. Thomas sent to Mr. Rausch that are missing from these messages and Mr. Rausch testified that Ms. Thomas had egged him on and had got him emotionally overwrought.

Mr. Rausch testified that since January, 2016 he and his ex-wife, Ms. Thomas, have had a good relationship and there have been no confrontations. Mr. Rausch referred to Joint Exhibit 3, page 59 at the 10:40 mark within the interview of Mr. Rausch by Mr. Whaley conducted on January 20, 2016 wherein Mr. Rausch is reported to have said: "... And she knows these little triggers – she knows – I'm not gonna lie; I do have a temper. Make no bones about that..."

Mr. Rausch denies that his job performance or the job performance of Ms. Thomas had been affected by his voice mail message or text messages. Mr. Rausch testified that he followed the civil protection order secured by Ms. Thomas on January 19, 2016 and has never traveled to the Department's central office where his ex-wife works.

Under questioning by the Employer's representative, Mr. Rausch testified that he does not deny sending the text messages. Mr. Rausch confirms that he sent some of text messages but is unable to recall sending all of them.

Mr. Rausch testified that at no time did he make a physical threat against Ms. Thomas.

Under redirect examination by the Union's representative, Mr. Rausch testified that no physical violence or threat of violence had been directed by Mr. Rausch at Ms. Thomas, although

at the time of his testimony in this proceeding Mr. Rausch admitted he now understands how his behavior could have been interpreted as threatening. Mr. Rausch testified that when he texted: “I promise you don’t know what I’m capable of ..” he was referring to legal action and was not making a physical threat against Ms. Thomas.

As to the text: “Die bitch,” Mr. Rausch now understands how this could have been understood to be a threat but testified that he never would have acted violently toward Ms. Thomas. Mr. Rausch testified that although the text message looks threatening, it was not meant to be threatening.

Under re-cross examination by the Employer’s representative, Mr. Rausch testified that he does not believe his conduct comprises domestic violence although he admits that his behavior was wrong, something he now sincerely regrets.

David Addair

David Addair is a first shift Correctional Officer at the Ohio Reformatory for Women who has worked there for eighteen years. Mr. Addair has known Mr. Rausch since their hire; they have become friends and have worked together often. Mr. Addair described Mr. Rausch as a good worker who did a good job, a good guy with good character. Mr. Addair stated that he had not seen Mr. Rausch lose his temper or threaten anyone or express racial slurs.

Mr. Addair testified that Mr. Rausch had discussed his divorce from his ex-wife and Mr. Addair knows Ms. Thomas. Mr. Addair testified that Mr. Rausch had always acted professionally at the Ohio Reformatory for Women.

Mr. Addair was referred to the December 17, 2015 voice mail message left by Mr. Rausch for Ms. Thomas. Mr. Addair testified that while he found the voice mail message inappropriate for a state telephone, he did not find the message threatening.

As to the text messages that appear in Joint Exhibit 3, pages 45 – 53, Mr. Addair testified that these text messages are not typical of how Mr. Rausch had talked to people and Mr. Addair believes that these text messages were obviously constructed at a time when Mr. Rausch was experiencing high emotion.

Corey Cunningham

Corey Cunningham is a first shift yard Correctional Officer who has worked with Mr. Rausch at the Ohio Reformatory for Women for over seventeen years. Mr. Cunningham described Mr. Rausch as a good employee, a hard worker, and a respectful colleague. Mr. Cunningham described Mr. Rausch as a good friend and Mr. Cunningham had not seen Mr. Rausch lose his temper or engage in racial slurs. Mr. Cunningham testified that Mr. Rausch was not insensitive to others and described Mr. Rausch as a co-worker who worked in a professional manner.

As to the voice mail message left by Mr. Rausch for Ms. Thomas on December 17, 2015 Mr. Cunningham agreed that it was an inappropriate message for a state telephone system but Mr. Cunningham did not find the message to be threatening.

Mr. Cunningham testified that the text messages directed to Ms. Thomas by Mr. Rausch that appear in Joint Exhibit 3 are messages that can be understood to give offense but Mr. Cunningham testified that it was not like Mr. Rausch to treat other people in this manner. Mr. Cunningham testified that he is not aware of Mr. Rausch harming Ms. Thomas.

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POSITIONS OF THE PARTIES

Position of the State of Ohio, Department of Rehabilitation and Correction, Ohio Reformatory for Women, Employer

The Employer, the State of Ohio, Department of Rehabilitation and Correction, Ohio Reformatory for Women understands the issue in this proceeding to be whether the Employer had just cause to discharge the grievant from his employment. The Employer contends that the main facts underlying this proceeding are not disputed.

The Employer notes that in 2014 and 2015 the grievant sent violent text messages to his ex-wife, Michelle Thomas, an employee of the Ohio Department of Rehabilitation and Correction. These text messages included threats of physical harm, suicide, racial epithets, remarks intended to degrade Ms. Thomas (“whore”) and threatened physical harm to Ms. Thomas’s husband, Rick Thomas. The Employer points out that the fact that these texts were directed to Ms. Thomas by Mr. Rausch is not disputed by Mr. Rausch, a fact also confirmed by Ms. Thomas. The Employer confirms the text messages were sent through a private account.

