IN THE MATTER OF ARBITRATION

BETWEEN

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

AND

OHIO DEPARTMENT OF TRANSPORTATION

Grievant: Lino Bartolozzi

Case No: 31-12-(03-26-08)-06-01-06

Date of Hearing: September 24, 2008

Place of Hearing: ODOT District 12

APPEARANCES:

#1013

For the Ohio Civil Service Employees Association:
Advocate: Lynn Kemp, Staff Representative
2nd Chair: Peggy Tanskley

For the Ohio Department of Transportation:
Advocate: Colleen Ryan, Labor Relations Officer
2nd Chair: Ed Flynn
Joe Trejo, Office of Collective Bargaining

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: November 6, 2008

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement (CBA) in effect March 1, 2006 through February 28, 2009 between the State of Ohio Department of Transportation (ODOT) and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO (Union).

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Lino Bartolozzi (Bartolozzi), for violating Ohio Department of Transportation Work Rule #3(C), making defamatory or false statements, and #6, threatening a supervisor, fellow employee or non-employee.

The removal of the Grievant occurred on or about March 21, 2008 and was appealed in accordance with Article 24 of the CBA. This matter was heard on September 24, 2008, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing oral arguments occurred on September 24, 2008 with the record being closed on that date. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Bartolozzi's date of hire was April 8, 1985. He was employed as a Signal Electrician I in District 12 for ODOT. Bartolozzi worked out of the Ridgeway Yard in Cuyahoga County and was responsible with other crew members for maintaining the lighting equipment on the roadways. Generally, Bartolozzi worked alone on his assignments, but he was required to work with other signal electricians from time to time. His immediate supervisor was Bryan Krall (Krall), at all times relevant herein.

The Grievant was removed for two reasons regarding conduct which occurred on February 1, 2008. The Grievant posted a picture from an article in the *Cleveland Scene* on a

soda machine in the break room at Ridgeway Yard. The picture accompanied an article on gang violence and was allegedly posted to intimidate or threaten a co-worker. The Grievant denied posting the material when originally interviewed during the investigation but later admitted that he did post it. At the time of his removal, Bartolozzi had two active ten-day suspensions and an EAP agreement in effect.

The Employer submits that Bartolozzi's co-workers were concerned for their safety and that no trust existed between the Grievant and management. The Employer further submits that this latest incident, coupled with the Grievant's prior active discipline, justified the removal.

The Union contends that the Grievant did not verbally or physically threaten anyone and that Bartolozzi voluntarily corrected his original untrue statement. The Union further argues that the Employer violated Article 24 when it failed to provide all of the investigatory information with the pre-disciplinary notice sent to Bartolozzi on March 10, 2008.

ISSUE

Was the Grievant removed for just cause, and, if not, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA AND ODOT WORK RULES

ARTICLE 24 – DISCIPLINE

24.01 – Standard

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04.

Employees of the Lottery Commission shall be governed by O.R.C. Section 377.02(1).

24.05 – Pre-Discipline (in part)

Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee prior to the meeting. In the event the Employer provides documents on the date of the meeting, the Union may request a continuance not to exceed three (3) days. Such request shall not be unreasonably denied. The Employer representative or designee recommending the discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-disciplinary meeting may be delayed until after disposition of the criminal charges.

DIRECTIVE NO. WR-101

3(C)	Making Defamatory or False Statements	Progression Reprimand/ Suspension	Suspension/ Removal	Removal
6.	Fighting/Striking with a Fellow Employee or Non-Employee on State Time or State Property. Threatening a Superior, Fellow Employee, or Non-Employee	Suspension/ Removal	Removal	

POSITION OF THE PARTIES

EMPLOYER'S POSITION

On February 1, 2008, Bartolozzi posted threatening material in the vending machine area directed at Calvin Schmidt (Schmidt), a co-worker. The material was a picture/poster from the

Cleveland Scene publication with the following printed words: ". . . Stop Snitchin – the gang responsible for Shawrica Lester's murder made one thing clear: you talk, you die." Also, handwritten at the top of the poster was "Snakeman." Robert Wagner (Wagner), co-worker, was in the vending area when Bartolozzi attached the picture/poster to the soda machine.

