

#1124

**OPINION AND AWARD**

**IN THE MATTER OF THE ARBITRATION BETWEEN**

**OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS (DEPARTMENT OF YOUTH SERVICES)  
-AND-  
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION (AFSCME, LOCAL 11 AFL-CIO)**

**APPEARANCES**

**FOR DYS**

Nina Belli, Investigator  
Ronald Bickers, Facility Intervention Administrator  
Larry L. Burke, Labor Relations Officer 3/EEO  
Victor Dandridge, Labor Administrator  
Pat Mogan, Labor Relations Officer 3 (Advocate)  
Cassandra Price, Labor Relations Officer 2  
Reed Smith, Witness

**FOR OCSEA**

Belinda Bradley, Grievant  
Russell Burkepile, OCSEA Staff, 2<sup>nd</sup> Chair  
Jennie Lewis, OCSEA Staff Rep., Lead Advocate  
Adam Ruth, Observer  
Tanya Serrell, Observer  
Karl Wilkins, Jr., Chapter President (Scioto Village)

**CASE-SPECIFIC DATA**

**HEARING HELD**

September 16, 2013

**GRIEVANCE NUMBERS**

UNION (35-07-13-02-05-0005-01-03)  
MANAGEMENT (35-07-20130205-0005-01-03)

**CASE DECIDED**

December 4, 2013

**SUBJECT**

Termination/ Physical Assistance for Fellow Officer

**DECISION**

**Fatal Procedural Error: Merits Not Addressed: Grievance Sustained**

RECEIVED / REVIEWED

DEC - 5 2013

OCSEA OFFICE OF  
GENERAL COUNSEL

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**I. THE FACTS**  
**A. INTRODUCTION**

1  
2  
3  
4 The parties to this contractual dispute are the Ohio Department of Youth Services (“Agency”  
5 “DYS”) and the Ohio Civil Service Employees Association (“OCSEA” “Union”), representing Ms.  
6 Belinda Bradley (Grievant).<sup>1</sup> DYS is a juvenile facility that houses Ohio’s juvenile felonious inmates  
7 ranging from 10-20 years of age. As a Branch of DYS, Scioto Juvenile Correctional Facility (SJCF)  
8 houses Ohio’s worst juvenile offenders. SJCF classifies its inmates as follows: (1) Minimum security-  
9 lowest custodial level/highest degree of liberty; (2) Medium security-enhanced custodial  
10 level/decreased liberty; (3) Close security-highest custodial level/lowest degree of liberty.

11 DYS decided to discharge the Grievant on January 30, 2013 (effective February 5, 2013) for the  
12 violating several work rules.<sup>2</sup> When DYS removed the Grievant, she was classified as a Youth  
13 Specialist with approximately twelve years of service, no active discipline, and a satisfactory record of  
14 performance.<sup>3</sup>

15 The Use of Force SOP, is an essential aspect of DYS institutional staff training and promotes a  
16 safe environment for staff, youth and visitors. Accordingly, all DYS institutional staff, including the  
17 Grievant,<sup>4</sup> must attend annual quarterly sessions of Use of Force SOP training. At least one of those  
18 sessions reviews the Use of Force policy.<sup>5</sup>

19 **B. ORIGIN OF INSTANT DISPUTE**

20 The Grievant’s problems began on the evening of September 5, 2012 when she was working an  
21 overtime shift on the podium in the Jefferson Unit, which houses only close-security-level juvenile  
22 offenders. During the Grievant’s shift, three male, “gang banger,” juvenile inmates,<sup>6</sup> following the  
23 orders of their gang leader(s), viciously assaulted Unit Manager Jodi Dawson in her office,<sup>7</sup> repeatedly

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<sup>1</sup> Hereinafter referenced as, “The Parties.”

<sup>2</sup> Joint Exhibit 2, at 9.

<sup>3</sup> Joint Exhibit 2, at 2.

<sup>4</sup> See Management Exhibit 1, containing the Grievant’s signature and establishing that June 15, 2012 (three months before Ms. Dawson’s assault) the Grievant had accumulated eight hours of MYR training.

<sup>5</sup> Joint Exhibit 16, at 10.