On December 17, 2015 Correctional Officer Kenneth Rausch left a derogatory voice mail message on the state telephone assigned to Michelle Thomas in her position as a Correction Records Management Officer at the Operations Support Center of the Ohio Department of Rehabilitation and Correction. Ms. Thomas did not immediately report this voice mail message but did report the voice mail message when she received the text messages from Mr. Rausch that included: “YOU WILL NOT FUCK ME OVER EVER AGAIN!!,” “Die bitch,” “Die bitch,” and “BAHAHAHA!!!!!!”

The Employer argues that earlier text messages sent by Mr. Rausch to Ms. Thomas cannot be ignored for to do so would constitute an indifference to the safety of departmental employees.

The Employer argues that the violent text messages and the voice mail message left on Ms. Thomas's state telephone brought the threats of domestic violence perpetrated by Mr. Rausch against Ms. Thomas from the private sphere to the public domain by bringing it to the Ohio Department of Rehabilitation and Correction, Ms. Thomas's workplace.

The Employer points out that the grievant had had training through the Corrections Training Academy and yearly in-service training that included victims' issues. The Employer contends that the grievant's training made him fully aware of the fact that his actions in sending the violent and derogatory text messages and the voice mail message of December 17, 2015 comprised violations of Standards of Employee Conduct rules.

The Employer points to two cases in 2017 wherein employees of the Ohio Department of Rehabilitation and Correction had been murdered after each victim had filed a complaint about a significant other. One of these victims was murdered by a fellow correctional officer employed by the Department. The Employer points out that these murders are not hypothetical - each occurred after threats of bodily harm had been made toward the victims and these circumstances were known the Employer when the Employer was presented in January, 2016 with the December 17, 2015 voice mail message and text messages sent by the grievant in 2014, 2015, and 2016. At the time the Employer was made aware of the December 17, 2015 voice mail message and text messages directed by Mr. Rausch to Ms. Thomas, the Employer understood the situation between Mr. Rausch and Ms. Thomas to be escalating and intruding into the workplace.

The Employer argues that the hearing record contains a preponderance of evidence showing the grievant to have violated rule 5b of the Standards of Employee Conduct for engaging in purposeful or careless acts which result in one or more of the following: damage, loss, or misuse of property of the State to include but not limited to vehicles and telephones. The Employer notes

that the grievant does not deny leaving the December 17, 2015 voice mail message on the state telephone assigned to Ms. Thomas. This message included: “You are a complete piece of shit parent to my son, Joe, you are violating all kinds of fucking custody agreements...” The Employer contends that leaving this type of message on a state telephone is a misuse of state property.

As to rule 18 of the Standards of Employee Conduct, threatening, intimidating, or coercing another employee or member of the general public, the Employer argues that the text messages Mr. Rausch admits to sending to Ms. Thomas show the threatening nature of these messages, *i.e.*, “Die bitch.” Sending a message that includes: “I promise you don’t know what I am capable of ..” and “Bitch I hope you fucking die, I hate you. You are a worthless piece of shit,” are threatening, intimidating, and comprise a violation of rule 18 of the Standards of Employee Conduct.

The Employer emphasizes that many of the text messages from the grievant threaten death or serious bodily harm to Ms. Thomas and her husband, Rick Thomas. The Employer points out that these text messages were specific as to what was intended by Mr. Rausch and at whom his ire was being directed.

As to rule 37 of the Standards of Employee Conduct, any act or failure to act that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee, the Employer claims that the text messages from Mr. Rausch to Ms. Thomas containing racial slurs would impair the ability of an employee to effectively carry out his or her duties as a public employee.

The Employer points out that text messages from Mr. Rausch to Ms. Thomas were clear about Mr. Rausch’s willingness and capability to inflict harm on Ms. Thomas and her husband. The Employer argues that Mr. Rausch’s conduct in this regard violated rule 37.

As to rule 38 of the Standards of Employee Conduct, any act or failure to act, or

commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public, the Employer points out that the grievant clearly threatened Michelle Thomas and her husband, both of whom were and remain employees of the Ohio Department of Rehabilitation and Correction. The Employer argues that the grievant chose to insert into the workplace these antics. The Employer argues that the threats made by Mr. Rausch against Michelle Thomas and Rick Thomas could not help but interfere in the security of the facility, staff, and other individuals under the supervision of the Department.

As to the testimony provided by Ms. Thomas, the Employer notes that the civil protection order secured by Ms. Thomas is still active, and in securing this protection order Ms. Thomas had signed a petition that stated: "I am concerned for my safety..."

The Employer points out that Ms. Thomas in her testimony at the arbitration hearing herein identified the text messages she received from her ex-husband, Mr. Rausch, and identified the December 17, 2015 voice mail message recorded on her state telephone by Mr. Rausch.

