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In the Matter of Arbitration Between the	:	Grievance Number: BWC-2018-01234-14
	:	
<b>STATE OF OHIO,</b>	:	
<b>BUREAU OF WORKERS' COMPENSATION,</b>	:	
	:	Grievant: Petr Serbo Kpan, Jr.
Employer	:	
and the	:	
	:	
<b>OHIO CIVIL SERVICE EMPLOYEES</b>	:	Date of Hearing: December 18, 2018
<b>ASSOCIATION, AMERICAN FEDERATION</b>	:	
<b>OF STATE, COUNTY AND MUNICIPAL</b>	:	
<b>EMPLOYEES, LOCAL 11, AFL-CIO,</b>	:	
	:	Howard D. Silver, Esquire
Union	:	Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: State of Ohio, Bureau of Workers' Compensation, Employer

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## TABLE OF CONTENTS

	Page
Case Caption .....	1
Appearances .....	1
Procedural Background .....	3
Joint Issue Statement .....	3
Joint Stipulations .....	3
Joint Exhibits .....	4
Statement of the Case .....	4
Summary of Testimony .....	9
Darrin Blosser .....	9
Shondale Lockett .....	17
Terry Pettet .....	22
Edward "Scott" Taylor .....	25
Petr Serbo Kpan, Jr. ....	27
Gerald Quick .....	31
Tim McAllister .....	32
Positions of the Parties .....	33
Position of the Ohio Bureau of Workers' Compensation, Employer .....	33
Position of OCSEA, AFSCME, Local 11, AFL-CIO, Union .....	37
Discussion .....	42
Award .....	49
Certificate of Service .....	50

## PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing on December 18, 2018 at 9:00 a. m. in a conference room on the third floor of the William Green Building within the offices of the Ohio Bureau of Workers' Compensation, 30 West Spring Street, Columbus, Ohio 43215. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded at 2:25 p. m. on December 18, 2018 and the evidentiary portion of the hearing record was closed at that time.

Post-hearing written arguments were submitted by the parties, with these post-hearing briefs received by the arbitrator by January 11, 2019.

This matter proceeds under a collective bargaining agreement between the parties, Joint Exhibit 1, in effect from July 1, 2015 through February 28, 2018.

No challenge to the arbitrability of the grievance at issue in this proceeding has been raised. Based on the language of the parties' collective bargaining agreement, Joint Exhibit 1, the arbitrator finds the grievance to be arbitrable and properly before the arbitrator for review and resolution.

## JOINT ISSUE STATEMENT

The parties agreed to the following as a statement of the issues raised by this proceeding:

Was the grievant, Peter Serbo Kpan, removed for just cause?

If not, what shall the remedy be?

## JOINT STIPULATIONS OF FACT

The following facts were stipulated by the parties:

1. The parties agree Peter Serbo Kpan had 21 years of state service at the time of his removal on Thursday, April 5, 2018.
2. The parties agree Peter Serbo Kpan was employed as an Infrastructure Specialist 2 in the Infrastructure and Operations Department, IT Division at the Ohio Bureau of Workers' Compensation on March 12, 2018.
3. The parties agree Peter Serbo Kpan had two (2) active disciplines on file at the time of his removal – a written reprimand dated January 24, 2017 and a 3-day working suspension dated April 28, 2017.
4. The parties agree Peter Sebo Kpan is responsible for documenting his timekeeping.
5. The parties agree both a threat assessment and an administrative investigation was completed concerning the incident leading management removing Peter Serbo Kpan.

#### JOINT EXHIBITS

The parties stipulated to the authenticity and admissibility of the following Joint Exhibits:

Joint Exhibit 1 – Collective Bargaining Agreement between the parties in effect from July 1, 2015 through February 28, 2018.

Joint Exhibit 2 – Discipline Trail

Joint Exhibit 3 – Grievance Trail

Joint Exhibit 4 – Peter Serbo Kpan's Disciplinary History

Joint Exhibit 5 - Security Investigation Documents

#### STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Bureau of Workers' Compensation, 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' collective bargaining agreement is Article 24, Discipline, that begins with the

following: “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...”

The grievant in this proceeding, Petr Serbo Kpan, Jr., served within the Ohio Bureau of Workers' Compensation as an Infrastructure Specialist 2 and had been employed by the Bureau for twenty-one and one-half years. Mr. Kpan's employment record includes a written reprimand dated January 24, 2017 and a three-day suspension dated April 28, 2017 that was served May 3 – 5, 2017. The three-day suspension was for dishonesty and insubordination.

On March 12, 2018 Mr. Kpan was scheduled for a work shift that was to begin upon Mr. Kpan's arrival, at his discretion, between 8:00 a. m. and 8:30 a. m. Mr. Kpan reported for duty on March 12, 2018 at 8:43 a. m., thirteen minutes after the latest, authorized reporting time available to Mr. Kpan. No prior contact about this tardiness occurred between Mr. Kpan and his supervisor.

At 12:17 p. m. Mr. Kpan's supervisor, Shondale Luckett, sent an email to Mr. Kpan directing that Mr. Kpan prepare and sign a request for leave form to cover the thirteen minutes of tardiness accumulated by Mr. Kpan in reporting for duty that day.

Between 1:00 p. m. and 1:30 p. m. on March 12, 2018 Mr. Kpan was approached by his supervisor, Mr. Luckett, and directed to prepare and submit a request for leave form for the thirteen minutes of tardiness that had occurred as a result of Mr. Kpan's late arrival. This instance of tardiness on the part of Mr. Kpan was not unprecedented as prior instances of tardiness in reporting for duty by Mr. Kpan were known to have occurred. Mr. Kpan's supervisor, Mr. Luckett, had counseled Mr. Kpan about his tardy arrivals and had on a number of occasions attempted to solve this problem through different, constructive counseling methods but without success. Mr. Luckett viewed the tardiness on March 12, 2018 by Mr. Kpan as the latest instance of tardiness within a series of instances of tardiness.

What was new and singular about the events that occurred in the early afternoon hours of March 12, 2018, to Mr. Kpan's thinking, had been the direct order that Mr. Kpan prepare and sign a request for

leave form to cover the thirteen minutes of tardiness. Mr. Kpan interpreted Mr. Lockett's demand for a request for leave form on March 12, 2018 to be punitive, aimed at Mr. Kpan personally. Mr. Kpan formed the opinion he was being singled out for harsher treatment than other similarly situated employees who had committed similar offenses and had not been required to prepare a request for leave form. Mr. Kpan had already been under the impression that he had been singled out within the Infrastructure and Operations Department to be accorded less respect as a co-worker with more than two decades of service to the Bureau and required to work under greater scrutiny. Mr. Kpan believed his treatment in the I & O Department, including the way he was treated on March 12, 2018 for his tardiness that day, was unfair, undeserved, and discriminatory.

While Mr. Kpan focused on March 12, 2018 on what he believed to be a demand that was unique to Mr. Kpan, Supervisor Lockett focused on a continuing pattern of tardiness and a lack of precision in Mr. Kpan's timekeeping practices, leaving ambiguities about Mr. Kpan's actual work time. Mr. Lockett had become frustrated by a pattern of rule breaking by Mr. Kpan involving timekeeping and tardiness in reporting for duty and in reporting back to duty following a lunch period. Mr. Lockett was aware of the written reprimand and the three-day suspension issued to Mr. Kpan having to do with Mr. Kpan's dishonesty and insubordination in these areas.

The face to face interaction between Supervisor Lockett and Mr. Kpan on March 12, 2018 began between 1:00 p. m. and 1:30 p. m. at Mr. Kpan's desk, and this initial face-to-face interaction concluded with Mr. Lockett leaving to attend a scheduled meeting. The face-to-face interaction between Mr. Kpan and Mr. Lockett resumed later that afternoon, initially at Mr. Kpan's desk and then at Mr. Lockett's work cubicle.

The interaction between Mr. Lockett and Mr. Kpan during the early afternoon on March 12, 2018 reflected the heightened emotion of an employee who feels he had been unfairly targeted for criticism and who had for some time harbored feelings of resentment toward management,

encountering the mounting frustration harbored by a supervisor who viewed Mr. Kpan as an employee who was refusing to comply with as basic an employment requirement as showing up for work on time. Mr. Luckett had been aware that Mr. Kpan had had a thirty-minute window in which to report for duty in a timely manner but Mr. Kpan still repeatedly failed to appear for duty as scheduled. Mr. Luckett was required to expend the time, energy, and focus on attending to this continuing problem, in addition to the other supervisory responsibilities for which Mr. Luckett was responsible.

Not surprisingly the interaction between Mr. Luckett and Mr. Kpan reflected each participant's perspective. Mr. Kpan emphasized to Mr. Luckett the unfairness of Mr. Luckett's treatment of Mr. Kpan, as well as Mr. Kpan's firm resolve to resist being "pushed around." Mr. Kpan impressed on Mr. Luckett verbally and repeatedly that Mr. Kpan was the wrong person to attempt to push around.

In response to Mr. Kpan's assertions about what Mr. Kpan was not going to accept, as well as Mr. Kpan's views on what Supervisor Luckett's duties entailed, Mr. Luckett, after reiterating the necessity of Mr. Kpan providing a completed and signed request for leave form for the thirteen minutes of tardiness, repeatedly advised Mr. Kpan in a level but authoritative voice that Mr. Kpan would be best served at that moment by walking back to Mr. Kpan's desk and attending to his duties. Mr. Kpan on at least one occasion walked in the direction of his desk after being instructed to do so by Mr. Luckett but within less than one minute Mr. Kpan returned to Mr. Luckett's work cubicle and reiterated to Mr. Luckett that the harassment of Mr. Kpan was to cease.

An investigation was conducted of the events that occurred between Mr. Luckett and Mr. Kpan on March 12, 2018 and there is much about those events that is not disputed between the parties. There are, however, specific allegations of misconduct against Mr. Kpan that are emphatically and specifically denied by Mr. Kpan, including the allegation that he had used profanity and had made a verbal threat of harm against Mr. Luckett. Mr. Luckett recalls being told by Mr. Kpan: "I'm going to fuck you up," but Mr. Kpan denies making this statement. No witnesses to these events, other than Mr.

Luckett, in their testimony at the hearing herein or in their written statements provided to Mr. Blosser recalled hearing profanity from Mr. Kpan. It was also only Mr. Luckett who claims to have heard Mr. Kpan say to Mr. Luckett: "I'm going to fuck you up."

The threat assessment performed by BWC Threat Assessment Coordinator Darrin Blosser was issued on March 16, 2018 and appears in the record as Joint Exhibit 5(a). Mr. Blosser's conclusions are presented on page five of the threat assessment case summary and they include the following: "... There is evidence to support Kpan was emotionally upset and was, at minimum, passively indicating threatening behavior, if not indicating a threat completely..."

Mr. Kpan was placed on administrative leave on March 14, 2018 and pre-disciplinary procedures were carried out, including a pre-disciplinary meeting scheduled for April 3, 2018 on March 29, 2018, Joint Exhibit 2(d), followed by the issuance of a pre-disciplinary meeting officer's report that presents its findings on its second page, State's Exhibit 2(e), page 2. The findings in the pre-disciplinary meeting officer's report include the following:

On March 12<sup>th</sup>, 2018, management believed and obtained proof that Mr. Kpan's behaviors displayed toward his supervisor was threatening and aggressive. After reviewing the statements, BWC Security threat assessment, and administrative investigation, I also agree Mr. Kpan's behaviors during his interaction with his supervisor were threatening and aggressive.