The Employer viewed the material as threatening on February 1, and immediately e-mailed Les Reel (Reel), Chief Investigator, to commence an investigation. (Joint Exhibit (JX) 5(B)(1)). On February 15, 2008, Reel interviewed Bartolozzi on two separate occasions.

The first interview began at 9:01 a.m., and Bartolozzi stated that the picture/poster was on the soda machine when he arrived that morning. He initially stated it was not his handwriting on the picture, but he later admitted that it was his handwriting. This interview concluded at 9:11 a.m.

The second interview began at 10:51 a.m., and Bartolozzi continued to assert the picture/poster was on the machine until Reel advised him that Wagner provided a statement that he witnessed Bartolozzi placing the picture/poster on the machine. At this point, Bartolozzi admitted to taping the article on the machine and indicated that Schmidt was trying to get him fired. (JX 5(H), pp. 1-11). Additionally, on February 1, 2008, Krall asked Bartolozzi if he had hung the picture on the machine and Bartolozzi replied, "I didn't do it." (JX 5(L), pp. 1-8).

Therefore, Bartolozzi's own admissions indicate that he knowingly gave false statements in this matter, in violation of Work Rule #3(C).

Regarding the threatening conduct, the Employer points out that Bartolozzi and Schmidt did not get along, and Schmidt had been avoiding the Grievant if at all possible for a long period of time. A major source of Bartolozzi's displeasure with Schmidt concerned an incident occurring in 2007. The Grievant was disciplined after an administrative investigation concluded

that Bartolozzi conducted personal business on state time and using a state vehicle. It was well known that Bartolozzi blamed Schmidt for informing ODOT of his conduct and often referred to Schmidt as "Snakeman" or "Snitch." Bartolozzi received a ten day suspension and also entered into EAP as a result of this investigation.

On February 1, 2008, Schmidt was informed by co-worker Wagner of the article in the vending area and believed that the reference to "Snakeman" was directed at Schmidt by Bartolozzi. Schmidt testified at the hearing that he was threatened and confronted Bartolozzi, who denied putting the article on the soda machine. Schmidt did not tell his supervisor about the incident but, instead, called the District Office and left a voice mail message for Tony Urankar (Urankar). (JX 5(J), p. 3).

Krall, who supervised both Schmidt and Bartolozzi, was aware that friction existed between them. Bartolozzi made it known to him on at least two occasions that he was upset at Schmidt for his suspension. Bartolozzi constantly had a bad attitude, and Krall had heard both refer to each other as a "snitch" or "snake." Krall testified that he told both Schmidt and Bartolozzi to stop the name calling. Krall finally indicated that a lot of his employees expressed concerns about working with Bartolozzi, primarily due to his attitude.

In addition to Schmidt, the Employer presented other co-workers who were reluctant to work with Bartolozzi because of his angry disposition and moody behavior. Co-workers Neil Boyle (Boyle) and Wagner expressed concern about working with Bartolozzi due to his attitude and "me first" behavior. Supervisor Krall expressed dire concerns if Bartolozzi and Schmidt were required to work together again in Cuyahoga County. (JX 6(L), p. 8). Krall summarized the issue when he testified that Bartolozzi was not a team player, acted uncooperatively with co-workers, and his attitude became progressively hostile after his suspension.

Regarding the Union's position on Article 24 as to ODOT's failure to provide documents, such as Reel's investigative report and witness list, when the pre-disciplinary notice was mailed to Bartolozzi on March 10, 2008, the Employer provided the documents at the pre-disciplinary meeting which occurred on March 13, 2008. Ron Wiech (Wiech), Labor Relations Officer (LRO), admitted that he was unaware that he was required to provide the investigative report prior to the pre-disciplinary meeting, but that he probably provided the report to the Union at the pre-disciplinary meeting and certainly did at the Step 3 meeting. The Step 3 Hearing Officer concluded that the Employer ". . . should have provided a copy of the investigation report at the time the pre-disciplinary notice was sent to the Grievant. However, this problem could have been resolved at the pre-disciplinary meeting. The Union could have requested a continuance. I find that the Union's arguments would not have changed with the support of the investigation report and they had a full hearing . . . " (JX 2, Step 3 Decision). Therefore, Article 24 was not violated by the Employer's conduct, and just cause existed for the removal.