When asked why she had not reported the December 17, 2015 voice mail message or other text messages until January 6, 2016, Ms. Thomas explained that when she began receiving text messages from Mr. Rausch that included: "Die bitch" and referred to her husband as a "nigger" Ms. Thomas came to believe that the situation was escalating and needed to be reported. In this regard Ms. Thomas identified the incident report she prepared and signed on January 6, 2016 that is found at Joint Exhibit 3, page 31.

The Employer recalls the testimony from Kevin Whaley who led the investigation into the voice mail message and text messages sent by Mr. Rausch to Ms. Thomas. The Employer points out that Mr. Whaley was able to substantiate the source of the voice mail and text messages as

Kenneth Rausch. Mr. Whaley testified that the grievant had admitted to being the source of these communications.

The Employer refers to the testimony of Warden Ronette Burkes who recalled her extensive training and experience in dealing with victims' issues arising from workplace violence. Warden Burkes emphasized that the Ohio Reformatory for Women provides additional training to staff in an effort to ensure that the work environment at the Ohio Reformatory for Women is free from sexual harassment, bullying, and workplace violence.

Warden Burkes testified that once issues involving domestic violence have been brought into the workplace it would not be appropriate for the Employer to ignore this circumstance. This testimony was corroborated by Mr. Whaley and Ms. Pounds-Alexander.

The Employer emphasizes that the threatening, intimidating, and derogatory text messages and voice mail message directed to Ms. Thomas by Mr. Rausch were not a one-time occurrence but elements of a pattern of abuse that continued over several years. The Employer contends that the grievant attempted to use threats and intimidation to control Ms. Thomas, and when it spilled over into the workplace Ms. Thomas had finally had enough and reported it to her employer.

The Employer acknowledges that at the arbitration hearing Mr. Rausch testified that he would never again engage in these kinds of acts and now understands he had been mistaken when he had engaged in such behavior. The Employer does not view these promises as credible and points out that such promises of future good behavior are often found within a cycle of violence commonly encountered in instances of domestic violence.

The Employer points out that the grievant now claims he will not abuse Ms. Thomas or her husband in the future after spending years doing exactly that. The grievant claims that although he used the word "nigger" on several occasions in his text messages directed to Ms. Thomas about

her husband, he is not a racist. The Employer argues that what is most significant is that the grievant, through his testimony, shows that he does not fully comprehend the seriousness of his misconduct.

The Employer acknowledges that both David Addair and Corey Cunningham vouched for the hard work provided by Mr. Rausch and their friendship with Mr. Rausch.

The Employer emphasizes that it has an affirmative duty to provide a safe working environment for its employees and when the grievant sent text messages with threats of serious bodily harm, suicide, and bodily harm to others the situation had escalated into the workplace and the Employer had had to take these circumstances seriously.

The Employer notes that after the grievant's actions were evaluated by experts, the Employer decided to remove the grievant from his Correctional Officer position at the Ohio Reformatory for Women for the reasons stated above. The Employer declares that it refuses to gamble with the lives of its employees, especially amid warning signs of domestic violence. The Employer believes that to ignore the grievant's actions in this case would be unethical and illegal.

For the reasons cited above, the Employer urges the arbitrator to find that a preponderance of evidence has been presented to the hearing record establishing just cause for the removal of the grievant and deny the grievance in its entirety.

Position of the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

The Union, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, notes that the grievant, Kenneth Rausch, was removed from his position as a Correctional Officer at the Ohio Reformatory for Women on May 6, 2016. At the time of his removal Mr. Rausch was a sixteen-year decorated employee of the

Ohio Department of Rehabilitation and Correction with no prior discipline other than a written reprimand for an attendance related issue that arose in the prior year. The Union states that Mr. Rausch was well-liked by his fellow employees and respected by his superior officers and by inmates. The Union notes the grievant was nonetheless discharged for a first offense associated with an alleged violation of the Department's Standards of Employee Conduct - rules 5b, 18, 37, and 38. The Union argues that the discipline imposed in this case was effected without just cause.

The Union argues that the Employer failed to follow requirements associated with progressive discipline and contends that the Employer stacked charges against the grievant, attributing violations to four separate rules based on the same voice mail and text messages. The Union argues that the stacking of charges on the same conduct was done to justify the removal of the grievant.

The Union points out that Warden Burkes testified at the arbitration hearing that discipline should be corrective in nature but nonetheless chose to impose upon the grievant the harshest discipline allowed. The Union notes that the Warden had had available to her a range of discipline for a first offense from which to determine the discipline to be imposed. It is contended that Warden Burkes chose to remove the grievant for something with which the grievant was never explicitly accused – domestic violence, a charge not made against the grievant and a charge the grievant had had no previous opportunity to rebut.

The Union points out that Ms. Thomas has at no time claimed that Mr. Rausch physically attacked her and made no such claim at the arbitration hearing herein. The Union questions the Employer's exhibits as they are not connected to any research identified as underlying Employer Exhibits 1 or 2. The Union also questions whether either document is a departmental form or simply memoranda favored by Ms. Pounds-Alexander.