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For the above reasons, it is this writer's opinion that the employee violated the BWC Disciplinary Policy and Grid: Failure of Good Behavior (b) Poor judgment and (d) Discourteous and/or rude treatment of fellow employee, manager, or customer.

I find that **Just Cause** exists for discipline and that the recommended discipline is both progressive and commensurate with the offenses as charged.

On April 5, 2018 the Administrator of the Ohio Bureau of Workers' Compensation issued to Mr. Kpan a letter notifying Mr. Kpan that Mr. Kpan was being removed from his employment as an



Infrastructure Specialist 2 within the Infrastructure and Operations Department, IT Division, Ohio Bureau of Workers' Compensation, effective April 5, 2018. Within this letter, Joint Exhibit 2(a), the reason for the discharge of Mr. Kpan was presented as follows:

You have been found to be in violation of the provisions of the BWC Disciplinary Policy and Grid: Failure of Good behavior (b) Poor judgment; and (d) Discourteous and/or rude treatment of fellow employee, manager, or customer.

A grievance on behalf of Mr. Kpan was filed on April 5, 2018 contesting the discharge of Mr. Kpan. A step two grievance meeting was held on April 12, 2018. When the grievance remained unresolved the grievance moved through the parties' contractual grievance procedure and was directed by the Union to final and binding arbitration.

The grievance at issue in this proceeding is arbitrable under the language of the parties' collective bargaining agreement and properly before the arbitrator for review and resolution.

#### SUMMARY OF TESTIMONY

##### Darrin Blosser

Darrin Blosser is employed as a Threat Assessment Coordinator by the Ohio Bureau of Workers' Compensation and has served in this position since July 2016. Mr. Blosser's duties include the investigation and assessment of internal and external threats to the Bureau. Mr. Blosser brings to his position twenty-five years of experience with the Ohio State Highway Patrol, as a Trooper, Sergeant, Post Commander, and Staff Lieutenant. Mr. Blosser conducted threat assessments and investigations while employed by the Ohio State Highway Patrol.

Mr. Blosser testified that on March 12, 2018 he met with a supervisor employed by the Ohio Bureau of Workers' Compensation, Shondale Luckett. Mr. Blosser had not known Mr. Luckett prior to March 12, 2018. Mr. Blosser had received a telephone call from the Bureau's Office of Labor Relations

about a threat. Mr. Blosser responded by traveling to the Labor Relations Office where he met with Mr. Luckett in a conference room.

Mr. Blosser explained in his testimony that making a threat assessment requires putting together pieces of information, akin to assembling a jigsaw puzzle. Mr. Blosser testified that he spoke to Mr. Luckett, to Mr. Kpan, and to eyewitnesses of the interaction between Mr. Luckett and Mr. Kpan on March 12, 2018. Mr. Blosser testified that with the exception of Mr. Kpan, Mr. Blosser interviewed all of the eyewitnesses to the events in question on March 12, 2018, the same day the events had occurred.

Mr. Blosser stated that when he interviewed Mr. Kpan there were a few times when Mr. Kpan diverted from the question posed in providing an answer. Mr. Blosser did not record the responses of any of the interviewees but relied on handwritten notes prepared by Mr. Blosser.

Mr. Blosser identified Joint Exhibit 5(a) as Mr. Blosser's threat assessment report, a report completed on March 16, 2018.

Mr. Blosser's threat assessment report, Joint Exhibit 5(a), referred to an incident that occurred in the early afternoon of March 12, 2018 between Petr Serbo Kpan, Infrastructure Specialist 2, and Mr. Kpan's immediate supervisor, Shondale Luckett, Information Technology Manager 1.

Mr. Blosser's case summary, Joint Exhibit 5(a), noted that Mr. Kpan had reported to work tardy on March 12, 2018, and between 1:00 p. m. and 1:30 p. m. had been instructed by his immediate supervisor, Mr. Luckett, to fill out and sign a Request For Leave (RFL) form to cover the thirteen minutes of tardiness that had occurred in Mr. Kpan's arrival for duty on March 12, 2018. Mr. Kpan is reported to have responded to Mr. Luckett that he, Mr. Kpan, would get to it, to which Mr. Luckett responded that it needed to be done now. Mr. Luckett was again advised by Mr. Kpan that Mr. Kpan would get to it. Mr. Blosser was told by Mr. Luckett that at this point in the interaction between Mr. Luckett and Mr. Kpan Mr. Kpan had begun to exhibit signs of agitation.

According to what Mr. Luckett told Mr. Blosser, Mr. Kpan was told by Mr. Luckett that they

would discuss the matter after Mr. Luckett had attended a scheduled meeting, whereupon Mr. Luckett departed. Later, after the conclusion of the meeting, Mr. Luckett returned to Mr. Kpan's desk and asked Mr. Kpan to join Mr. Luckett in a conference room to discuss the request for leave form demanded from Mr. Kpan by Mr. Luckett. According to Mr. Luckett, as told to Mr. Blosser, Mr. Kpan asked what else they needed to talk about, and when Mr. Luckett reiterated that they needed to talk about Mr. Kpan's request for leave, Mr. Kpan disagreed with the need to discuss this and reiterated that he would "... get to it." Mr. Luckett left Mr. Kpan and returned to Mr. Luckett's work pod.

Within one minute of Mr. Luckett's return to his desk, Mr. Kpan arrived at Mr. Luckett's work pod and informed Mr. Luckett that Mr. Kpan was the wrong person to mess with. According to Mr. Luckett, as reported by Mr. Blosser in his case summary, Joint Exhibit 5(a) at page 1, Mr. Kpan informed his supervisor, Mr. Luckett, that Mr. Kpan was not going to take it anymore and that he would "fuck him up." Mr. Luckett described Mr. Kpan to Mr. Blosser as having been visibly angry, and when Mr. Luckett stood up and told Mr. Kpan that Mr. Kpan had tasks that needed to be completed and it would be best for Mr. Kpan to leave Mr. Luckett and return to Mr. Kpan's desk, Mr. Kpan walked away in the direction of Mr. Kpan's desk. Mr. Kpan returned almost immediately to Mr. Luckett's work pod to advise Mr. Luckett that Mr. Kpan was not going to be pushed around or intimidated by anyone, and such efforts to do so would stop that day. Mr. Kpan then walked away from Mr. Luckett.

Mr. Luckett had told Mr. Blosser that there had been previous incidents of aggression by Mr. Kpan, including an event that had occurred about one year prior, at a time when Mr. Luckett had been counseling Mr. Kpan. Mr. Kpan became upset and had pounded his fist on the table. Mr. Luckett told Mr. Blosser that during that incident he, Mr. Luckett, had felt threatened because of the aggressiveness exhibited by Mr. Kpan, the loudness of his voice, and the fact that he had put his hands on Mr. Luckett's desk and had leaned toward Mr. Luckett while Mr. Luckett had been seated. Mr. Luckett confirmed to Mr. Blosser that during the incident on March 12, 2018 Mr. Kpan at no time touched or

came into contact with Mr. Luckett. Mr. Luckett identified two employees who had heard the conversation between Mr. Kpan and Mr. Luckett, Terry Pettet and Scott Taylor.

The case summary prepared by Mr. Blosser, Joint Exhibit 5(a), refers to a written statement secured from Terry Pettet, an Infrastructure Specialist 3. Mr. Pettet recalled in his written statement that on March 12, 2018 Mr. Pettet had overheard Mr. Luckett approaching Mr. Kpan and discussing coming to work late and then working over to cover the late arrival. Mr. Pettet recalled a verbal exchange between Mr. Luckett and Mr. Kpan, with Mr. Kpan repeatedly saying that he would work on it, and Mr. Luckett repeatedly saying: "Don't work on it, just do it." Mr. Pettet in his written statement stated that he understood this reference by Mr. Luckett to mean that Mr. Luckett wanted Mr. Kpan to stop coming to work late and then working over. Mr. Pettet in his written statement recalled Mr. Luckett leaving Mr. Kpan's desk and a few minutes later Mr. Kpan traveling to Mr. Luckett's desk and telling Mr. Luckett Mr. Kpan was not going to be pushed around, Mr. Luckett had picked the wrong guy to mess with, and Mr. Kpan wasn't going to take it. Mr. Pettet recalled in his written statement that Mr. Luckett had repeatedly directed Mr. Kpan to walk away but Mr. Kpan kept repeating his statements. Mr. Pettet had not been in a position to observe the exchange between Mr. Luckett and Mr. Kpan but had heard the words being spoken. Mr. Pettet described Mr. Kpan's words as having been aggressive and threatening. Mr. Pettet in his written statement recalled that the volume of Mr. Kpan's voice had been somewhat elevated .

Mr. Pettet in his written statement stated that he had observed Mr. Kpan acting aggressively about one year earlier when a coworker had been instructing Mr. Kpan on something and Mr. Kpan had been having difficulty fully understanding the instruction. A verbal confrontation was overheard by Mr. Pettet between the instructor and Mr. Kpan, and Mr. Pettet recalled in his written statement other instances in the past where Mr. Kpan had gotten upset and had "blown up." Mr. Pettet told Mr. Blosser that Mr. Kpan got angry with others and "blew up" about four times per year.

Mr. Pettet was asked by Mr. Blosser, according to Mr. Blosser's case summary, Joint Exhibit 5(a), page 2, if he had believed during the incident that had occurred on March 12, 2018 that it was going to result in a physical confrontation between Mr. Luckett and Mr. Kpan. Mr. Pettet had responded to Mr. Blosser that Mr. Pettet believed it could have gotten physical as Mr. Kpan had been emotionally agitated and Mr. Luckett kept directing Mr. Kpan to walk away from Mr. Luckett, but Mr. Kpan kept returning to Mr. Luckett and saying: "You're messing with the wrong guy." According to Mr. Blosser, Mr. Pettet had said that if he had been in Mr. Luckett's position he would have felt the situation could have gotten physical.

The case summary prepared by Mr. Blosser referred to a written statement secured from Scott Taylor, an Infrastructure Specialist 4, in which Mr. Taylor recalled observing and hearing Mr. Kpan berating Mr. Luckett in a loud and unprofessional manner while located at Mr. Luckett's work pod. Mr. Taylor in his written statement recalled that what he witnessed had been brief, that Mr. Kpan had been very loud and had appeared angry, and Mr. Taylor stated that if he had been in Mr. Luckett's place he, Mr. Taylor, would have been on the defensive. Mr. Taylor recalled Mr. Luckett telling Mr. Kpan: "You need to go back and work on what you need to." Mr. Taylor told Mr. Blosser that Mr. Kpan's actions were not what you would typically see from an employee and Mr. Kpan had not handled the situation well. Mr. Taylor stated that if he had been in Mr. Luckett's place he probably would not have remained as calm as Mr. Luckett had managed to remain. Mr. Taylor stated that he had seen people like that before and felt the conversation was about to escalate into a physical altercation.