<sup>6</sup> The Arbitrator omitted the names of the three youths because the Parties will likely publish this opinion, and the Undersigned is unfamiliar with any rules governing public disclosure of youths’ identities.

<sup>7</sup> Unfortunately, such violence is relatively common at SJCF.

1 punching and kicking her. As the staff member closest to Ms. Dawson’s office, the Grievant was in the  
2 best position to observe the entire assault. However, the Grievant never entered Ms. Dawson’s office to  
3 assist her during the brutal assault. Instead, the Grievant hit her “Man-Down” alarm, alerting other staff  
4 members to an ongoing emergency. Meanwhile, the Grievant yelled verbal commands to the juvenile  
5 offenders from the doorway of Ms. Dawson’s office.

6 Former Youth Specialist Reed Smith was the first staff to arrive at the scene. He brushed past the  
7 Grievant and pulled youth Anderson away from Ms. Dawson who was seriously injured. He later  
8 reported that the Grievant had “a look of panic” when he arrived on the scene, and he never saw the  
9 Grievant inside Ms. Dawson’s office.

10 Meanwhile, other juvenile offenders approached Ms. Dawson’s office. To avoid possible  
11 escalation of the violence, the Grievant ordered them to the return to the entryways of their rooms, per  
12 Agency rules. The Grievant, with staff assistance, secured the juveniles in their rooms. The day after  
13 the assault, the Grievant actually helped to restrain another juvenile offender.

14  
15 In a letter dated November 29, 2012, the Agency charged the Grievant with the following  
16 violations:

- 17  
18 1. Rule 5.01P Failure to follow policies and procedures (Specifically: ODYS Policy  
19 103.17—General Work Rules (Responsiveness)  
20 SOP 301.0 5.01—Use of Force, including: Attachment (G) (Youth Resistance  
21 Grid)  
22 2. Rule 5.12P Actions that could harm or potentially harm an employee, youth, or a member  
23 of the general public  
24 3. Rule 5.26P Failure to report a procedural violation of Managing Youth Resistance Policy  
25 and Procedures (Rule 5.25P) OR Submitting an incomplete and/or  
26 false report of a procedural violation of Managing Youth Resistance Policy  
27 and Procedures (Rule 5.25 P).  
28 Failing to report are not competing a report per Report Writing training (refer  
29 to Standard Operating Procedure 301.0 5.01).<sup>8</sup>

### 30 C. PROCEDURAL BACKGROUND

31 An administrative investigation was launched on September 7, 2012<sup>9</sup> and concluded on or about

<sup>8</sup> Joint Exhibit 3, at 2-3

<sup>9</sup> Joint Exhibit 4, at 1.

1 October 26, 2012.<sup>10</sup> The Agency held a pre-disciplinary meeting on December 4, 2012.<sup>11</sup> During that  
2 meeting the parties presented the evidence and arguments to a hearing officer school. In a letter dated  
3 December 5, 2012 Ms. Karen M. Lahman, LPCC sent a letter to Mr. Ziegler, attempting to explain  
4 why the Grievant did not physically intervene during the assault on Ms. Dawson and asking the  
5 Agency to spare the Grievant's job.<sup>12</sup> Nevertheless, on December 21, 2012, seventeen days after the  
6 pre-disciplinary hearing, the Pre-disciplinary Hearing Officer found cause to discipline the Grievant.<sup>13</sup>  
7 The Agency elected to discharge her and issued a formal "Order of Removal" that was signed on  
8 January 30, 2013,<sup>14</sup> fifty-seven days after the pre-disciplinary hearing. On February 1, 2013, the  
9 Grievant was hospitalized, and that same day the Union notified the Agency of the Grievant's  
10 hospitalization. The hospital released the Grievant on February 2, 2013, and the Agency notified her  
11 of her removal on February 5, 2013, *sixty-three* days after the pre-disciplinary hearing.<sup>15</sup>

12 On February 5, 2013, the Union issued Grievance No. 35-07-20130205-0005-01-03  
13 ("Grievance"), challenging the Grievant's removal as not for just cause.<sup>16</sup> The Parties held a Step-3  
14 Grievance Hearing on March 29, 2013; the Agency denied the Grievance in a letter dated April 11,  
15 2013.<sup>17</sup>

16 The Parties were unable to resolve the dispute and elected to arbitrate it before the Undersigned  
17 who heard the matter on September 16, 2013 at SJCF. At the outset of those proceedings, the Union  
18 alleged that the Agency had committed a fatal procedural error by not notifying either the Union or the  
19 Grievant until 63 days after the pre-disciplinary hearing, thereby violating the contractually required  
20 sixty-day window. That procedural error, if established, effectively deprives the Undersigned of  
21 jurisdiction in this dispute.