The Union claims that Mr. Rausch's behavior as proven in the hearing record has not been substantiated as domestic violence and therefore presents behavior that can be corrected. Ms. Thomas confirmed in her testimony that since the issuance of the civil protection order on January 19, 2016 there has been no harassing text messages or other problems caused by the grievant. Ms. Thomas testified at the hearing that at the time of her testimony she no longer feared the grievant. Ms. Thomas testified that at the time of her testimony in this proceeding she did not fear the grievant in relation to her son's safety.

The Union notes that Mr. Rausch testified of his regret for the text messages he had sent to Ms. Thomas and explained the reasons underlying the sending of these texts and the voice mail message, agreeing that it had been wrong to send them. Mr. Rausch also testified that he would never engage in anything like this again.

The Union contends that the Warden ignored the grievant's very fine work record, a mitigating factor that should have been considered in determining whether just cause existed for Mr. Rausch's discharge.

The Union claims that the evidence gathered by Mr. Whaley was one-sided, with Mr. Whaley confirming that the messages directed by Ms. Thomas to Mr. Rausch had been deleted among some of the text messages. The Union claims that this is the reason that some of the text messages do not make sense on their face as presented in Joint Exhibit 3. In this regard the Union points to Joint Exhibit 3, page 45 which presents a text message chain from Mr. Rausch that tells Ms. Thomas to: "Back off..." then "NOW" which is followed by another text from Mr. Rausch that states: "No bitch you back off" and "Is that how you were raised, never to trust anyone including family??" The Union claims that text messages at Joint Exhibit 3, pages 47 and 48 present similar progressions that appear nonsensical taken at face value. The Union argues that

context is what is missing from Mr. Whaley's investigation and the Union claims this lack of context fails to present an accurate or fair depiction of what was being communicated. The Union argues that the lack of context shows the Employer has failed to satisfy its burden of proof by failing to show that Mr. Rausch communicated in the way he did without provocation by Ms. Thomas. The Union claims that the investigation by Mr. Whaley could have filled in this investigative gap but the records needed to clear up this point were never sought.

The Union refers to the testimony of Mr. Rausch who claimed that he had been threatened repeatedly by Ms. Thomas through text messages, including threats to move with their son to the city of Mansfield, Ohio, thereby making it more difficult for Mr. Rausch to see his son. Mr. Rausch testified of the frustration he experienced as a result of these threats and testified of his belief that Ms. Thomas was not living up to the mandates of their custody agreement.

The Union refers to the voice mail message left on December 17, 2015 that was prompted by that part of the custody agreement that calls for Mr. Rausch's son to telephone Mr. Rausch every night before bedtime. Mr. Rausch testified that Ms. Thomas would repeatedly "forget" to have their son telephone Mr. Rausch and then would remain unreachable. The Union points out that this was the circumstance underlying the December 17, 2015 voice mail message transcribed at Joint Exhibit 3, page 54 wherein Mr. Rausch referred to Ms. Thomas as violating "... all kinds of fucking custody agreements that we have. He is supposed to talk to me every freaking night." The Union argues that this is not presented to excuse the inappropriate nature of Mr. Rausch's December 17, 2015 voice mail message but to substantiate the purposeful excision of Ms. Thomas's text messages that reveal her role in these incidents.

The Union also questions the timeliness of the allegations. The Union notes that the date of the incident for five of the seven text message chains could not be determined by any witness

at the arbitration hearing. The hearing record reflects that a number of these text messages were attached to an email dated January 26, 2014, meaning that the attached text messages were at least two years old at the time of the investigation conducted by Mr. Whaley.

The Union points out that since the date of each incident could not be established the grievant and the Union had no means of rebutting the charge. The Union questions how far back the Employer should be permitted to go to prove charges that were brought against Mr. Rausch in 2016. The Union reminds the arbitrator that all of these text messages were personal in nature and occurred between personal cellular telephones. The Union contends that this does not support a finding of just cause and reflects why the Standards of Employee Conduct place an emphasis on current work performance.

The Union also questions why Ms. Thomas saved these text messages for as long as two years although she failed to report them at the time each message was received. The Union recalls Ms. Thomas's testimony about having been scared. The Union claims that such an assertion would serve to increase the likelihood that the text messages would have been reported when they occurred.

The Union emphasizes that the text messages at issue in this proceeding are, in many cases, the very same text messages that were reported on January 26, 2014. While the grievant did send a "Die bitch" text message to Ms. Thomas in 2016, the Union claims that it has established that there was no escalation of misbehavior by Mr. Rausch and also claims that a pattern of misbehavior has not been established. In this regard the Union notes that the text messages attached to the January 26, 2014 emails did not come up again until the December 17, 2015 voice mail message. The Union claims that for two years there was no evidence of threatening or intimidating behavior. The Union claims that the Employer has not provided proof of recurring misbehavior but rather

has proven isolated incidents of frustration expressed by Mr. Rausch about his parental rights not being respected.