The case summary prepared by Mr. Blosser, Joint Exhibit 5(a) indicates an interview of Mr. Kpan by Mr. Blosser on March 14, 2018 at 10:30 a. m. Mr. Kpan was assisted at this interview by a Union representative and was first shown an Administrative Investigatory Interview form and given a "Garrity Warning."

Mr. Blosser in his case summary stated that Mr. Kpan had said that Mr. Kpan had initially

received a written communication from Mr. Luckett on March 12, 2018 asking Mr. Kpan to prepare a request for leave form for arriving for work thirteen minutes late on March 12, 2018. Mr. Kpan recalled that he had responded by asking Mr. Luckett to allow Mr. Kpan to complete the RFL form at the end of the work day. Between 1:00 p. m. and 1:30 p. m. Mr. Luckett is recalled coming to Mr. Kpan's desk in haste and saying: "I need you to enter that RFL." Mr. Kpan reiterated to Mr. Luckett that Mr. Kpan would do it at the end of the work day and, according to Mr. Kpan, Mr. Luckett had said, aggressively: "I need you to do it now." Mr. Kpan recalled asking Mr. Luckett why it had to be done immediately and Mr. Luckett had responded that Mr. Luckett had had to leave to attend a meeting, and departed.

Mr. Kpan told Mr. Blosser that Mr. Luckett returned on March 12, 2018 to Mr. Kpan's desk thirty minutes after departing for his meeting and had said to Mr. Kpan: "Let's go." Mr. Kpan recalled asking Mr. Luckett why they had to have a meeting, and Mr. Luckett had said: "Forget it." Mr. Kpan recalled that he had already been told what he needed to do and recalled Mr. Luckett saying: "I need you to do it now." Mr. Kpan recalled telling Mr. Luckett that Mr. Kpan would do as he had been directed but he would do it at the end of the day and tried to explain that due to his flexed schedule, if Mr. Kpan worked through his lunch he could avoid having to request leave for the thirteen minutes in question. Mr. Kpan recalled Mr. Luckett saying that Mr. Kpan needed to prepare and submit the Request For Leave form now.

Mr. Kpan told Mr. Blosser that Mr. Kpan had observed a manager standing near Mr. Luckett's desk, Gerald Quick, and Mr. Kpan had approached Mr. Quick about the situation with Mr. Luckett and Mr. Luckett's demand for a request for leave form from Mr. Kpan. Mr. Kpan told Mr. Blosser that Mr. Kpan had told Mr. Quick that Mr. Kpan was not declining to do what had been asked of him but had said that Mr. Luckett had come at Mr. Kpan, harassing him. Mr. Kpan told Mr. Quick that this was a frequent occurrence. Mr. Kpan told Mr. Quick that Mr. Luckett called for meetings about petty things, things they could have talked about and resolved without having a meeting, and Mr. Kpan felt this

needed to stop. Mr. Kpan told Mr. Blosser that he had told Mr. Quick that supervisor Luckett had singled out Mr. Kpan. Mr. Quick then left the area and Mr. Kpan turned to Mr. Luckett and informed him that this harassment had to stop. Mr. Kpan told Mr. Blosser that he had said to Mr. Luckett: "You have to stop harassing me. You mess with the wrong person and I am the wrong person." Mr. Kpan recalled being instructed by Mr. Luckett to leave Mr. Luckett's area.

Mr. Blosser asked Mr. Kpan if Mr. Kpan had been upset during his interaction with Mr. Luckett, to which Mr. Kpan had responded: "I was basically expressing what he is doing and my discomfort based on his action. But it depends on how you describe upset."

Mr. Kpan recalled that in his interaction with Mr. Luckett on March 12, 2018 he had never entered Mr. Luckett's work pod. Mr. Blosser asked Mr. Kpan if he would describe his voice tone and actions as normal/businesslike, to which Mr. Kpan responded: "...to some extent. I would say my tone was loud. Depends on how you interpret it."

Also within Mr. Blosser's case summary was a reference to a written statement from Gerald Quick who indicated therein that he had been at Mr. Luckett's desk requesting the loan of a tape measure from Mr. Luckett whereupon Mr. Quick was approached by Mr. Kpan who claimed that Mr. Luckett had been harassing Mr. Kpan. Mr. Quick secured the tape measure from Mr. Luckett and quickly departed the area. Mr. Blosser asked Mr. Quick if Mr. Kpan had appeared calm, agitated, etc. to which Mr. Quick had responded: "Not calm. I wouldn't say he was going to get physical at that point, but he was not calm." Mr. Quick recalled that he had not felt threatened by Mr. Kpan and recalled that he had never seen Mr. Kpan like that before, saying that Mr. Kpan had appeared aggravated. Mr. Quick recalled that he had only been in the area for a few minutes and when he left the area Mr. Kpan was still in the vicinity of Mr. Luckett's desk.

The conclusion reached by Mr. Blosser in his threat assessment and investigation was that there had been a verbal altercation between Mr. Luckett and Mr. Kpan on March 12, 2018, primarily at or

near Mr. Lockett's work pod. Based on multiple witness statements Mr. Blosser concluded that the conversation had been loud and coworkers had felt the conversation could have gotten physical.

On the last page of Mr. Blosser's case summary, Joint Exhibit 5(a) at page 5 Mr. Blosser concludes his report with the following:

During Kpan's interview, it was noted he was elusive with some of his answers. There is evidence to support that Kpan was emotionally upset and was, at minimum, passively indicating threatening behavior, if not indicating a threat completely. There were a couple times during the interview, I had to tell Kpan to stay focused on the question being asked and not circle back to earlier questions, etc. Lastly, after reading some of his responses written on paper, Kpan changed a couple responses deflecting indications admitting threatening behavior.

Mr. Blosser testified that Gerald Quick was a manager but not in the chain of command containing Mr. Lockett and Mr. Kpan.

Mr. Blosser explained that any threat has to be evaluated on the basis of how the recipient of the threat was affected by it, that is, how the threat was received and understood by the person to whom the threat was directed.

Under questioning by the Union's representative, Mr. Blosser identified Union Exhibit 1 as Memo 8.01, the Equal Employment Opportunity Policy of the Ohio Bureau of Workers' Compensation. This policy prohibits in the work environment discrimination and harassment based on race, color, gender, national origin, ancestry, military status (past, present and future), disability, age (40 years of age or older), genetic information, sexual orientation, or retaliation.

Mr. Blosser identified Union Exhibit 2 as Memo 8.03, the Anti-Harassment Policy of the Ohio Bureau of Workers' Compensation that prohibits harassment in the workplace based upon race, color, religion, gender, national origin, ancestry, military (past, present and future), disability, age (40 years of age or older), genetic information, sexual orientation, or retaliation.

Mr. Blosser confirmed in his testimony that he was not an eyewitness to any of the events



described in his case summary that had occurred during the early afternoon hours of March 12, 2018 between Mr. Luckett and Mr. Kpan.

#### Shondale Luckett

Shondale Luckett has been employed by the Ohio Bureau of Workers' Compensation for fourteen years. Since 2013 Mr. Luckett has worked from a position classified Information Technology Manager 1. Mr. Luckett's duties include the supervision of Infrastructure Specialists responsible for the Bureau's internal network. Mr. Luckett reports to Jim Cunningham, Director, Infrastructure and Operations Department, IT Division. Mr. Luckett served as the immediate supervisor of Mr. Kpan.

Mr. Luckett described his working relationship with Mr. Kpan as “nothing real bad” although Mr. Luckett confirmed that the two men had had their disagreements. Mr. Luckett recalled that on March 12, 2018 Mr. Kpan had been tardy in reporting for his scheduled shift. Because of this tardiness Mr. Luckett had directed Mr. Kpan to fill out a Request For Leave (RFL) form for the thirteen minutes of tardiness accumulated by Mr. Kpan in reporting late for duty that day. Mr. Luckett described his direction to Mr. Kpan concerning an RFL form as a normal procedure. Mr. Luckett testified that Mr. Kpan did not comply with Mr. Luckett's direction about preparing and submitting an RFL form, although Mr. Luckett recalled Mr. Kpan saying at the time: “I'll get to it.”

Mr. Luckett recalled that on March 12, 2018, after his initial interaction with Mr. Kpan concerning Mr. Kpan's tardiness in reporting for duty that day and the need for a completed leave form, Mr. Luckett was to attend a previously scheduled meeting and advised Mr. Kpan that Mr. Luckett would be returning to Mr. Kpan and the subject of the request for leave form.

Mr. Luckett testified that when his scheduled meeting on March 12, 2018 had concluded he returned to Mr. Kpan's desk where he found Mr. Kpan seated. Mr. Luckett found that the requested leave form had not been prepared, whereupon Mr. Luckett asked Mr. Kpan to provide the RFL form.

Mr. Lockett recalled Mr. Kpan standing up. Mr. Lockett again advised Mr. Kpan that Mr. Lockett needed the request for leave form from Mr. Kpan. Mr. Lockett then walked to Mr. Lockett's work pod.

Mr. Lockett recalled that after arriving at his work pod Mr. Kpan approached and advised Mr. Lockett that Mr. Lockett was going to stop pushing Mr. Kpan around. Mr. Lockett recalled Mr. Kpan banging on Mr. Lockett's desk. Mr. Lockett was seated during this part of his interaction with Mr. Kpan. Mr. Lockett recalled Mr. Kpan saying to Mr. Lockett: "I'm going to fuck you up. I don't know who you think you are." Mr. Lockett stated that these statements were repeated by Mr. Kpan, at which time Mr. Lockett stood because Mr. Kpan was coming closer to Mr. Lockett, invading Mr. Lockett's personal space. Mr. Lockett recalled advising Mr. Kpan that Mr. Kpan needed to go back to his desk and Mr. Kpan began walking in the direction of his desk. Mr. Lockett recalled that about forty seconds after Mr. Kpan had walked away Mr. Kpan returned to Mr. Lockett's work pod and there Mr. Kpan encountered Gerald Quick, a manager who had arrived looking to borrow a tape measure from Mr. Lockett. Mr. Lockett observed Mr. Kpan telling Mr. Quick that Mr. Lockett had been harassing Mr. Kpan. Mr. Lockett pointed out that Mr. Quick had not been a manager of Mr. Kpan and was not in Mr. Kpan's chain of command. Mr. Lockett noted that Director Cunningham is Mr. Lockett's immediate supervisor. Mr. Lockett recalled Mr. Quick leaving the area, as did Mr. Kpan.

Mr. Lockett was contacted by BWC's Office of Labor Relations and Mr. Lockett traveled to the labor relations offices where he spoke to BWC Threat Assessment Coordinator Darrin Blosser.

Mr. Lockett recalled that March 12, 2018 had been a Monday, and Mr. Lockett had had pre-approved vacation days scheduled for March 13, 14, and 15, 2018. Mr. Lockett returned to work the following Tuesday and found Mr. Kpan had been placed on administrative leave.

Mr. Lockett recalled telling Mr. Blosser, the threat assessment coordinator, that at some point in Mr. Lockett's interaction with Mr. Kpan on March 12, 2018 Mr. Lockett had come to believe that Mr. Kpan was about to "swing on" Mr. Lockett. Mr. Lockett told Mr. Blosser that Mr. Kpan had appeared

that agitated.