UNION'S POSITION

Bartolozzi, a twenty-three (23) year employee, was removed without just cause under the facts in this matter. Bartolozzi received good-to-above-average performance evaluations from supervisor Krall at all relevant times in this matter except the last evaluation of February 12, 2008.

Regarding the threat allegation, the Grievant admitted posting and writing the word "Snakeman" on the article during the second interview with Reel. The Grievant maintains that he was known as "Snakeman" and the notation was directed to himself, not Schmidt. The Grievant testified that he was confused when initially interviewed by Reel and simply failed to

tell the truth. The Grievant does not deny that he told Krall and Leo Circirella (Circirella) on February 1, 2008 that he did not put the picture/poster on the soda machine.

Regarding whether Schmidt was actually threatened by the article, Schmidt confronted the Grievant in the vending area after Wagner informed him of the article. According to Bartolozzi, Schmidt approached him, using vulgar language and said among other things " . . . you looser (sic) I should beat the shit out of you, but you would sue me . . ." (JX 5(E)). On February 1, 2008, Bartolozzi provided a written statement of that incident to LRO Wiech to investigate.

Schmidt did not inform his supervisor that he felt threatened on February 1, 2008 but, instead, made an anonymous phone call to the district office and left a voice message on Urankar's phone. (JX 5(J), p. 5). On cross-examination, Schmidt testified that he failed to leave his name because he was upset and believed that his voice was known to Urankar. Schmidt's actions fail to demonstrate that he felt threatened in any manner. Moreover, the Employer offered no evidence that Bartolozzi verbally or physically threatened anyone as a result of his behavior.

The Grievant testified that he and Schmidt were social friends at one time but that their relationship had become adversarial over time. As to co-workers not wanting to work with Grievant because of his poor attitude, witnesses Michael Stansell (Stansell) and Gerald Ullman (Ullman) indicated otherwise.

Stansell and Ullman had worked around the Grievant for over twenty years and had a good relationship with him. Both testified that the Grievant and Schmidt were always using inappropriate language toward each other. Their contempt for each other was known throughout

the department, and they were considered equal combatants. Simply, they did not have a good relationship at work.

Supervisor Krall, upon cross-examination, testified to Bartolozzi's performance evaluations conducted from 2003 until the removal. (JX 10(A), (B), (C), (D), (E)). On February 15, 2008, supervisor Krall's overall rating for the previous year was unsatisfactory, due to the Grievant receiving "does not meet", i.e., lowest rating, in four out of seven dimensions (content areas) (JX 10(A)). Supervisor Krall indicated that the February 15, 2008 evaluation was not the original evaluation that he prepared. Rather, he was directed by management to revise (JX 10(A)) his original evaluation because he did not have any "does not meet" ratings on the Grievant's 2007-2008 evaluation. Also, a review of the preceding evaluations for years 2003-2006 fails to reveal low marks attributable to the Grievant's confrontational style with either management or co-workers. (JX 10(B), (C), (D), (E)).

The fairness and objectiveness of the investigation is questioned by the Union in two key areas. First, the Grievant informed Krall verbally prior to February 1, 2008 that Schmidt had been verbally abusive toward him in the past. Additionally, on February 1, 2008, the Grievant presented a written complaint to LRO Wiech containing specific allegations of potential threatening conduct by Schmidt toward the Grievant. (JX 5(E)). LRO Wiech sent the Grievant's complaint to investigator Reel. Reel did not investigate any of the Grievant's written allegations or mention the Grievant's complaints in his investigative report. (JX 5(A-M)). The alleged mistreatment by Schmidt of the Grievant was a mitigating circumstance, and the Employer was obligated to investigate the Grievant's complaints. The Employer's failure to be fair and objective in the investigation erodes one of the standards of just cause.