The Union claims the Employer has failed to provide a preponderance of evidence showing how the actions of Mr. Rausch would compromise or impair his ability to carry out his duties as alleged under rule 37 of the Standards of Employee Conduct. The hearing record reflects that Ms. Thomas and Mr. Rausch would have had no reason to communicate with each other while each was on duty nor to be in the same place while carrying out their respective job assignments. Mr. Rausch was asked at the arbitration hearing how often over the past sixteen years he had found himself at the Department's central offices; Mr. Rausch responded: "Zero."

The Union claims that some of the text messages from Mr. Rausch to Ms. Thomas were regrettable and derogatory but they were not unlawful, and the Union claims there is no indication from the Employer or from any criminal law enforcement agency that Mr. Rausch had been accused of breaking the law. The Union claims there was no unlawful act and also claims there is no nexus between the conduct of Mr. Rausch on his personal text messaging account and the workplace. The text messages were of a personal nature, sent on personal cellular telephones within a complicated relationship. These interactions argues the Union had nothing to do with the Department and in no way impacted the work of the Department.

The December 17, 2015 voice mail message, however, did create a nexus as it was recorded on a state telephone assigned to Ms. Thomas. Using state equipment for personal reasons is wrong. However, the Union points out that the voice mail message left on December 17, 2015 on the state telephone assigned to Ms. Thomas was different in its nature from the text messages sent by Mr. Rausch. Ms. Thomas pointed out in her testimony at the arbitration hearing that she had not felt the need to report the voice mail message at the time she listened to it on December 18, 2015

because this voice mail message did not contain threats of physical harm. The Union claims that the voice mail message may have been inappropriate for the workplace but it does not provide sufficient grounds for the removal of a sixteen-year employee.

The Union claims that it has proven the Employer did not possess just cause to discharge the grievant. Mr. Rausch had provided sixteen years of service to the Department at the time of his removal and coworkers Cunningham and Addair testified of Mr. Rausch's hard work, respectful conduct, and friendship. The Union reminds the arbitrator that Warden Burkes knew of no negative conduct on the part of Mr. Rausch while on duty at the Ohio Reformatory for Women.

The Union contends that it is Mr. Rausch's passion for and commitment to parenting his son that drove him to send the text messages to his ex-wife. The Union argues that the Employer has been unable to provide dates for many of these text messages; there were substantive issues that arose from the conduct of the investigation through the excision of text messages from Ms. Thomas to Mr. Rausch; a lack of adequate notice was provided to the grievant to the effect that his personal life could be the basis for discipline. The absence of proof that this is a case of domestic violence is also apparent and deserving of weight.

The Union argues that the most egregious oversight in this case is the absence of progressive discipline being imposed. The Union urges the arbitrator to grant substantial weight to the grievant's work record and length of service, as had been done by other arbitrators addressing workplace violence cases. The Union recalls the arbitration case wherein the grievant, Jeffrey Hubbard, had allegedly threatened Governor Kasich on a Facebook page. Arbitrator Pincus in his Opinion and Award issued March 6, 2013, grievance number 27-11-2011201-0010-01-03, determined: "The grievant, despite his military and correction experience, was not disposed to violence. The Grievant, moreover, had a good performance record with no active discipline. These

mitigating factors serve as a basis for modification of the imposed penalty.” The Union notes that the comment used by the grievant in that case had read: “Ok we got Bin-Laden ... let’s go get Kasich next. Who’s with me?” Arbitrator Pincus found these to be nothing more than “empty words.” Arbitrator Pincus held that: “A statement becomes a threat if certain conditions exist. Words, themselves do not establish a threatening circumstance. They must be evaluated in terms of context, the way the words are used and the circumstances existing at the time.”

Citing a separate case involving grievant Edmonia Antoine, the grievant was accused of saying to a co-worker at the workplace: “You better stop fucking with me or you’re going to be sorry,” and the accuser wrote that the grievant: “Threatened me repeatedly, saying over and over, just one more time ... just one more time.” The Union notes that arbitrator Washington in his in his Decision and Award issued June 3, 2004, grievance number 23-18-030808-0070-01-04, returned the grievant to work finding: “The evidence is nonconclusive to support a finding or inference that a specific threat occurred...” Arbitrator Washington held: “Moreover did Antione have the power to carry out the inferred threats to damage Leugers’ possessions or person? ... no evidence exists to suggest that Antione had the power to direct clients and/or others to physically harm Leugers or cause property damage to Leugers’ possessions.” The Union argues that there are parallels to the case herein, in both of the prior arbitration cases cited above. The Union argues that the Employer failed to show how Mr. Rausch’s words were a clear threat of harm to the person or possessions of Ms. Thomas. While Mr. Rausch’s background has been in the military and in corrections, no evidence in the hearing record indicates that such a background predisposes someone to violence. The Union argues that there is no evidence to the effect that Mr. Rausch was capable of carrying out a threat.

In both of the prior arbitration cases cited above, the employees’ work records could not

be ignored and in each case the arbitrator ordered the reinstatement of the grievant.