Mr. Luckett identified Joint Exhibit 2(h) as his written statement provided on March 12, 2018 to Mr. Blosser, prior to Mr. Luckett leaving on his scheduled vacation days.

Mr. Luckett testified that he understood “work and grieve” to be a generally accepted principle followed in the workplace, meaning that if an employee takes issue with a direction from an authorized supervisor, and presuming the direction to be lawful, the employee is to carry out the direction and then file a grievance challenging the supervisor's direction.

Mr. Luckett recalled that Mr. Kpan while located at Mr. Luckett's work pod on March 12, 2018 had been loud and agitated, and Mr. Luckett testified that he had observed this aggressiveness exhibited by Mr. Kpan in the past. Mr. Luckett recalled that on March 12, 2018 Mr. Kpan had exhibited a high level of anger and Mr. Luckett recalled Mr. Kpan looking at Mr. Luckett in the eye and declaring: “I'm going to fuck you up.”

Mr. Luckett testified that he is five feet, seven inches tall and Mr. Kpan is six feet, eight inches tall.

Under questioning by the Union's representative, Mr. Luckett was asked about the tardiness policy followed in the IT Division. Mr. Luckett stated that the policy called for a telephone contact within thirty minutes of an assigned starting time to advise a supervisor of a late report for duty. Mr. Luckett testified that all others who did not report for duty by their assigned starting times were considered tardy.

Mr. Luckett was asked whether all employees who report for duty in a tardy manner are required to fill out a Request For Leave form to cover the tardy time. Mr. Luckett testified that filling out such a form under this circumstance does not occur often, happening once or twice per year. Mr. Luckett stated that if an employee is tardy in reporting for duty, that employee is not permitted to make up the tardy time by working through a lunch period but may, with supervisory approval, if there is

sufficient work available, stay after the conclusion of the scheduled shift to cover the tardiness time. If such tardy time is not covered through work performed beyond the end of the scheduled work day, a request for leave form is required from the employee.

Mr. Luckett testified that he has in the past on multiple occasions demanded a Request For Leave form from Mr. Kpan for reporting for duty in a tardy manner. Mr. Luckett testified that there had been a number of instances of tardiness involving Mr. Kpan.

Mr. Luckett testified that on March 12, 2018 Mr. Kpan arrived for duty at 8:43 a. m. when his starting time had been flexed to allow an arrival between 8:00 a. m. and 8:30 a. m. Mr. Luckett explained that because of the flexed time for reporting for work, Mr. Kpan was considered to be within his scheduled starting time so long as he arrived for duty by 8:30 a. m.

Mr. Luckett testified that he received no prior telephone call from Mr. Kpan about being late for duty on March 12, 2018 and therefore when Mr. Kpan arrived for his scheduled tour of duty on March 12, 2018 at 8:43 a. m. he was found to be thirteen minutes tardy in reporting for work.

Mr. Luckett identified Union Exhibit 3 as presenting three emails that were prepared and sent on March 12, 2018. The first email was sent at 12:17 p. m. on March 12, 2018 by Mr. Luckett to Mr. Kpan that reads: "Please submit an RFL for you being tardy today."

At 1:19 p. m. on March 12, 2018 Mr. Kpan responded to Mr. Luckett's email with an email that reads: "I already have an RFL for today that I will need to cancel due to change of a vacation plan and my time is being adjusted."

At 1:25 p. m. on March 12, 2018 Mr. Luckett directed an email in response to Mr. Kpan that reads: "A RFL needs to be submitted for 8:30 to 8:43."

Mr. Luckett testified that he had counseled Mr. Kpan in the past in a constructive attempt to fix the tardiness problem presented by Mr. Kpan. Mr. Luckett testified that he had tried different techniques in counseling Mr. Kpan in an attempt to solve the problem.

Mr. Lockett recalled that when Mr. Kpan had been located at Mr. Lockett's work pod, Mr. Kpan had leaned in toward Mr. Lockett.

Mr. Lockett testified that Mr. Kpan was letting Mr. Lockett know what was going to happen when Mr. Lockett had stood up. At this point in the chronology of events Mr. Lockett had thought the situation was about to get physical. Both Mr. Lockett and Mr. Kpan had been standing. At no time, however, did either man come into physical contact with the other and there had been no physical gesture threatening Mr. Lockett with harm.

Under redirect questioning by the Employer's representative, Mr. Lockett identified Joint Exhibit 2(l) as a direct order dated January 3, 2017 from Mr. Lockett to Mr. Kpan. This direct order related to entering accurate lunch period entries into the BWC timekeeping system. Mr. Lockett recalled that this direct order had been required because Mr. Kpan had not been telling the truth about his time in reporting back to duty after lunch.

Mr. Lockett referred to Joint Exhibit 4(a) as a three-day suspension issued to Mr. Kpan dated May 1, 2017 and served on May 3, 4, and 5, 2017 based upon insubordination, failure to follow supervisory direction and/or failure to follow a written policy of the Employer, and dishonesty, willful falsification of an official document. This three-day suspension comprises active discipline and remains in effect.

Mr. Lockett identified Joint Exhibit 5(i) as an email from Mr. Kpan directed to Mr. Lockett on March 12, 2018 at 1:25 p. m. concerning the request for leave form demanded by Mr. Lockett from Mr. Kpan, that reads: "Ok. I made the changed (sic)."

An email on March 22, 2018 from Mr. Lockett directed to Mr. Blosser reads: "His RFL was for later in the day. It was for him to leave at 3:30pm. Not for arriving late."

Terry Pettet

Terry Pettet has been employed by the Ohio Bureau of Workers' Compensation in the Information Technology Division for over twenty-one years. Mr. Pettet is an Infrastructure Specialist 3, performing the work of a network engineer.

Mr. Pettet stated Mr. Luckett is Mr. Pettet's immediate supervisor and Mr. Pettet had known Mr. Kpan as a co-worker. Mr. Pettet identified himself as a member of the bargaining unit.

Mr. Pettet had been at work on March 12, 2018 and on that day had overheard interactions between Mr. Kpan and Mr. Luckett. On March 13, 2018 Mr. Pettet prepared a written statement, Joint Exhibit 5(e), a statement dated March 13, 2018 and provided to Mr. Blosser, the BWC's Threat Assessment Coordinator.

The March 13, 2018 written statement by Mr. Pettet, Joint Exhibit 5(e) includes the following:

On March 12<sup>th</sup> @ approximately 1330 hrs Shon Luckett approached Peter "Serbo" Kpan and explained to Serbo that Serbo couldn't come in late and then work over to cover his late arrival. A verbal exchange followed where Serbo kept saying he would work on it, and Shon kept saying "Don't work on it, just do it." (I took Shon's meaning as stop coming in late and working over). At this point Shon went back to his desk.

A few minutes later Serbo went to Shon's desk and told Shon he wasn't going to be pushed around. Serbo also said that Shon picked the wrong guy to mess with and he wasn't going to take it. Shon repeatedly told Serbo to walk away, and Serbo kept repeating his previous statements.

I couldn't see the exchange, but Serbo's words sounded aggressive and threatening, and his volume was somewhat elevated. Serbo even went so far as to accuse Shon of having employees watching Serbo and reporting back to Shon.

Following Mr. Pettet's written statement, questions put to Mr. Pettet by Mr. Blosser are presented, along with Mr. Pettet's responses to those questions. The initial question put to Mr. Pettet by Mr. Blosser asked whether Mr. Pettet had seen Mr. Kpan act similarly in the past. Mr. Pettet responded that he had seen such behavior on the part of Mr. Kpan on several occasions, with the last time about

one year earlier. That earlier instance involved a co-worker attempting to explain something to Mr. Kpan and Mr. Kpan encountering difficulty in fully understanding what was being conveyed to him. The co-worker said to Mr. Kpan, "Use your brain," and Mr. Kpan became upset and asked the co-worker who the co-worker thought he was talking to. According to Mr. Pettet, Mr. Kpan "... is a challenge to keep calm," as Mr. Kpan blows up pretty frequently, maybe three to four times per year.

When asked by Mr. Blosser whether Mr. Pettet believed that the interaction between Mr. Kpan and Mr. Lockett was about to get physical, Mr. Pettet had responded: "I thought it could. Serbo was emotionally agitated. Shon would tell him to walk away and Serbo would come back saying 'You're messing with the wrong guy.' Shon kept telling Serbo, 'You need to walk away.'" Mr. Pettet told Mr. Blosser that had he had been in Mr. Lockett's place Mr. Pettet would have felt the situation could get physical.

Mr. Pettet identified Joint Exhibit 2(f) as an email dated March 12, 2018 from Mr. Pettet to Rhonda Bell of BWC's Office of Labor Relations sent at 1:58 p. m. Mr. Pettet stated that Mr. Lockett had asked Mr. Pettet to direct an email to Ms. Bell about what Mr. Pettet had observed and Mr. Pettet stated that what is contained in his March 12, 2018 email is in accordance with Mr. Pettet's written statement provided to Mr. Blosser on March 13, 2018. Mr. Pettet's March 12, 2018 email to Ms. Bell reads as follows:

Shon approached Serbo and explained to him that he couldn't come in late and then work over to cover his late arrival. Serbo kept saying he would work on it. Shon said, "Don't work on it, just do it. [I too (sic) the meaning for him to stop coming in late and working over]" At this point, Shon went back to his desk.

A few minutes later, Serbo went to Shon's desk and told him he wasn't going to be pushed around. That Shon picked the wrong guy to mess with and he wasn't going to take it. I couldn't see the exchange, but Serbo's words sounded aggressive and threatening, and his volume was somewhat elevated. Serbo even went so far as to say that Shon has the employees watching him and reporting back to Shon.

Under questioning by the Union's representative, Mr. Pettet stated that his work station was across the aisle and one cubicle up from the desk of Mr. Kpan, with about twelve feet separating them.

Mr. Pettet testified that at no time had he heard Mr. Kpan say to Mr. Lockett: "I'm going to fuck you up."

Mr. Pettet was asked whether he had ever been asked for a Request For Leave form in the event he reported for duty in a tardy manner. Mr. Pettet responded: "I believe I have."

As to Mr. Pettet's working relationship with Mr. Kpan, Mr. Pettet stated that it had been a friendly relationship and he had had no heated discussions with Mr. Kpan.

Mr. Pettet was referred to Union Exhibit 4, an email dated April 5, 2018 directed to over fifty BWC employees notifying them that Mr. Kpan had been separated from his employment with BWC and the email asked that if any person had provided access to Mr. Kpan to please delete that access from their system. This email was sent by Edwin Todd II, I & O Information Technology/Computer Security, Ohio Bureau of Workers' Compensation. The email from Mr. Todd was sent at 1:32 p. m. on April 5, 2018. At 1:37 p. m. on April 5, 2018 Mr. Pettet directed an email in response to Mr. Todd's email to Mr. Lockett in reference to the discharge of Mr. Kpan that read: "AWESOME!!!!" Mr. Pettit explained that he had sent this email on April 5, 2018 because Mr. Kpan had made too many mistakes in his work. Mr. Pettet stated that Mr. Kpan was not a good worker.