22 Ultimately, the Parties agreed to: (1) present the merits of the case; (2) submit closing arguments

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<sup>10</sup> Joint Exhibit 4, at 30.

<sup>11</sup> Joint Exhibit 2, at 1.

<sup>12</sup> Joint Exhibit 2, at 8.

<sup>13</sup> Joint Exhibit 2, at 7.

<sup>14</sup> Joint Exhibit 2, at 9.

<sup>15</sup> *Id.*

<sup>16</sup> Joint Exhibit 3, at 1.

<sup>17</sup> Joint Exhibit 3, at 2-3

1 on the merits; and (3) submit post-hearing evidence and closing arguments on the procedural issue.  
2 The Parties also agreed that if the Union establishes the alleged procedural error, the Undersigned shall  
3 dismiss this dispute without addressing the merits thereof. If, on the other hand, the Union does not  
4 establish the alleged procedural, then the Undersigned shall resolve this dispute on the merits and  
5 substance.

6 **D. THE HEARING**

7 When they presented their cases in the arbitral hearing, the Parties' advocates made opening  
8 statements and proffered documentary/testimonial evidence supporting their positions in this dispute.  
9 All documentary evidence was available for proper and relevant challenges; all witnesses were duly  
10 sworn and subjected to both direct and cross-examination. The Grievant was present throughout the  
11 proceedings. At the close of the hearing, the Parties agreed to submit all relevant materials pertaining  
12 to the procedural issue as well as Post-hearing Briefs, addressing both procedural arbitrability and the  
13 merits. Upon receipt of those materials, the Undersigned closed the arbitral record on October 10,  
14 2013.

15 **II. THE ISSUES**

16 **A. PROCEDURAL ISSUE**

17 Whether the Agency timely notified either the Grievant or the Union of the Grievant's termination.

18  
19 **B. MERITS-BASED ISSUE**

20 Whether the Agency terminated the Grievant for just cause. If not what shall be the remedy?  
21

22 **III. RELEVANT CONTRACTUAL AND REGULATORY PROVISIONS**

23 **ARTICLE 24.06 IMPOSITION OF DISCIPLINE**

24 The decision on the recommended disciplinary action shall be delivered to the employee, if available,  
25 and the Union in writing within sixty (60) days of the date of the pre-disciplinary meeting, which date  
26 shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within  
27 the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union  
28 shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day  
29 requirement will not apply in cases where a criminal investigation may occur and the Employer decides  
30 not to make a decision on the discipline until after disposition of the criminal charges.  
31

32 **IV. SUMMARIES OF THE PARTIES' PROCEDURAL ARGUMENTS**

33 **A. SUMMARY OF THE UNION'S PROCEDURAL ARGUMENTS**

- 34 1. The Agency had ample time to notify the Grievant of its disciplinary decision within the sixty-day  
35 contractual window.  
36 2. The Parties did not mutually agree to modify the sixty-day contractual time limit within which the  
37 Agency must notify the Union of Management's disciplinary decisions.

- 1 3. The Parties amended the Collective-bargaining Agreement, taking pains to adopt a sixty-day  
2 window to replace the old forty-five-day window, which Management continually violated.  
3 Article 24.06 explicitly and emphatically mandates the Agency to notify either the Grievant, the  
4 Union, or both of its disciplinary decision *no later than* sixty days *after* pre-disciplinary hearings.
- 5 4. Union officials were available to receive the Agency's disciplinary decision within the sixty-day  
6 window.
- 7 5. The Grievant was available to receive Management's disciplinary decision on February 1 and 2,  
8 2013, fifty-nine days after the pre-disciplinary hearing.