Finally, the Employer committed a due process violation under Article 24 when it failed to provide a witness list and documents ". . . known at that time used to support the possible disciplinary action." (CBA Article 24.05 (in part)). Reel's investigative report was completed on March 4, 2008 (JX 5(A-M)). The pre-disciplinary notice was sent to the Grievant on March 10, 2008, (JX 4) indicating that ODOT was considering disciplinary action against him for violations of WR-101, Items 3(B) and 6. No document or witness list was attached to the pre-disciplinary notice. The Grievant testified that he was only shown the picture/poster at the pre-disciplinary meeting. The failure of the Employer to comply with Article 24.05 is a serious due process violation and compromised the Grievant's ability to "refute or rebut any of the charges against him." (Union Opening Statement, p. 3).

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony and the exhibits presented at the hearing, the grievance is sustained in part and denied in part. My reasons are as follows:

The evidence is clear that, on February 1, 2008, Bartolozzi placed the picture/poster on the soda machine. It is also unrefuted that Bartolozzi had written "Snakeman" on the picture. The Employer points out that the inflammatory nature of the words "You talk, you die" and "Stop snitchin'" were directed to Schmidt due to the parties' ongoing animosity toward each other. Schmidt saw the picture after being informed by co-worker Wagner that Bartolozzi had put it up. Schmidt testified that he was threatened by the picture and reported it to the district office. However, Schmidt reported this "threat" by leaving an anonymous voice mail on Urankar's office phone (JX 5(B)(1)). Schmidt also testified that he directly confronted Bartolozzi in the vending machine area that morning to discuss the posting. According to Bartolozzi, Schmidt asked if the Grievant was threatening him, and Schmidt used vulgar

language several times toward the Grievant. The evidence fails to indicate that during this confrontation in the vending room Bartolozzi engaged in any menacing or threatening behavior toward Schmidt.

Based upon the facts, I find that Schmidt's initial response to the posting fails to demonstrate any fear or apprehension on his part. In fact, Schmidt's reaction in directly confronting the Grievant in the break room underscores his combatant nature, and his actions were inconsistent with someone allegedly in fear or apprehension. Despite my finding that Schmidt did not act as if he felt threatened, the evidence does support a finding that just cause exists for discipline under Rule #6 because it was the clear intent of the Grievant to threaten Schmidt.

The Grievant testified that the handwritten word "Snakeman" was, in fact, referring to himself. Several witnesses testified that they had heard both the Grievant and Schmidt referring to each other as "Snitch" or "Snake" from time to time. Therefore, the Grievant's version would require some proof that the posting was put up by the Grievant in reference to himself. No version of the evidence exists to allow an inference that the picture was posted in the workplace to enable the Grievant to "intimidate" himself. If that was his intent, why didn't the Greivant put the poster up in his house, his car or any other personal space away from the work site? The Grievant intentionally affixed the poster in an attempt to further dig at Schmidt. The poster, as modified and put up by Grievant, is offensive and was intended to threaten and intimidate Schmidt. Given, however, the plethora of other circumstances present in this matter, just cause exists for discipline for a Rule #6 violation, but not for removal.

Regarding Rule #3(C), it is unrefuted that, during the initial interview with Investigator Reel and verbal conversations with Managers Cicirella and Krall, the Grievant denied putting up

the poster. The Grievant's subsequent admission to Reel does not abrogate his initial false statements provided during an official investigation. The Grievant's admission supports a finding of just cause with the first offense carrying a disciplinary range from reprimand to unspecified suspension. However, given the state of this record, Grievant's violation of #3(C), even when coupled with the violation of #6, fails to support removal as an appropriate discipline.

The Union raised several arguments in Grievant's defense and as mitigating circumstances to reduce or overturn the removal: inadequate investigation; failure to comply with Article 24.05; good performance evaluations except for the one dated February 12, 2008; ample length of service; and no violations of the EAP agreement executed on August 15, 2008 (JX 8).