Mr. Pettet reiterated that he had believed that the interaction between Mr. Lockett and Mr. Kpan could have escalated to violence, and confirmed that he, Mr. Pettet, did nothing to intervene. Mr. Pettet noted that Mr. Kpan's voice had been getting louder and Mr. Lockett kept repeating to Mr. Kpan that Mr. Kpan needed to walk away. Mr. Pettet stated that he did not contact anyone at the time of these interactions.

Mr. Pettet's direct supervisor is Mr. Lockett and Mr. Lockett directed Mr. Pettet to write down what he had overheard. Mr. Pettet did as he was directed.



Mr. Pettet referred to Union Exhibit 5, his timekeeping sheet that reflects that his reporting time is flexed from 9:00 a. m. to 9:30 a. m.

Edward "Scott" Taylor

Edward "Scott" Taylor has been employed by the Ohio Bureau of Workers' Compensation for the past thirteen years, and at the time of his testimony in this proceeding was serving within a position classified Infrastructure Specialist 4. Mr. Taylor's duties address the Ohio Bureau of Workers' Compensation's network infrastructure.

Mr. Taylor's supervisor is Shondale Luckett. Mr. Taylor stated that Mr. Kpan and Mr. Taylor had had a fairly good working rapport.

Mr. Taylor was at work on March 12, 2018 when he overheard a heated discussion between Mr. Kpan and Mr. Luckett, with a passionate sounding Mr. Kpan telling Mr. Luckett what Mr. Luckett's job duties entailed. Mr. Taylor identified Joint Exhibit 5(f) as his written statement provided to Threat Assessment Coordinator Blosser on March 13, 2018. The first paragraph of Mr. Taylor's written statement reads as follows:

On March 12<sup>th</sup> 2018 during the early afternoon I observed and heard Peter Kpan (Serbo) berating Shondale Luckett in a loud and unprofessional manner at Shon's pod. The parts I saw and heard were brief but it entailed Serbo telling Shon what Shon's job was and that it was his job to supervise him.

The narrative from Mr. Taylor's written statement set out above is followed by questions put to him by Mr. Blosser and the responses from Mr. Taylor to those questions. In these questions and answers Mr. Taylor stated that Mr. Kpan had been very loud and had appeared to be very angry. Mr. Taylor stated that in passing he had observed Mr. Kpan in Mr. Luckett's work pod when both were standing up and Mr. Kpan had been: "Sort of in & out of Shon's pod, in an aggressive manner." Mr. Taylor responded to Mr. Blosser's question by saying that Mr. Taylor would have been on the defensive

if he had been in Mr. Lockett's position, and he recalled Mr. Lockett telling Mr. Kpan to go back to his desk and work on what he needed to work on. Mr. Taylor recalled that Mr. Lockett "... was actually pretty calm and I felt handled it well."

As to Mr. Kpan's actions, Mr. Taylor had stated in his response to Mr. Blosser's question that all employees get animated and upset at times but this was not typical. Mr. Taylor said that Mr. Kpan had been upset and had not handled the situation well. When asked whether if he were Shon he would have felt threatened, Mr. Taylor responded: "I probably would not have been as calm as Shon was." When asked whether he had thought at that time that a physical altercation was about to occur, Mr. Taylor responded: "I've seen people like that before, and feel it could have escalated to that."

Mr. Blosser asked Mr. Taylor: "Did you feel threatened or uncomfortable during this?" to which Mr. Taylor had responded: "Not threatened but certainly uncomfortable." When asked whether he had seen Mr. Kpan act like this before, Mr. Taylor responded that he had not.

Mr. Taylor identified Joint Exhibit 2(g) as an email he directed to Ms. Bell at the Office of Labor Relations on March 12, 2018 at 2:16 p. m. The email directed to Ms. Bell from Mr. Taylor reads:

Early afternoon on the 12<sup>th</sup> of March 2018 I observed and heard Peter Kpan (Serbo) berating Shondale Lockett in a loud and unprofessional manner at Shon's pod. The parts I saw and heard were brief but it entailed Serbo telling Shon what Shon's job was.

Under questioning by the representative of the Union, Mr. Taylor recalled that Mr. Lockett had been very calm, cool, and collected. Mr. Taylor testified that he had known Mr. Lockett to have served in the military and understood that Mr. Lockett had served in a special operations unit, an assignment limited to America's military elite.

Mr. Taylor was asked if he had reported for duty tardy, and if so, whether he had been asked for a Request For Leave form. Mr. Taylor testified that if he had not been "ahead on hours" he would

submit a request for leave form to cover the tardy time.

Petr Serbo Kpan, Jr.

Petr Serbo Kpan, Jr. had been employed by the Ohio Bureau of Workers' Compensation for twenty-one and one-half years. At the time of Mr. Kpan's discharge on April 5, 2018 Mr. Kpan had filled an Infrastructure Specialist 2 position. Mr. Kpan came to United States from Monrovia, Liberia in West Africa and is today a naturalized American citizen.

Mr. Kpan recalled that on March 12, 2018 he arrived for duty at 8:43 a. m., an arrival that was tardy by thirteen minutes. Mr. Kpan was asked whether he had reported tardy for duty on previous occasions and Mr. Kpan confirmed that he had. Mr. Kpan pointed out that his prior tardiness had not produced a demand for a request for leave form from Mr. Kpan. Mr. Kpan stated that he had always made up his tardiness by flexing his lunch period or working beyond the conclusion of his assigned work shift. Mr. Kpan stated that this was known by Mr. Kpan's supervisor, Mr. Lockett.

Mr. Kpan was asked whether anyone else who had been tardy in reporting for duty had been required to prepare a request for leave form. Mr. Kpan stated that to his knowledge no one had been directed to do so. Mr. Kpan claimed that he had been singled out for harsher treatment, and this had not been an isolated occurrence. Mr. Kpan noted that over the last twelve months of his employment by BWC he had been evaluated more often and had been reprimanded for conduct that other employees got away with.

Mr. Kpan recalled in his testimony that he had been refused access to a data center on the fifteenth floor of the William Green Building, the building to which Mr. Kpan was assigned. Mr. Kpan had been told that only employees with a "lead" designation were to continue to have access to the fifteenth floor data center. Mr. Kpan testified that he subsequently discovered that he was the only BWC employee whose access to the data center had been revoked.

Mr. Kpan identified Union Exhibit 9 as two emails, the earlier from Mr. Kpan directed to the Director of the Information and Operations Department, Mr. Cunningham, the direct supervisor of Mr. Luckett. Union Exhibit 9 presents a June 16, 2017 email from Mr. Kpan to Mr. Cunningham that states that Mr. Kpan was checking to determine whether Director Cunningham had been aware of Mr. Kpan's immediate supervisor's action of revoking Mr. Kpan's access to the L15 Test Lab effective June 16, 2017 and that Mr. Kpan had been the only person denied this access. Mr. Kpan wrote in his June 16, 2017 email to Director Cunningham:

I am checking to learn if you are aware of Shon's action of revoking any access to L15 as of Tuesday 6/16/17 and not others? I am not sure if you are aware, thought to bring this to your attention. I was told management performed floors audit and sought to minimize and revoke few staffs access to L15 test lab accept (sic) for team leads, but yet the rest of my teammates has the capacity, access and has long been tooled with the mobility, flexibility of a laptop, ability to navigate, explore, test and get hands-on experience with the new rollout switches (4507 and 3567) as well as team collaboration accept (sic) for me.

I am hopeful that I can be part of my team effort and collaboration as well as the capacity to use those tools.

Thanks.

P. Serbo Kpan, Jr.

On June 19, 2017, as presented by Union Exhibit 9, Director Cunningham responded with an email to Mr. Kpan that, in its entirety, read: "I am aware and approved."

Mr. Kpan believes he was singled out to be excluded from the fifteenth floor data center and this singular limitation placed solely on Mr. Kpan disadvantaged Mr. Kpan. Mr. Kpan stated that he raised his concerns in this regard within the Bureau, asking to speak directly to the Administrator of BWC. Mr. Kpan was directed to the Director of BWC's Department of Human Resources.

Mr. Kpan identified Union Exhibit 10 as a series of emails that begin on April 21, 2017 and conclude on May 15, 2017. These emails relate to the referral of Mr. Kpan to BWC's Director of

Human Resources. The emails are about scheduling a meeting between Mr. Kpan and BWC's Director of Human Resources. The meeting was scheduled for April 3, 2017 from 1:00 p. m. to 1:30 p. m.

The last email presented by Union Exhibit 10 was sent on May 15, 2017 and was directed to Mr. Kpan by the Director of BWC's Department of Human Resources. This email advised Mr. Kpan that because Mr. Kpan had recently received disciplinary action, the Director believed it necessary to place their conversation on hold until the grievance process had been completed.

Mr. Kpan recalled that he had reported for work at 8:43 a. m. on March 12, 2018, thirteen minutes tardy, and during the early afternoon that day Mr. Kpan was asked to complete a request for leave form. Mr. Kpan stated that the demand for a request for leave form caused shock and concern in Mr. Kpan because he had never before been asked for a request for leave form to cover his tardiness. Mr. Kpan recalled that the demand for a request for leave form had come from Mr. Kpan's immediate supervisor, Shon Luckett.

Mr. Kpan identified Union Exhibit 11 as the email that was directed to Mr. Kpan by Mr. Luckett on March 12, 2018 at 12:16 p. m. that, in its entirety, reads: "Please submit a RFL for you being tardy today."

Mr. Kpan recalled that on March 12, 2018 he had been approached by Mr. Luckett and asked for a request for leave form for the thirteen minutes of tardiness occasioned by Mr. Kpan's late arrival for duty that day. Mr. Kpan recalled that Mr. Luckett then walked back to his work cubicle. When Mr. Kpan inquired of Mr. Luckett whether Mr. Kpan could flex his time to cover the thirteen minutes of tardiness, Mr. Kpan recalled Mr. Luckett responding: "No! No!" Mr. Kpan recalled that he then asked Mr. Luckett: "Can I get some clarity?" Mr. Kpan recalled Mr. Luckett saying that Mr. Luckett had had to leave to attend a meeting but he would be back. Mr. Kpan understood from this interaction that before Mr. Kpan took any action he was to await Mr. Luckett's return.

Mr. Kpan recalled walking to Mr. Luckett's cubicle where he observed a second line manager,

Gerald Quick, standing by Mr. Lockett's cubicle. Mr. Kpan walked up to Mr. Quick and spoke to him. Mr. Kpan stated that he never walked up to Mr. Lockett while Mr. Lockett had been seated and had never entered Mr. Lockett's work cubicle's space. Mr. Kpan stated that his interaction with Mr. Quick and with Mr. Lockett occurred in front of Mr. Lockett's cubicle, not within it.

Mr. Kpan identified Union Exhibit 12 as a diagram of floor sixteen of the William Green Building, the floor to which Mr. Kpan and Mr. Lockett had been assigned. Mr. Kpan explained that near the midway point of the northern-most hallway (hallway runs east and west) on this diagram is where Mr. Kpan and Mr. Quick interacted on March 12, 2018, outside Mr. Lockett's work cubicle. Mr. Kpan told Mr. Quick at that time that Mr. Kpan was being harassed, and from that location had also advised Mr. Lockett that: "You're messing with the wrong person."