9  
10 **B. SUMMARY OF THE AGENCY'S PROCEDURAL ARGUMENTS**

- 11  
12 1. The Grievant failed to notify the Agency of her hospitalization, thereby violating the Agency's Call-  
13 In Rule, constructively abandoning her job, and preventing the Agency from timely notifying her of  
14 Management's disciplinary decision. The Agency telephoned the Grievant and left voicemails  
15 before the sixty-day window had closed. The Grievant responded to neither the telephone calls nor  
16 the voicemails.
- 17 2. Approximately 2.5 years ago, the Parties adopted a past practice of notifying the Union of  
18 Management's disciplinary decisions only after it had notified the Grievant thereof. This practice  
19 obtains even if that means that the Agency does not notify the Union of its decision within the  
20 sixty-day contractual window.
- 21 3. Management has presented the following evidence that establishes the existence of the  
22 aforementioned past practice:
  - 23 a. Affidavits from institutional Labor Relations Officers, attesting to the practice of first notifying  
24 grievants of disciplinary decisions before notifying unions of those decisions. See Attachment  
25 A.
  - 26 b. Since January 2011 90% of all agencies' disciplinary orders revealed no union signatures. See  
27 Attachment B. Furthermore, nothing in the arbitral record establishes that the Union has  
28 received written notice of discipline before the same was issued to employees.
- 29 4. By failing to address, let alone rebut, the affidavits, the Union essentially concedes the validity of  
30 the Agency's evidence.
- 31 5. The Union's arbitral precedent is inapplicable because it contains no managerial arguments of a  
32 past practice.
- 33 6. How Arbitration Works (Elkouri & Elkouri (sixth edition)) embraces the following as attributes  
34 that establish the existence of a past practice:
  - 35 a. "Unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period  
36 of time as a fixed, and established practice accepted by both parties."
  - 37 b. "Clarity, consistency, and acceptability." "The lack of bilateral involvement should not  
38 necessarily be given controlling weight." The weight to be accorded past practice as an  
39 interpretive guide may vary greatly from case to case. . . . Unilateral interpretations might not  
40 bind the other party. However, continued failure of one party to object to the other party's  
41 interpretation is sometimes held to constitute acceptance of such interpretation so as, in effect,  
42 to make it mutual. . . . [C]laims of lack of knowledge often carry relatively little weight and a  
43 party may be 'assumed' to know what is transpiring, or . . . The party knew or should have  
44 reasonably known' of the asserted practice.

45 **V. EVIDENTIARY PRELIMINARIES**

46 Because the Union alleged a procedural error, it has the burden of proof. Specifically, the  
47 Company has the burden of persuasion (risk of non-persuasion) and, hence, must establish the existence

1 of the procedural error by preponderant evidence in the arbitral record as a whole. Doubts about proof  
2 of that error will be resolved against the Union. Similarly, the Agency shoulders the burden of  
3 persuasion (risk of non-persuasion) regarding its allegations and affirmative defenses, doubts about the  
4 proof of which will be resolved against the Agency.

## 5 **VI. DISCUSSION AND ANALYSIS**

### 6 **A. PROCEDURAL ARBITRABILITY—TIMELINESS OF THE AGENCY’S DISCIPLINARY NOTIFICATION**

7 At the outset of the arbitral proceedings, the Union alleged that the Agency had committed a  
8 fatal procedural error under the Collective-bargaining Agreement by untimely notifying the Union and  
9 the Grievant of its disciplinary decision.

### 10 **B. The Parties’ Procedural Positions**

#### 11 **1. The Union’s Procedural Contentions**

12 The Union offers several arguments in support of the alleged procedural error. First, the Union  
13 stresses that the sixty-day window in the current Contract reflects the Parties’ considerable efforts to  
14 adopt a sixty-day window of notification for disciplinary decisions because Management frequently  
15 violated the previous forty-five day window. Second, the Union urges that during the sixty-day  
16 window Management knew of the Grievant’s hospitalization on February 1, 2013 and of her release on  
17 February 2, 2013. Hence, according to the Union, Management could have delivered its disciplinary  
18 decision on either of those days. Furthermore, in the Union’s view, Management could have timely  
19 delivered its decision to Union personnel on either February 1, 2013 or February 2, 2013. The Union  
20 also stresses that Article 24.06 *explicitly* requires the Agency to deliver disciplinary decisions to either  
21 the Grievant, the Union, or both within the sixty-day window. Finally, the Union insists that the Parties  
22 never *mutually agreed* to deliver its disciplinary decisions to employees *before* delivering those  
23 decisions to the Union.