The Union states that the obvious difference in the arbitration cases cited above and the arbitration case addressed herein is the nexus to the workplace in each case. In the case of Ms. Antione, the latter case cited, the incident occurred “on the clock,” establishing a connection to the workplace.

In the case of Mr. Hubbard, the earlier arbitration cited, the nexus was established through a public social media platform where the grievant was identified as an employee of the State of Ohio. The Union contends that in the case herein the workplace nexus connecting the grievant’s behavior to the workplace is less clear. The Union states that the grievant left an inappropriate voice mail message on a work telephone that provided a nexus to the subject matter of the voice mail message, but not to the text messages. The Union points out that the text messages were not done in a public forum or a workplace forum. The text messages were sent to personal cellular telephone accounts. The Union claims that the difference in this regard is significant. The Union claims that this difference is sufficiently significant to sustain the grievance in its entirety.

The Union urges the arbitrator to issue an order reinstating the grievant to his position as a Correctional Officer at the Ohio Reformatory for Women; expunge from his personnel file any mention of Mr. Rausch’s removal effective May 6, 2016; pay the grievant all lost wages reduced by interim earnings and appropriate deductions, including Union dues; pay the grievant for missed overtime opportunities; bring leave balances to the level each would have been at had the discharge not occurred, and make any missed payments to the Ohio Public Employees Retirement System (OPERS). The Union asks that the arbitrator’s order include a direction that no loss in seniority be suffered by the grievant and order the payment of any medical, vision, or dental expense that the grievant and his dependents have had to incur since the date of the removal, May 6, 2016, that

would have otherwise been covered by an insurance plan.

The Union asks the arbitrator to retain jurisdiction over this case for sixty days.

DISCUSSION

The stipulated issue agreed by the parties to be determined by the arbitrator in this proceeding is whether the grievant was removed from his employment with the State of Ohio for just cause. The stipulated issue further asks, in the event just cause is not found to support the removal of the grievant, what the remedy shall be so as to restore the grievant to the position he would have been in, in terms of pay, benefits, seniority, and leave accrual, had the removal not occurred.

The collective bargaining agreement between the parties, Joint Exhibit 1, in Article 5 reserves to the Employer the right to suspend, discharge, and discipline bargaining unit members, with these and other managerial rights enumerated in Article 5 limited only by express and specific written provisions in the parties' Agreement.

An express and specific written provision in the parties' Agreement is Article 24, section 24.01 that limits the Employer's managerial right to impose discipline upon a bargaining unit member by requiring the Employer to possess just cause for the imposition of discipline.

The action taken by the Employer that is the subject of the grievance underlying this arbitration proceeding occurred effective May 6, 2016, the date of the termination of the employment of the grievant by the Employer. The timely, written grievance filed on behalf of Mr. Rausch challenging the discharge of the grievant calls into question whether just cause was possessed by the Employer when this action was taken.

What is not an issue in this proceeding are projections as to the future conduct of the

grievant as it relates to his ex-wife, Michelle Thomas; as it relates to his ex-wife's husband, Rick Thomas; or as it relates to the Ohio Department of Rehabilitation and Correction and the Ohio Reformatory for Women. The arbitrator is unable to predict with any confidence how any individual, including the grievant herein, will act in the future. To premise a resolution of the grievance herein on the arbitrator's estimate of how the grievant will comport himself in the future is to ground the outcome in clairvoyance and a crystal ball.

The Employer's action that has been grieved occurred on May 6, 2016 and that is the date upon which what was known or what should have been known by either or both parties is to be determined in resolving the dispute between the parties herein concerning the grievant's discharge. It is the conduct of the grievant prior to May 6, 2016 and what the Employer knew on or prior to May 6, 2016 that are the subjects of this proceeding, the subject matter that defines what is material and relevant to the issues raised by this proceeding.

Kenneth and Michelle Rausch were married in February, 2004 and they divorced in May, 2013. There is in the hearing record a number of text messages from Mr. Rausch to his ex-wife that were attached to two emails dated January 26, 2014. The content of the text messages attached to the two January 26, 2014 emails, text messages from Mr. Rausch to his ex-wife, included Mr. Rausch declaring his hope that the mother of his son would "fucking die" and Mr. Rausch promising his ex-wife that she did not know what Mr. Rausch was capable of, calling his ex-wife a "bitch" and "a worthless piece of shit." Some of these text messages also included a racial epithet, the term "nigger." The racial epithets used by Mr. Rausch referenced Rick Thomas who would become Michelle Thomas's husband in October, 2015.

There is a span of time in the hearing record that does not present any text messages or other messages between Mr. Rausch and Ms. Thomas. This time period begins with the text

messages attached to the two January 26, 2014 emails and extends to the text messages from Mr. Rausch directed to his ex-wife in December, 2015 and January, 2016. A voice mail message was recorded on Ms. Thomas's state telephone by Mr. Rausch on December 17, 2015. Some of the same content found in the 2013-2014 text messages from Mr. Rausch to his ex-wife appear in the voice mail message and the text messages from Mr. Rausch directed to his ex-wife in December, 2015 and January, 2016.