Mr. Kpan recalled Mr. Quick walking away and Mr. Kpan turning to Mr. Lockett and saying that Mr. Lockett had to stop messing with Mr. Kpan. Mr. Kpan testified that it had been his intention to change Mr. Lockett's behavior toward Mr. Kpan, but it had never been his intention to threaten Mr. Lockett. Mr. Kpan stated that he never threatened to harm Mr. Lockett or anyone else, and while his voice may have been somewhat elevated at a time of high emotional stress, it had not been loud.

Mr. Kpan stated that he stands six feet, six and one-half inches tall. Mr. Kpan pointed out that he has a low voice and therefore must speak louder to be heard. Mr. Kpan specifically and explicitly denied saying to Mr. Lockett: "I'm going to fuck you up," pointing out that Mr. Kpan does not use profanity and had always remained disciplined in his speech.

Mr. Kpan was placed on administrative leave on March 14, 2018.

Mr. Kpan recalled that when he arrived at work on March 14, 2018 he had been directed to the second floor by Director Cunningham where Mr. Kpan was interviewed by Mr. Blosser. During this interview, as recalled by Mr. Kpan, he was never asked if he had used the term "fuck you up," having been first asked about this language the following day. Mr. Kpan stated that on March 14, 2018 he then

traveled to the nurse's station because he was experiencing a panic attack. Mr. Kpan was transported to a local hospital due to his high anxiety.

Mr. Kpan identified Union Exhibit 13 as an email from Director Cunningham dated March 14, 2018 that advised BWC staff that Mr. Kpan had been placed on administrative leave and will not be permitted into the building until a current situation had been resolved. Director Cunningham in his email asked that Director Cunningham be made aware of any work that Mr. Kpan had been assigned so that the work could be reassigned.

Mr. Kpan identified Union Exhibit 10(a) as a memorandum dated April 30, 2017 prepared by Mr. Kpan and directed to BWC Human Resource Management. This memorandum, titled "Personal Health State, Performance and Working Conditions," is comprised of ten pages in which Mr. Kpan charges that management is creating a workplace sub-culture that includes harassment, intimidation, and singling out Mr. Kpan for unfair, undeserved, and detrimental treatment.

Mr. Kpan testified that he has had his disagreements in the past with his supervisor and BWC management but Mr. Kpan has never been violent toward anyone and has never used profanity in expressing himself. Mr. Kpan stated that he has never threatened anyone with harm and stated that he had no desire to appear threatening and never intended to appear threatening. Mr. Kpan stated that he has reached out to supervision and others to resolve the issues he has raised but his concerns have been ignored.

#### Gerald Quick

Gerald Quick serves as an Information Technology Manager 2 within the Ohio Bureau of Workers' Compensation and has been employed by the Bureau for seventeen years.

Mr. Quick recalled that on March 12, 2018 he had been approached by Mr. Kpan and handed a piece of paper stating that Mr. Kpan was being harassed. Mr. Quick recalled hearing no exchange

between Mr. Kpan and Mr. Lockett. Mr. Quick stated that he did not serve in the chain of command that contained Mr. Kpan and Mr. Lockett.

Mr. Quick recalled that Mr. Kpan had not been calm when he approached Mr. Quick but Mr. Quick had not thought that the situation was going to get physical.

As to the tardiness policy followed within the IT Division, Mr. Quick stated he could not recall the policy. Mr. Quick stated that he understood that if there was work available it had been possible to make up tardiness time, but work hours could not be extended simply for the purpose of covering tardy time.

Mr. Quick stated that he had not been involved in issuing the written reprimand and three-day suspension to Mr. Kpan, and recalled that during all the events he observed that had occurred on March 12, 2018, Mr. Lockett had been seated at his desk in Mr. Lockett's work cubicle.

#### Tim McAllister

Tim McAllister has been employed by the Ohio Bureau of Workers' Compensation for twenty-nine years and serves as a Union Chapter President representing BWC bargaining unit members.

Mr. McAllister was asked whether he could recall the flex time policy of the Bureau and Mr. McAllister said that he could not. Mr. McAllister testified that within the IT Division there was no set flex time policy.

Mr. McAllister stated that he flexes his starting time between 6:15 a. m. and 6:45 a. m. and he has never been asked to provide a request for leave form for tardiness. Mr. McAllister stated that his flexed time in reporting for duty had been in effect for one year.



## POSITIONS OF THE PARTIES

### Position of the State of Ohio, Bureau of Workers' Compensation, Employer

It is the position of the Employer in this proceeding, the State of Ohio, Bureau of Workers' Compensation, that based on the threat assessment that was completed, the Employer's investigation, and admissions by the grievant, the Employer has proven that the grievant violated the Employer's work rules by defying his supervisor's directions and threatening the supervisor on March 12, 2018. The Employer argues that the grievant's behavior in this regard was so egregious that removal was warranted.

The Employer points out that on March 12, 2018 the grievant's supervisor made repeated requests that Mr. Kpan prepare and submit a request for leave form to cover the tardiness that occurred with Mr. Kpan's late arrival for duty that day. The Employer contends that the grievant not only failed to immediately comply with his supervisor's direction but instead confronted his supervisor on several occasions that were observed and/or overheard by eyewitnesses who testified at the arbitration hearing.

The Employer claims that those eyewitnesses who had observed and/or overheard the interaction between Mr. Kpan and Mr. Lockett on March 12, 2018 had each indicated that at some point in this interaction they had formed the impression that the interaction might move from a verbal altercation to a physical one. The Employer argues that the grievant's behavior and voice were threatening and aggressive and his verbal attacks upon his supervisor were personal in nature, specifically directed at supervisor Lockett.

The Employer notes that Mr. Kpan was placed on administrative leave with pay effective March 14, 2018 until the date of his discharge, April 5, 2018.

The Employer notes that when the grievant was discharged on April 5, 2018 he had in his BWC employment record active discipline in the form of a three-day suspension issued May 1, 2017 for

insubordination - failure to follow supervisory direction, and dishonesty - willful falsification of an official document. Also within the employment record of the grievant is a written reprimand dated January 24, 2017 for insubordination - failure to follow supervisory direction, neglect of duty - failure to perform the duties of the position or performance at substandard levels, and failure to report a work related accident, injury, or illness to an immediate supervisor within forty-eight hours. The Employer contends that the grievant's removal was both progressive and commensurate with the offenses that have been proven to have occurred on March 12, 2018.

The Employer recalls the testimony of threat assessment coordinator Darrin Blosser who prepared the case summary that appears in the hearing record as Joint Exhibit 5(a). Mr. Blosser found that Mr. Kpan had been "... emotionally upset and, at minimum, passively indicating threatening behavior, if not completely threatening." Mr. Blosser confirmed that he had heard directly from eyewitnesses, reiterated in written statements from these eyewitnesses, that the grievant's behavior was so aggressive and threatening that each had come to believe that the situation between Mr. Lockett and Mr. Kpan could become physical. The arbitrator is reminded by the Employer that during these events Mr. Kpan had told his supervisor that Mr. Lockett "... was messing with the wrong individual." Mr. Blosser also confirmed that it is the object of the threat who determines the nature of the threat, and in this case supervisor Lockett perceived he was in a threatening situation based on Mr. Kpan's actions, tone, and words.

The Employer points to the testimony from supervisor Shondale Lockett who had said that Mr. Kpan's agitation had escalated, that at one point Mr. Kpan came to Mr. Lockett's desk, leaned in with his hands on the top of Mr. Lockett's desk, and told Mr. Lockett that Mr. Kpan was going to "fuck you up." Mr. Lockett indicated in his testimony that while he had been seated when this had occurred, he stood because he had observed Mr. Kpan becoming sufficiently agitated so as to conclude that Mr. Kpan might take a swing at Mr. Lockett.

The Employer points to the testimony from Mr. Taylor and Mr. Pettet who each recalled Mr. Kpan berating his supervisor, Mr. Lockett, on March 12, 2018, with each forming the impression that the verbal altercation he was overhearing could become a physical altercation.

The Employer notes that the Ohio Bureau of Workers' Compensation has a Workplace Violence Awareness Policy, Memo 4.19, a copy of which Mr. Kpan signed for through an acknowledgment of receipt signed on December 30, 2016. The Employer's Workplace Violence Awareness Policy defines a threat as an expression of present or future intent to cause physical or mental harm to oneself or others regardless of whether the party communicating the threat has the present ability to do harm in any location, either permanent or temporary, where an employee performs any work-related duty. The BWC's Workplace Violence Awareness Policy declares a "zero tolerance" for workplace violence.

The Employer notes that the Bureau's zero tolerance policy for workplace violence applies to physical acts, threats, and menacing behavior in the workplace. Included among the prohibitions intended by the Workplace Violence Awareness Policy are direct or indirect threats; threatening, abusive, or harassing telephone calls; possession of a weapon on agency property or on a job site; destructive or sabotaging actions against BWC or personal property; stalking; threatening, hostile, or intimidating behavior; violation of restraining orders, and fighting.

The Employer notes that the threatening behavior by Mr. Kpan toward Mr. Lockett on March 12, 2018 was reported to the Director of BWC's Office of Employer and Labor Relations and an investigation was initiated immediately that included a threat assessment. These procedures were in accordance with BWC work rules.

The Employer points to the testimony from IT Manager 2 Gerald Quick who had interacted with Mr. Kpan on March 12, 2018 at about 1:30 p. m. Mr. Kpan had alleged to Mr. Quick that Mr. Kpan was being harassed by supervisor Lockett. Mr. Quick recalled in his testimony at the arbitration hearing that Mr. Kpan had not appeared calm and this had not been the first time Mr. Quick had

observed Mr. Kpan in an aggravated state.

The Employer acknowledges that the grievant at the arbitration hearing denied he entered Mr. Lockett's work cubicle at any time on March 12, 2018 and denied placing his hands on the top of Mr. Lockett's desk. Mr. Kpan confirmed that he told Mr. Lockett that Mr. Lockett must stop harassing Mr. Kpan and had asserted to Mr. Lockett that Mr. Lockett was messing with the wrong person.

The Employer recalls Mr. Kpan telling threat assessment coordinator Blosser that he, Mr. Kpan, had not been upset by the request for a request for leave form but had been concerned about it. Mr. Kpan indicated in his testimony and in his interview with Mr. Blosser that he had not been calm, had been upset and concerned, and had expressed his disagreement with the treatment he was receiving from Mr. Lockett. Mr. Kpan does not dispute that he displayed tension arising from the directions he was receiving from his supervisor.

The Employer concludes its post-hearing brief with the following:

Based on the above merits, the State showed that it was justified in removing the Grievant from his position due to violating the BWC Disciplinary Policy and Grid (Joint Exhibit 6): Failure of Good Behavior (b) Poor Judgment and (d) Discourteous and/or rude treatment of a fellow employee, manager, or customer. Although there was a multitude of work rule violations management could have chosen, Failure of Good Behavior (b) Poor Judgment seemed to be the best fit. On March 12, 2018, the Grievant made many poor decisions and displayed poor judgment, including:

1. The Grievant arrived to work late;
2. The Grievant was directed to submit a RFL for his tardiness; he failed to immediately comply with this direction on several occasions.
3. The Grievant argued with his supervisor instead of "working and grieving", if he did not agree with the request.
4. The Grievant went to his Supervisor's desk and reignited the confrontation with the supervisor.
5. The Grievant argued with his supervisor in an open area which could be seen and overheard by his peers.
6. The Grievant was threatening and aggressive in his actions, tone, and words used towards his supervisor.