#### 24 **2. The Agency’s Procedural Contentions**

25 The Agency concedes that it missed the sixty-day contractual window for notifying either party.  
26 Still, it counters with essentially two arguments: (1) The Grievant failed to notify Management of her  
27 whereabouts, thereby preventing Management from timely delivering the penalty decision; (2) the



1 Parties adopted a past practice of not delivering disciplinary decisions to the Union until they are  
2 delivered to grievants.

3 **C. Overview of Specific Evidentiary Considerations**

4 Ultimately, the Union must establish the alleged procedural error. In this respect, the Union has  
5 established a prima facie case of the alleged procedural violation by: (1) referencing the sixty-day  
6 window in Article 24.06; and (2) establishing that the Agency delivered its penalty decision after the  
7 sixty-day procedural deadline. Once that prima facie case is established, the burden of persuasion shifts  
8 to the Agency to establish its allegations of interference by the Grievant and of a past practice  
9 modifying the sixty-day window. To prevail on the procedural issue, the Agency must establish *both* of  
10 its allegations because Article 24.06 facially and explicitly recognizes the Grievant and the Union as  
11 entitled recipients of the Agency's penalty decisions within the sixty-day timeframe. Consequently, the  
12 ensuing analysis focuses on the Agency's contentions because they must overcome contractual  
13 language that appears to be clear and unambiguous regarding the Agency's sixty-day duty of  
14 notification.

15 **D. Assessing the Parties Procedural Arguments**

16 **1. Grievant's Role in Management's Tardy Notification**

17  
18 Here, the Union essentially claims that the Agency had ample opportunity to satisfy its  
19 contractual notification obligation, stressing the Grievant's hospitalization and release on February 1  
20 and 2, respectively. In addition, the Union emphasizes that Union President Carl Wilkins notified  
21 Management of the Grievant's hospitalization and release. Furthermore, the Union observes that  
22 despite the Agency's claim that the Grievant violated the call-In Policy and, thereby, constructively  
23 abandoned her position, the Agency, nevertheless, compensated the Grievant for her February 1  
24 absence. Ultimately, the Union seems to contend that the Grievant's failure to notify the Agency of her  
25 hospitalization is, somehow, irrelevant because: (1) The Agency either knew or should have known that  
26 she was hospitalized before the expiration of the sixty-day procedural window; and (2) The Agency  
27 compensated the Grievant for the February 1 absence. As noted above, the Agency maintains that the

1 Grievant's violation of her duty to appraise Management of her whereabouts prevented Management  
2 from timely notifying her of its penalty decision.<sup>18</sup>

3 The Agency prevails on this issue. First, the Undersigned finds that preponderant evidence in  
4 the record establishes that while she was on administrative leave, the Grievant was *duty-bound* to  
5 inform the Agency of her whereabouts, including her hospitalization. Indeed, the Union does not  
6 contend otherwise. Second, the Undersigned holds that the Grievant failed to satisfy her notification  
7 obligations. Again, the Union does not contend that the Grievant somehow *satisfied* her duty to notify  
8 the Agency of her hospitalization while she was on administrative leave. Third, the Undersigned holds  
9 that, contrary to the Union's suggestions, the Agency's knowledge of the Grievant's hospitalization on  
10 February 1, 2013 did not somehow excuse the Grievant's failure to obey the Agency's Call-In Policy.

11 This is not to suggest, however, that the Agency bears no fault in this matter; clearly it does.  
12 Preponderant evidence in the arbitral record as a whole establishes that on February 1, 2013 (within the  
13 sixty-day window), the Agency learned of the Grievant's hospitalization and likely could have notified  
14 her of its penalty decision within the sixty-day time frame. Given this balance of mutual fault, the  
15 Undersigned holds that but for the Grievant's noncompliance with the Agency's Call-In Policy,  
16 Management likely would have timely notified the Grievant of her removal.