The December 17, 2015 voice mail message refers to Ms. Thomas as a "complete piece-of-shit parent to my son" and accuses Ms. Thomas of "violating all kinds of fucking custody agreements that we have."

Text messages sent by Mr. Rausch to Ms. Thomas in December, 2015 and January, 2016 included the command: "Die bitch" that appears twice in a text message chain, both at 9:19 p.m. Mr. Rausch explained at the arbitration hearing that the second transmission of "Die bitch" had not been intended but a mistaken transmission resulting from a texting error.

The grievant and the Union have argued in this proceeding that there were no threats of harm directed at Ms. Thomas by Mr. Rausch in any of the text messages sent in December, 2015 and January, 2016 or in the voice mail message recorded by Mr. Rausch on December 17, 2015 on Ms. Thomas's state telephone. Mr. Rausch testified at the arbitration hearing herein that he never intended to threaten his ex-wife through his text messages or his December 17, 2015 voice mail message but was simply venting his frustration at what he believed to be a purposeful and exasperating refusal by his ex-wife to honor the custody agreement between them that called for a telephone call to Mr. Rausch from his son every evening before the son's bedtime.

Everyone who reads the text messages from Mr. Rausch directed to his ex-wife in 2013, 2014, December, 2015 and January, 2016 will react to the content of these messages and form a

conclusion as to whether these messages are threatening, intimidating, or coercive. At the arbitration hearing Mr. Rausch provided his interpretation of the language he composed and sent to his ex-wife and stated whether he had intended these messages to be threatening, intimidating, or coercive. Mr. Rausch's opinions about the language he sent to Ms. Thomas and Mr. Rausch's assertions about his intentions in sending these messages were heard and considered but they do not determine this issue.

As the sender of the text messages and the recorder of the December 17, 2015 voice mail message the grievant is accountable to the recipient of these messages as she is. If the recipient of these text messages and the voice mail message felt threatened, intimidated, or coerced by these communications it is her reaction to these messages that were sent to and intended for her by Mr. Rausch that determines whether the text messages and voice mail message are to be considered threatening, intimidating, or coercive. If there is no basis for finding these messages threatening, intimidating, or coercive, that is, no reasonable person would react to the contents of the messages with foreboding or fear, the sender of these messages may be found to have committed no threatening, intimidating, or coercive act .

The hearing record presents the sworn testimony of Ms. Thomas who spoke of her reaction to the text messages she had received after hearing the December 17, 2015 voice mail message for the first time on December 18, 2015. Ms. Thomas's reaction to the most recent text messages prompted her to report the most recent text messages and the December 17, 2015 voice mail message because Ms. Thomas came to believe that the emotion exhibited in the angry tone and content of the text messages was escalating, the messages were threatening Ms. Thomas and her husband, and the angry communications from Mr. Rausch were beginning to intrude into the workplace, affecting Ms. Thomas's job performance at the Operations Support Center.

There is nothing unreasonable, capricious, or arbitrary about Ms. Thomas's reaction to the December 17, 2015 voice mail message and text messages directed to her by her ex-husband in December, 2015 and January, 2016. Ms. Thomas had encountered these types of text messages in the past, in 2013 and 2014. It does not seem merely coincidental that the messages resumed shortly after Ms. Thomas's marriage to Rick Thomas in October, 2015. In any event, Ms. Thomas received angry text messages from Mr. Rausch in 2013 and 2014, and was receiving them again in December, 2015 and January, 2016.

The December 17, 2015 voice mail message was heard by Ms. Thomas for the first time on December 18, 2015 and Ms. Thomas initially refrained from reporting this voice mail message to her employer. However, having received text messages from Mr. Rausch subsequent to the December 17, 2015 voice mail message that had included the command: "Die bitch," and having been described in the voice mail message once again as a "piece-of-shit parent," Ms. Thomas was moved to report the situation to her employer. Ms. Thomas was also moved in mid-January, 2016 to petition for a civil protection order from the Franklin County, Ohio Court of Common Pleas. The civil protection order sought by Ms. Thomas applied to Mr. Rausch. The civil protection order sought by Ms. Thomas was granted by the Court effective January 19, 2016. This civil protection order remains in effect today. Every action taken by Ms. Thomas in January, 2016 reflected a person who had feared what Mr. Rausch was planning based on the text messages and voice mail message that Mr. Rausch had directed to Ms. Thomas in December, 2015 and January, 2016, with prior text messages in 2013 and 2014 serving as background to the more recent communications.

The arbitrator finds the actions of Ms. Thomas in reaction to the text messages and voice mail message directed to her by Mr. Rausch in December, 2015 and January, 2016 to reflect a person who had found the text messages threatening, intimidating, and coercive. Because the effect

of these threatening, intimidating, and coercive messages were brought to bear on an employee of the Ohio Department of Rehabilitation and Correction, a violation of rule 18 of the Standards of Employee Conduct is proven. Rule 18 provides in the case of a first violation for a range of discipline that extends from a two-day suspension to a removal.