For the above reasons, the State respectfully requests that you deny this 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

It is the position of the Union in this proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, that the issue in this case is whether the grievant was removed from his position without just cause. If so, the issue becomes the nature of the remedy to heal this contractual breach.

The Union points out that the grievant in this proceeding, Mr. Kpan, was a twenty-one and one-half year employee of the Ohio Bureau of Workers' Compensation. Mr. Kpan worked within the Information Technology Division as an Infrastructure Specialist 2.

It is claimed that for a number of years, beginning under Mr. Kpan's previous immediate supervisor, about ten years ago, and continuing since that time, Mr. Kpan has voiced his concerns within his chain of command and to the BWC Human Resources Department's Director that Mr. Kpan has not been treated fairly or respectfully. Mr. Kpan said that BWC's management never adequately addressed Mr. Kpan's concerns in this regard.

The Union notes that on March 12, 2018 Mr. Kpan arrived thirteen minutes late for work. While the IT Division does not have a "tardy policy" *per se*, Mr. Kpan and his co-workers were permitted to make up tardy time during lunch periods, by coming in a few minutes early, or by staying over a few minutes at the end of the work day. On March 12, 2018 Mr. Kpan had believed and had had reason to believe he would be allowed to make up the time during his lunch period. Mr. Kpan was told on March 12, 2018 instead that he was to submit a request for leave form for the thirteen minutes of tardiness. When Mr. Kpan inquired of Mr. Luckett why this requirement had arisen for the first time and, to Mr. Kpan's knowledge, had not been raised with any other tardy employee, Mr. Kpan's concerns in this regard were dismissed by his supervisor, Mr. Luckett. Mr. Kpan was only told, repeatedly, to fill out and submit the request for leave form to cover the thirteen minutes of tardiness.

It is the position of the Union that Supervisor Lockett became agitated when questioned by Mr. Kpan about the need for a request for leave form and Mr. Lockett left for a meeting, advising Mr. Kpan that Mr. Lockett would be returning after the meeting.

The Union contends that at no point did the grievant threaten his supervisor or anyone else. The Union contends that Mr. Kpan has been singled out in a way that no other BWC IT employee has been treated. Because Mr. Kpan was not aware of any other employee being required to submit a request for leave form in the event of tardiness, Mr. Kpan formed the opinion that this “new” procedure was directed specifically at Mr. Kpan and was intended to harass him.

The Union points out that during the early afternoon hours of March 12, 2018 Mr. Kpan had approached IT Manager 2 Gerald Quick and had informed Mr. Quick that Mr. Kpan was being harassed by Mr. Kpan's supervisor, Mr. Lockett. Mr. Quick walked away and made no report of the allegation that had been made by Mr. Kpan as to harassment, a violation, argues the Union, of BWC policies 8.01 and 8.03. In support of this claim the Union points to a written reprimand issued to Mr. Quick by Director Cunningham for Mr. Quick's failure to act in accordance with those policies during the events in question, by failing to report the charge of harassment that had been made by Mr. Kpan.

The Union points out that on March 14, 2018, the day upon which Mr. Kpan was interviewed by BWC threat assessment coordinator Darrin Blosser, Mr. Kpan following the interview had experienced a panic attack, traveled to BWC's employee health services in the William Green Building for assistance, and was subsequently transported to a local hospital by ambulance. While awaiting transportation by ambulance to a local hospital and still located at BWC's employee health services in the William Green Building, Mr. Kpan was advised that he was being placed on administrative leave with pay, and was asked to hand over his BWC badge. The Union claims that the Employer's actions in this instance, under these circumstances, served to exacerbate Mr. Kpan's deteriorating physical condition.

The Union notes that Mr. Kpan has admitted that Mr. Lockett's request for a request for a leave form had concerned him and he had said to Mr. Lockett: "You are messing with the wrong person." The Union emphasizes, however, that Mr. Kpan never threatened anyone nor did he exhibit threatening and/or aggressive behavior. The grievant never threatened his supervisor with violence, and it is noted that only one witness, Mr. Lockett, claimed that the "fuck you up" statement had been uttered, with Mr. Kpan denying making such a statement and no other eyewitness present during the events in question recalling hearing this verbal threat.

The Union claims that there are several inconsistencies in statements submitted during the investigation into the events in question, including that neither Mr. Pettet nor Mr. Lockett nor Mr. Taylor mentioned the presence of IT Manager 2 Quick, and supervisor Lockett had stated that he had stood up in response to aggression from Mr. Kpan but IT Manager 2 Quick recalled in his testimony that supervisor Lockett was already standing when Mr. Quick observed Mr. Kpan approaching Mr. Lockett's work area. The Union notes that while the grievant was accused of threatening supervisor Lockett, Mr. Lockett failed to notify IT Manager 2 Quick of the threat when Manager Quick arrived at Mr. Lockett's work station. The Union notes that while Mr. Quick described the grievant as "not calm," Mr. Quick still left the immediate area, presumably believing that what was occurring at that time did not require his intervention or presence. The Union points out that while Mr. Pettet had said that Mr. Kpan "blows up" three to four times per year, Mr. Pettet could only identify one instance from over a year ago. In that instance the Union claims a derogatory comment was directed at Mr, Kpan and Mr. Kpan had responded with reasonable indignation considering the disrespect directed at Mr. Kpan in the comment.

The Union claims that other than the January 2017 written reprimand and the three-day suspension issued on May 1, 2017, there is no other discipline to be considered over the twenty-one and one-half years of service provided by Mr. Kpan to BWC. The Union notes that Mr. Kpan was not

placed on administrative leave until March 14, 2018, and had been permitted to work for the two days following March 12, 2018. The Union questions why, if a threat were considered imminent, Mr. Kpan was permitted to work two more days before being placed on administrative leave.

The Union claims that the grievant did submit the request for leave form requested from him but this request for leave form was denied by the Employer which the Union believes was the intention of the Employer at the moment the request for leave form from Mr. Kpan had been submitted.

The Union claims that the Employer has over-reached in its attempt to correct a situation and the arbitrator is reminded by the Union that the primary purpose of progressive discipline is to assist an employee in overcoming a work performance problem and to provide an opportunity to the employee to improve. The Union claims that a discharge is not corrective as it affords no opportunity to an employee to address the concerns raised by the Employer nor does it provide an opportunity for the Employer to address the concerns raised by the employee.

The Union points to two arbitration decisions involving the Union and the State of Ohio. In *OCSEA v. Ohio Department of Taxation*, Grievance No. 30-04-070112-0137-01-14, a decision issued in 2007 by arbitrator Anna DuVal Smith, arbitrator DuVal Smith held that the charge of threatening another employee was so serious and would have such an effect on an employee's reputation and ability to obtain subsequent employment that to sustain such a serious charge an Employer must present clear and convincing proof in support of what has been charged. Arbitrator DuVal Smith found that the charge against the grievant that involved a threat of violence in the case before her was not supported by a preponderance of evidence in the hearing record, even less by clear and convincing evidence.

A separate arbitration, *OCSEA v. Ohio Department of Mental Health*, Grievance No. 23-07-(94-09-13)-0109-01-04, resulted in a decision and award issued in 1995 by arbitrator Rhonda Rivera. Arbitrator Rivera found that discharge is analogous to capital punishment in the workplace. Arbitrator



Rivera expressed the opinion that a discharge to be upheld must be supported by clear and convincing evidence of the charged unacceptable behavior. Arbitrator Rivera considered a grievant who was a thirteen-year employee who had a long and consistent record of discipline, with a number of instances involving misbehavior directed at managerial authority. Arbitrator Rivera did not find sufficient evidence of an actual threat of harm to reach the clear and convincing standard, and noted that while the grievant may have been persistent and irritating, even inappropriately argumentative, arbitrator Rivera was not persuaded that the employer had proven the grievant had threatened another. Arbitrator Rivera found the grievant had engaged in a verbal outburst and a heated argument with his supervisor that had been inappropriate and disrespectful. The grievant's misconduct was determined to be a failure of good behavior but one that did not include a threat of bodily harm. Arbitrator Rivera found a serious suspension to be just and commensurate with the misconduct proven in the case before her.

The Union in the case herein argues that the Employer did not provide clear and convincing evidence that the conduct for which the grievant was removed occurred. The Union contends that the discharge occurred without just cause and asks that the arbitrator in his case sustain the grievance in its entirety, return Mr. Kpan to his former employment with BWC with full back pay, reimburse Mr. Kpan for medical or hospital expenses incurred after the date of his removal and prior to the date of his reinstatement, restore Mr. Kpan's seniority credits and leave balances, and order that Mr. Kpan be placed in the position he would have been had the removal of Mr. Kpan on April 5, 2018 not occurred. The Union asks the arbitrator to order that Union dues that would have been paid but for the removal of the grievant be paid to the Union, and Mr. Kpan requests that he be placed under a different immediate supervisor as the relationship between Mr. Kpan and Mr. Luckett had become contentious. The arbitrator is asked to award any other relief determined appropriate under the facts of this case.

## DISCUSSION

Within the parties' collective bargaining agreement, Joint Exhibit 1, Article 24, Discipline, section 24.01 begins with the following: "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."

The arbitrator understands "just cause" as that term is used in Article 24, section 24.01 to be grounded in what has been alleged, what allegations have been proven, and among the allegations that have been proven, whether the proven misconduct supports the level of discipline imposed. The arbitrator has no authority to interpose his own judgment as to what discipline should result from proven misconduct. The arbitrator is authorized to consider what was specified in the notice provided to the Union and the grievant as to the reasons for the imposition of the discipline, what was proven by the evidence in the hearing record, and whether that which had been proven is sufficiently substantial and serious to provide the just cause needed to support the level of discipline imposed by the Employer.

In the case herein the Employer had notified Mr. Kpan and his Union on April,5, 2018 that Mr. Kpan's removal from employment by the BWC was grounded in Mr. Kpan's violation of provisions of the BWC Disciplinary Policy and Grid, to wit: Failure of Good Behavior, (b) Poor judgment; and (d) Discourteous and/or rude treatment of fellow employee, manager, or customer. See April 5, 2018 notice of removal letter, Joint Exhibit 2(a).

In support of the discipline imposed by the Employer upon the grievant, discharge from employment effective April 5, 2018, the Employer claims that Mr. Kpan had not only been discourteous and rude in his treatment of his immediate supervisor, Mr. Luckett, actions resulting from poor judgment exhibited by Mr. Kpan during the events in question, but Mr. Kpan had also threatened his supervisor, Mr. Luckett, with physical harm. The Employer claims that the threatening behavior

exhibited by Mr. Kpan during the events addressed herein and the discourteous and rude treatment of supervisor Luckett by Mr. Kpan provide the just cause required to uphold the discipline imposed and to deny the grievance in its entirety.