## 17 **2. The Agency's Duty to Notify the Union**

18 The pivotal (outcome-determinative) issue in this dispute is whether the Parties mutually  
19 adopted a past practice of permitting the Agency to ignore the contractual sixty-day requirement until it  
20 could first notify the Grievant of her termination. Here, the Agency argues that the Parties mutually  
21 agreed to ignore the unambiguous sixty-day window in Article 24.06 by permitting Management to  
22 deliver its penalty decisions to the Union after that procedural deadline. The Union disagrees by  
23 simply underscoring the language of Article 24.06 and the absence of any explicit mutual agreement to  
24 waive the sixty-day deadline in a past practice.

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<sup>18</sup> Although the Arbitrator could not find definitive evidence that the Grievant was on administrative leave when she was hospitalized, the Agency makes that assertion, and the Union does not contest it. Therefore, the Undersigned adopts, as a fact, that the Grievant was on administrative leave when she was hospitalized.

1 For the following reasons, the Undersigned holds that the Union prevails on this issue. First and  
2 foremost, arbitrators are *eternal and irrevocable* creatures of their parties' Collective-bargaining  
3 Agreements and, therefore, must pay irrevocable obeisance thereto.<sup>19</sup> In this respect, Article 24.06  
4 states:

5 The decision on the recommended disciplinary action *shall be* delivered to the  
6 employee, if available, and the Union in writing within *sixty (60) days* of the  
7 date of the pre-disciplinary meeting, which date shall be *mandatory*. It is the  
8 intent to deliver the [disciplinary] decision to both the *employee and the Union*  
9 within the *sixty (60) day* timeframe; however, the showing of delivery to *either*  
10 the *employee or the Union* shall satisfy the Employers procedural obligation. At  
11 the discretion of the Employer, the sixty (60) day requirement will not apply in  
12 cases where a criminal investigation may occur and the Employer decides not to  
13 make a decision on the discipline until after disposition of the criminal charges.<sup>20</sup>  
14

15 This language is not only clear and unambiguous regarding the Agency's duty of notification to  
16 the Union, but also explicitly enumerates the sole circumstance in which the Agency may ignore the  
17 sixty-day window. Furthermore, preponderant evidence in the arbitral record demonstrates that the  
18 Parties adopted this deadline largely because of the Agency's frequent violations of the earlier forty-  
19 five-day deadline. Why, then, would they *implicitly* agree to modify that procedural standard and grant  
20 the Agency what is essentially an open-ended right to ignore the deadline? Such pellucid language and  
21 surrounding circumstances paint an extremely clear picture of the Parties' intent regarding the Agency's  
22 duty of notification to the Union. That "picture" in turn creates an extremely resilient rebuttable  
23 presumption that the Parties fully intended for the Agency to honor the sixty-day deadline for notifying  
24 the Union.

25 It would require a mutual agreement equally as explicit as the language in Article 24.06 to  
26 modify the manifest intent of that language. Mere silence or inferences from circumstantial evidence  
27 do not suffice to rebut the highly resilient rebuttable presumption arising from such lucid language.  
28 Indeed, a strict application of the "Plain Meaning" Rule would render inadmissible any evidence  
29 offered to establish a past practice contrary to the manifest intent of clear and unambiguous language

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<sup>19</sup> See Appendix A for a discussion of the two major schools of arbitral thought, regarding contractual interpretation.

<sup>20</sup> Joint Exhibit 1, at 97 (emphasis added).

1 such as that in Article 24.06.