With respect to the initial investigation on February 1, 2008, Grievant provided the Employer a document on that date that alleged Schmidt had engaged in conduct on the job that was directly threatening (JX 5(E)) to Grievant. LRO Wiech testified that he forwarded the document to Investigator Reel for follow up. Upon cross-examination, Reel testified that after he became engaged in the picture/poster investigation, his "focus" was only on that matter. In other words, none of the Grievant's February 1st allegations were investigated along with the picture/poster matter or subsequent to it. Considering the nexus between the Grievant and Schmidt and that the allegations underlying the investigation all occurred on February 1, a prudent approach would indicate that a fair investigation would have inquired into this matter and not have been dismissive of Grievant's concerns. Given that all of the relevant individuals were interviewed after the Grievant's complaint on February 1, 2008, this issue should have been included as well.

The Union also contends that Article 24.05 was violated when the pre-disciplinary notice was void of any documents or witness list to support the alleged violations of Rules #3(C) and/or #6. The Employer does not contest that fact, but concluded at Step 3 that the Union could have sought a continuance at the pre-disciplinary hearing and the Union's argument(s) would have been the same if Reel's investigation report had been provided. Article 24.05 provides that if ". . . the Employer provides documents on the date of the meeting . . ." the Union may request a continuance of the pre-disciplinary hearing. However, a sentence preceding the above is specific and governs the facts in this matter. It provides:

> When the predisciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known at that time used to support the possible disciplinary action. Article 24.05 (Emphasis added).

The pre-disciplinary notice was sent on March 10, 2008, (JX 4) and the investigative report was completed on March 4, 2008 (JX 5(A-M)). The Employer is contractually required to provide the information upon which it relied to the Grievant and the Union. The testimony of LRO Wiech indicates that the notice failed to include any documents or witness list. According to Wiech, he provided some of the witnesses' interviews and believed he provided the investigative report to the Union representatives during the pre-disciplinary meeting. However, at the Step 3 meeting which occurred on April 8, 2008, Wiech provided a copy of the investigative report to Union representative, Lynn Kemp (Kemp).

The facts are unrefuted that the Employer failed to provide any documents or witness list before the pre-disciplinary hearing. The Employer was contractually required to provide witness statements and/or other documents relied upon to support the anticipated disciplinary action. OCSEA & Ohio-Department of Youth Services, 35-16 (90-05-02) 0032-01-03 (Rivera, 1990). In OSCEA & Ohio-Department of Youth Services, Arbitrator Rivera interpreted identical

language, concluded that the "contract section is clear and unmistakable . . .", and then determined that the Employer committed a fatal error through its non-compliance. I concur and have reached a similar conclusion herein. The record is silent as to any evidence which provides a legal or contractual basis to withhold the investigative report or witness statements before the pre-disciplinary hearing, and the Employer erred by doing so.

The next issue involves the annual performance evaluations Krall issued to Grievant from 2003 through 2008. Nothing on the performance evaluations -- until the annual evaluation dated February 12, 2008 -- warrants an unsatisfactory evaluation or can be viewed as generally negative. In fact, the Grievant received satisfactory evaluations for four (4) consecutive years prior to the February 12, 2008 evaluation (JX 10(B)(C)(D)(E)).

All of the Grievant's evaluations were prepared by Krall, his immediate supervisor. Krall testified that he had completed the Grievant's annual evaluation for the preceding twelve months prior to February 12, 2008 but that he was then directed by his superiors to alter the evaluation. As a result of the forced changes, Krall's revised evaluation now contained four (4) does not meet areas whereas his original evaluation had none. The revised document rated the Grievant poorly in the following areas: teamwork/cooperation; communication; using equipment; and customer service. Consequently, the Grievant's overall ratio went from satisfactory to unsatisfactory. No evidence exists indicating that the Grievant received any prior written counseling from his supervisor in the performance areas for which he received the rating "does not meet." The Employer's actions in obtaining a pre-determined result undermined the evaluation process and rendered the February 12, 2008 evaluation useless and unreliable. Therefore, JX 10(A) has no evidentiary value whatsoever.