The Union and the grievant emphatically deny that Mr. Kpan engaged in any threatening behavior, verbal or physical, and while the grievant's agitated demeanor during the events in question is not disputed, the Union and the grievant specifically and without qualification deny that at any time during the events at issue Mr. Kpan had used profanity or had directed a threat of physical harm at Mr. Luckett.

The arbitrator finds that the Employer has proven some of the claims of misconduct ascribed to Mr. Kpan, supported by a preponderance of the evidence in the hearing record, and in many cases by clear and convincing evidence. There is, however, one aspect of what has been alleged by the Employer against the grievant in this proceeding that is not found by the arbitrator to be proven by a preponderance of the evidence in the hearing record. The unproven allegation involves the claim that Mr. Kpan threatened Mr. Luckett with physical harm during the events in question.

What has been proven is a course of conduct by the grievant that begins with a breach of the work rules of the Employer in failing to report for duty on March 12, 2018 as scheduled in a timely manner. The contentious interaction between Mr. Kpan and Mr. Luckett on the day in question flowed from this failure by Mr. Kpan to report for duty on time, an instance of tardiness that was only the most recent instance of tardiness among a series of instances of tardiness by Mr. Kpan.

The request for a request for leave form communicated by Mr. Kpan's supervisor may have been unexpected by Mr. Kpan but there is nothing in the hearing record to indicate that Mr. Luckett's request in this regard had been irregular or unlawful or unreasonable. The thirteen minutes of tardiness that arose with Mr. Kpan's late report for duty on March 12, 2018 were not to be treated as minutes during which Mr. Kpan had provided work for which he was to be compensated because he had not

provided work during that time span. If these thirteen minutes were to be compensated by the Employer, the status of the compensation used to pay for these minutes of tardiness must be determined by the employee, using some form of leave or other accrued time available to categorize the compensation of the thirteen minutes of tardiness.

Mr. Kpan's perspective on the request from Mr. Luckett for a request for leave form occurred after a series of tardiness occasions by Mr. Kpan that had been the subject of prior interactions between supervisor Luckett and Mr. Kpan. Mr. Kpan nonetheless maintains in this case that he had never before been asked for a request for leave form for a tardiness and therefore the March 12, 2018 request from Mr. Kpan's supervisor had raised concerns in Mr. Kpan that had been expressed to supervisor Luckett and to IT Manager 2 Gerald Quick.

Supervisor Luckett had first directed an email to Mr. Kpan on March 12, 2018 at 12:17 p. m. asking for a request for leave form from Mr. Kpan to cover the tardiness that had occurred that day. Mr. Luckett approached Mr. Kpan between 1:00 p. m. and 1:30 p. m. while Mr. Kpan was at Mr. Kpan's desk. Mr. Luckett reiterated his request that a leave form be submitted to cover the thirteen minutes of tardiness. Mr. Kpan assured Mr. Luckett that Mr. Kpan would get to it by the end of the work day. Supervisor Luckett told Mr. Kpan that Mr. Luckett would like to have the leave form now and Mr. Kpan reiterated that the form would be prepared by the end of the work day. Mr. Luckett then left Mr. Kpan to attend a scheduled meeting. Following this meeting Supervisor Luckett returned to Mr. Kpan and again demanded a request for leave form from Mr. Kpan.

There follows between Mr. Luckett and Mr. Kpan interactions that occurred next to the work cubicle of supervisor Luckett in which Mr. Luckett was located. What factual disagreements exist in this case relate to whether Mr. Kpan entered the space of Mr. Luckett's work cubicle and whether Mr. Kpan had used profanity in threatening Mr. Luckett by saying to Mr. Luckett: "I'm going to fuck you up!"

The arbitrator finds nothing in the hearing record with which to find fault or question the actions of Mr. Luckett during the events in question. As stated earlier, the request for a leave form from Mr. Kpan violated no rule or policy, and in response to Mr. Kpan's increasingly agitated demeanor Mr. Luckett had been able to maintain a calm, resolute demeanor in maintaining his supervisory authority and his personal dignity.

The arbitrator does not find in the hearing record a preponderance of evidence indicating that Mr. Kpan had made any physical gesture or verbal threat of physical harm to Mr. Luckett. This is not in any way to question the credibility of Mr. Luckett. Mr. Luckett is, however, the only witness who stated that Mr. Kpan had used profanity, had said: "I'm going to fuck you up!," and had slammed his hands onto the top of Mr. Luckett's desk. There is in the hearing record mention of a prior testy exchange between Mr. Luckett and Mr. Kpan that occurred about a year prior to the events at issue in this proceeding, and that prior incident may have included what Mr. Luckett recalled as happening on March 12, 2018, but the weight of evidence in the hearing record does not support the claim of a physical gesture threatening physical harm, profanity, the threat to "fuck you up," or the invasion of the space in Mr. Luckett's work cubicle and the slamming of Mr. Kpan's hands down onto Mr. Luckett's desktop on March 12, 2018. Mr. Kpan specifically denies each of the above allegations involving the use of force or making a threat as to the use of force, and there is no corroborating evidence in support of Mr. Luckett's testimony as to these particular allegations from Mr. Pettet, Mr. Wilson, or Mr. Quick.

The BWC threat assessment coordinator, Mr. Blosser, stated in his testimony at the hearing that threats are to be determined on the basis of the target of the threat and the effect on that person by the threat. The arbitrator has been informed in this case that Mr. Luckett has a background in the United States military that included extensive and advanced training in personal defense and other necessary military attributes. It is the case that Mr. Kpan is six feet, six and one-half inches tall and Mr. Luckett stands five feet, seven inches tall, but there was never a persuasive indication in the hearing record as

adjudged by the arbitrator that at any time during the events in question Mr. Luckett felt himself physically in danger of serious bodily harm at the hands of Mr. Kpan. The arbitrator believes Mr. Luckett understood at the time of these events that it was his legitimate authority as a supervisor that was being called into question by a subordinate, not Mr. Luckett's physical safety.

As noted above, the arbitrator finds no gesture or verbal threat from Mr. Kpan directed at Mr. Luckett or to anyone else based upon the evidence in the hearing record. Had such a threat of physical harm been proven the arbitrator would at this point in his discussion be considering the gravity of a threat of workplace violence and the weight such a threat brings to a determination about the proportionality of the discipline imposed in the case of a proven instance of a threat of workplace violence.

In the case herein, however, the threat of violence alleged by the Employer to have been perpetrated by the grievant has not been proven by a preponderance of the evidence, even less by clear and convincing evidence. Even BWC Threat Assessment Coordinator Blosser described Mr. Kpan's actions as "... passively indicating threatening behavior, if not indicating a threat completely..." See Joint Exhibit 5(a), page 2. Establishing the occurrence of the threat of violence is a burden of proof assigned to the Employer by Article 24, section 24.01. This burden of proof has not been carried in this case.

The arbitrator is therefore left with the discourteous and rude treatment of a supervisor by a subordinate. The actions of the grievant in berating his supervisor at a location in the workplace that was among coworkers and other administrative staff, and the refusal by Mr. Kpan to have this discussion in a conference room that would have accorded greater privacy to both participants, away from the hearing of others, reflect poor judgment on the part of the grievant and a failure of good behavior by the grievant in treating his supervisor in a publicly discourteous and rude manner. Beyond the reasons put forward by Mr. Kpan as underlying his actions toward Mr. Luckett, Mr. Kpan's

complaints, assertions, concerns, and allegations could have been addressed to his supervisor in a more private, constructive setting and without the public spectacle of belittling a supervisor in front of that supervisor's staff by explaining the duties assigned to the supervisor and asserting what the supervisor will and will not do. The arbitrator understands the frustration that has been described by the grievant as having been harbored by the grievant at that time based on his treatment in the I & O Department, but his actions toward his supervisor on March 12, 2018, while not physically threatening, were nonetheless demeaning, insulting, and could have been addressed in a more appropriate setting and in a more appropriate manner.

The rudeness Mr. Kpan exhibited to his supervisor on March 12, 2018 followed a three-day suspension that was issued on May 1, 2017 and a written reprimand issued in January 2017. Counterbalancing this aspect of Mr. Kpan's BWC work history is twenty-one and one-half years of service to the Bureau. The charges underlying the discipline imposed in this case do not include the quality of the grievant's work but rather his interpersonal communications with his direct supervisor during the events in question.

The Union has cited two prior arbitration decisions involving the Union and the state of Ohio, and in each case a grievant had been accused of threatening physical violence in the workplace and in each case the threat of physical harm was not found to be borne out by the evidence. In each case the grievant was found to be deserving of a serious suspension but discharge was determined to be disproportionate to what had been proven in terms of the grievant's misconduct.

The arbitrator herein finds in the case before him parallels to some aspects of the circumstances and findings expressed in the two arbitration decisions cited by the Union. The arbitrators in those cases found evidence for sustaining the grievance in part and for denying the grievance in part, ordering a suspension of the grievant but modifying the discharge. As noted above, the case herein contains persistent, inappropriate, irritating, and insubordinate speech directed to an authorized

supervisor by a subordinate but does not present a proven instance of a threat of harm against the supervisor.

The arbitrator herein too finds part of the grounds for the discipline imposed to have been proven but also finds the most serious allegation, a threat of harm against another in the workplace, not proven. Accordingly, the arbitrator finds the discipline imposed upon the grievant supported in part and not supported in part.

The arbitrator finds that the grievant's charged misconduct proven by the Employer involved discourteous and rude behavior directed at a supervisor and occurred due to poor judgment on the part of the grievant. This misconduct supports disciplinary action but does not support discharge. The grievant's more than two decades of service to the Bureau outweigh the heightened emotion and unprofessional conduct exhibited by Mr. Kpan toward his supervisor on March 12, 2018. The arbitrator finds that a serious suspension for the misconduct of the grievant that has been proven in this proceeding is proportionate to the failure of good behavior committed by the grievant. In the absence of proof of a threat of violence, however, Mr. Kpan's discharge is not sufficiently supported to uphold the removal of the grievant.

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## AWARD

1. The grievance in this case is found arbitrable under the language of the parties' collective bargaining agreement and properly before the arbitrator for review and resolution.
2. The grievant, Petr Serbo Kpan, Jr., was not removed for just cause.
3. The grievance is sustained in part and denied in part.
4. The removal of the grievant effective April 5, 2018 is modified to a suspension without pay for thirty work days, beginning on April 5, 2018.
5. The grievant shall be placed in the position he would have been in had the grievant been suspended for thirty work days without pay beginning April 5, 2018 instead of being removed, in terms of back pay (less income earned), leave balances, and seniority accrual.
6. The arbitrator shall retain jurisdiction in this case for sixty days from the issuance of this award to assist the parties, if needed, in implementing the arbitrator's award.

Howard D. Silver

Howard D. Silver, Esquire  
Arbitrator  
500 City Park Avenue  
Columbus, Ohio 43215  
[howard-silver@att.net](mailto:howard-silver@att.net)

Columbus, Ohio  
February 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that a duplicate original of the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Bureau of Workers' Compensation and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Grievance No. BWC-2018-01234-14, Grievant: Petr Serbo Kpan, Jr., was served electronically this 11<sup>th</sup> day of February, 2019 upon the following:

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Columbus, Ohio  
February 11, 2019