2 Even if the Undersigned permitted parole evidence to modify the clear and unambiguous  
3 contractual language in this dispute, the Agency's evidence, in the instant case, does not establish the  
4 alleged past practice.<sup>21</sup> The Agency seeks to modify the clear and unambiguous language of Article  
5 24.06 by adducing numerous documents in which the Union did not signed off on the Agency's  
6 disciplinary decision and affidavits of the alleged past practice. This circumstantial evidence essentially  
7 invites a reasonable *inference* that the Parties have *mutually agreed* to modify the italicized language  
8 under Article 24.06. In the Undersigned's view, however, such a reasonable inference, even if  
9 forthcoming, would be insufficient to modify the foregoing italicized language under Article 24.06.  
10 Such a modification would, at the very least, require *direct* evidence that the Parties have *mutually*  
11 *agreed* to modify the sixty-day deadline. In short, where contractual language is clear and  
12 unambiguous on a given issue, evidence of an intent to modify that language must be equally clear and  
13 unambiguous. Circumstantial evidence may support inferences that clarify/modify ambiguous  
14 contractual language as well as fill gaps therein, but circumstantial evidence is unlikely to supersede  
15 contractual language that is clear and unambiguous regarding a given issue(s).

## 16 VII. THE AWARD

17 For all the foregoing reasons, the Union's procedural Grievance is hereby **SUSTAINED**  
18 in its entirety, and the Undersigned accordingly refrains from addressing the merits of this dispute.  
19 Consequently, the Agency shall forthwith reinstate the Grievant with *full backpay and all other*  
20 *benefits* that she might have forfeited *because of* her removal in this case.

### Appendix A

21 When enlisted to interpret controversial contractual provisions, arbitrators splinter into two  
22 schools of thought that embrace antithetical interpretive approaches. Both schools of thought

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<sup>21</sup> Observe, however, that the Undersigned does not subscribe to barring evidence that seeks to refute the thrust of clear and unambiguous language. The point is that such evidence must establish the intent to modify that language with the same force and clarity as the original language establishes the status quo intent. In short, the clarity of the intent of modification must be as clear as the original intent of creation.

1 essentially agree that the sole purpose of arbitral interpretation in contractual disputes is to discern the  
2 parties' intent regarding disputed contractual provisions.

3 The dominant and time-honored approach firmly embraces the “Plain Meaning” Rule, which  
4 obliges arbitrators to seek out and enforce clear and unambiguous contractual language, as the best  
5 indication of the Parties’ intent. Under the “Plain Meaning Rule,” parole evidence, such as *past*  
6 *practice*, bargaining history, etc., becomes relevant in contractual disputes *if and only if* contested  
7 contractual language has, in the first instance, succumbed to either latent or patent ambiguities. A  
8 contractual provision that is susceptible to more than one reasonable interpretation is inherently  
9 ambiguous. That is, if a reasonable person can embrace more than one interpretation of a disputed  
10 contractual provision, then that provision is, by definition, ambiguous. Perhaps the major benefit of the  
11 “Plain Meaning Rule” is that it affords *linguistic clarity* a high priority among contractual  
12 draftspersons, given the decisive interpretive role of clear and unambiguous contractual language in  
13 “Issues” disputes. To the greatest extent possible, contracting parties should be able to rely on the  
14 language they select during contractual negotiations to shape their prospective relationship. Still, no  
15 contractual language, however carefully crafted, can be clear and unambiguous for *all* issues that may  
16 arise thereunder. But that linguistic shortcoming hardly justifies either subordinating or otherwise  
17 ignoring language that is clear and unambiguous with respect to a given issue. Ample opportunities  
18 abound to reference parole evidence *after* careful scrutiny reveals that contentious contractual language  
19 is ambiguous regarding a given issue(s).

20 In stark contrast, the second interpretive approach flatly ignores contractual language—  
21 however clear and unambiguous regarding the issue in question—screening *all* contractual language  
22 through parole evidence. This school of thought maintains that *past practice*, rather than clear and  
23 unambiguous contractual language, more accurately reflects the parties’ intent regarding disputed  
24 contractual provisions. In other words, as an interpretive aid, *conduct* categorically trumps clear,  
25 unambiguous, mutually-adopted contractual language. This approach prompts the query: Why have  
26 collective-bargaining agreements in the first instance if conduct is the sole interpretive source?

1           Despite the numerous opposing and supporting arguments relating to the foregoing schools of  
2 thought, the Undersigned subscribes to the “Plain-Meaning” Rule, which emphasizes clear and  
3 unambiguous contractual language as most accurately mirroring the parties’ intent.

4

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