Finally, the Union properly indicates that the Grievant, as a long-term employee with good evaluations, was entitled to receive some deference from the Employer and that Grievant has not violated the EAP agreement. The Grievant's active discipline of record involved conduct different than that contemplated by #3(C) and #6 and what is at issue here. It is obvious that the Grievant and Schmidt have issues with each other that were not properly addressed by the Employer. Witnesses from both sides, including management, were aware of their animus toward each other. The Employer was complicit in not addressing the conduct or performance issue of the Grievant and Schmidt which escalated overtime and culminated in the February 1, 2008 incident(s).

A concern of significance to this Arbitrator is the failure of the Employer to advise the Grievant of the specific nature and purpose of the interviews during either of the investigatory meetings conducted by Reel on February 15, 2008. During the first interview, Reel apparently possessed information that strongly suggested that the Grievant had placed the picture on the machine. Reel told the Grievant on two occasions during that initial interview that another individual had observed him taping the picture on the machine (JX 5(F), pp. 3, 5). The individual referred to by Reel is Wagner. On February 7, 2008, Wagner provided a written statement that he had witnessed the Grievant taping the picture on the machine (JX 5(D)).

During the second interview, Reel again confronted the Grievant with Wagner's information (JX 5(H), pp. 3-5). At no time during either interview did the Grievant request Union representation, nor did Reel threaten to discipline the Grievant. However, these purported "investigatory interviews" were used by the Employer to assess the credibility of the Grievant in relation to evidence it already had in its possession accusing him of posting threatening material

in the break room and served as the basis for the Employer's charge that Grievant provided false/defamatory statements.

Given the state of the facts known to the Employer at the time of the interviews, the Employer, at a minimum, should have advised the Grievant of the disciplinary nature and purpose of the interviews. Had he been fully apprised of that information, the Grievant may have requested a witness or Union representation during the interview(s) and an entirely different result may have occurred.

The Grievant's length of service, quite frankly, has not been all good service, as indicated by his current active disciplinary record. However, the Employer was required to monitor and progressively address behaviors of both the Grievant and Schmidt regarding its rules that govern the workplace environment. It did not do so here.

Based upon the above, this Arbitrator finds that the following mitigating circumstances require the reduction of the excessive discipline imposed by the Employer: its violation of Article 24.05; its failure to conduct a thorough investigation; the unreliability of the February 12, 2008 performance evaluation; and its tolerance of a workplace environment that encouraged, in part, the Grievant's behavior.

Given the state of the record, the remedy is as follows:

1. Removal reduced to a suspension;
2. Reinstatement, without back pay or any other economic benefit, effective the date of this decision;
3. Grievant is to be placed on paid administrative leave, effective the date of this decision, that will continue until he has attended and successfully completed an

Ohio EAP-designed comprehensive anger-management program for a minimum of twenty consecutive work days;

4. Upon Grievant's successful completion of the EAP anger-management program, he shall be immediately placed in his prior position with the Employer;

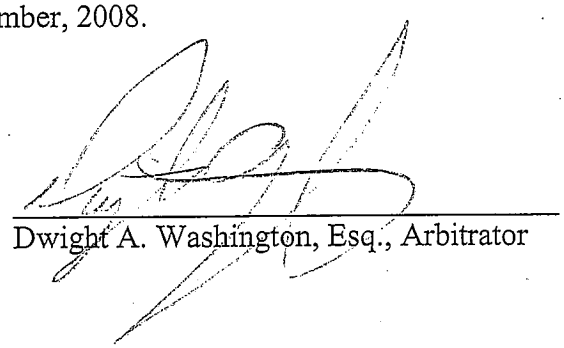
5. If the Grievant fails to successfully complete the EAP program, his removal shall be immediately reinstated;

6. All benefits and insurance shall be reinstated effective the date of this decision;

7. Employer shall have the EAP program available and in effect on or before November 21, 2008; and

8. This Arbitrator retains jurisdiction over this matter for a period of six months.

Respectfully submitted this 6th day of November, 2008.



Dwight A. Washington, Esq., Arbitrator