The placement of the profane, derogatory, and personal message left on the state telephone assigned to Ms. Thomas was a misuse of state property, namely a state telephone, a violation of rule 5b of the Standards of Employee Conduct, a rule that provides in the case of a first violation for a range of discipline that extends from a written reprimand to a one day suspension.

The arbitrator also finds it more likely than not that the threatening, intimidating, and coercive text messages directed to Ms. Thomas by Mr. Rausch affected, even compromised or impaired the ability of Ms. Thomas to effectively carry out her duties as a public employee. Ms. Thomas spoke of her fears of this personal situation spilling over into the workplace and cited it as one of the reasons she decided to report the situation to her employer on January 6, 2016. The arbitrator finds the conduct of the grievant, proven in this case by a preponderance of evidence, did violate rule 37 of the Standards of Employee Conduct for which a first violation calls for a range of discipline from a two-day suspension to a removal.

The arbitrator is less sure that Mr. Rausch's behavior constituted a threat to the security of the facility, staff, or individuals under the supervision of the Department, or a member of the general public as prohibited by rule 38 of the Standards of Employee Conduct. If the prohibition expressed in rule 38 is similar to that which is prohibited by rule 37, the violation of rule 38 is simply duplicative of the violation of rule 37. If rule 38, however, requires a showing of a connection between the conduct of the grievant and a breach in the security of the facility, staff, or inmates, such a showing is not made out by a preponderance of evidence in the hearing record.

The proven conduct of the grievant that is found to have violated rule 5b, rule 18, and rule 37 within the Standards of Employee Conduct opens the grievant to discipline by the Employer. The violation of these rules provides the just cause needed by the Employer to impose discipline as required by the language of Article 24, section 24.01.

Having proven misconduct on the part of the grievant, especially the threatening, intimidating, and coercive language directed to Ms. Thomas by Mr. Rausch in 2013, 2014, 2015, and 2016, the issue of the severity of the discipline imposed by the Employer arises, that is, whether the discipline imposed on the grievant is proportionate to the seriousness of the offenses that have been proven. The Union correctly points out that the grievant's disciplinary history includes a single written reprimand resulting from a tardy call off in 2015, and the grievant's sixteen year work record with the Employer is otherwise exemplary and highly valued.

The issue as to the discipline imposed upon the grievant does not ask the arbitrator to express or apply his own views on what discipline the arbitrator would have imposed on these facts. The arbitrator is required to consider the discipline imposed by the Employer and find whether that discipline is grounded in just cause, is based on proven misconduct that is sufficiently serious to support the level of discipline imposed, and determine whether the discipline imposed by the Employer presents an abuse of discretion as it was imposed arbitrarily or capriciously or with a discriminatory intention.

The Employer in early January, 2016 was made aware of an ongoing situation between Mr. Rausch and Michelle Thomas, and was apprised of the background to these events involving earlier text messages from Mr. Rausch directed to his ex-wife, Ms. Thomas, in 2013 and 2014. The Employer examined the recent text messages and voice mail message and was apprised of the earlier text messages and determined that the grievant had committed misconduct that was

sufficiently egregious to support the most severe discipline allowed under the rules violated.

The arbitrator finds nothing arbitrary or capricious or discriminatory in the Employer's exercise of its right to discipline for just cause. The arbitrator finds no abuse of discretion in the action taken by the Employer in this case. The express language in the parties' collective bargaining agreement was carried out in effecting the discharge of the grievant and in processing the grievance that was filed to challenge Mr. Rausch's removal. The hearing record shows the Employer has proven by a preponderance of the evidence that the grievant violated rules 5b, 18, and 37 of the Ohio Department of Rehabilitation and Correction's Standards of Employee Conduct and that the violation of rules 18 and 37 of the Standards of Employee Conduct provide for a range of discipline that includes removal for a first offense. The arbitrator finds no abuse of discretion on the part of the Employer in determining the level of discipline to impose upon the proven misconduct of the grievant. The arbitrator finds the Employer's determination that the misconduct of the grievant was sufficiently egregious to support discharge, on these facts, to be a valid and enforceable action of the Employer, grounded in just cause, and not in violation of the terms and conditions of employment presented in the parties' collective bargaining agreement.

Based on the foregoing, the arbitrator denies the grievance in its entirety.

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AWARD

1. The grievance at issue in this proceeding is arbitrable and properly before the arbitrator for review and resolution.
2. The grievant, Kenneth Rausch, was removed from his position as a Correctional Officer on May 6, 2016 for just cause.
3. The Employer presented to the hearing record preponderating clear and convincing evidence proving that grievant Kenneth Rausch violated rules 5b, 18, and 37 of the Ohio Department of Rehabilitation and Correction's Standards of Employee Conduct and that such misconduct presents just cause sufficiently serious to support the discharge of the grievant.
4. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire
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Columbus, Ohio
October 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Department of Rehabilitation and Correction, Ohio Reformatory for Women, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Grievant: Kenneth Rausch, Grievance Number: DRC-2016-01914-3, was served electronically upon the following this 18th day of October, 2017:

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October 18, 2017