CD 5/3/99

#700

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Department of Rehabilitations and Corrections

-AND-

OCSEA/AFSCME Local 11

APPEARANCES

Ohio Department of Rehabilitations and Corrections
Tina Krueger, OCB Labor Relations Specialist
Lou Kitchen, OCB Labor Relations Specialist
Lisa Haynes, ACIA Manager/Acting Labor Relations Officer
James Hieneman, Superintendent.
Terry J. Collins, Warden RCI
David M. Hall, Ohio Bureau Criminal Identification and Investigation
Carla Bentley, Personnel Officer II, Southern Ohio Correctional Facility

OCSEA/AFSCME Local 11
Don Sargent, OCSEA/AFSCME Advocate
Brenda Moyer, Grievant
Glen Barlowe, Chapter President
Donald D. Tackett, Witness

Case-Specific Data
Hearing Held
February 22, 1999

Grievance #
27-25-(96-12-02)-1169-01-09

Case Decided
April 14, 1999

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Resignation/Rescission

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II. Factual Stipulations

1. The Grievant had 16 years of service with the Department of Rehabilitations and Corrections.
2. The Grievant had an excellent work record.
3. The Grievant has several letters of appreciation for her excellent work at SOCF.
4. The Grievant has no past discipline.
5. The Grievant was under investigation for an unauthorized relationship with an inmate prior to her resignation.
6. Investigator John Ison determined in a letter to Warden Collins on November 26, 1996, that the Grievant had violated the DR&C Code of Conduct: Rule 40 and 46. Mr. Ison recommended that appropriate disciplinary action be taken.

III. The Facts

The facts in this case are largely undisputed. The Southern Ohio Correctional Facility (SOCF) employed Ms. Brenda Moyer (the Grievant) as a secretary for 16 years. During that period, the Grievant consistently rendered excellent performance,[1] received several letters of appreciation for her service during the riots at SOCF,[2] and maintained a discipline-free work record.[3] Although the Grievant's job assignments often placed her in the presence of inmates, a third party accompanied her during those times.

The Grievant's problems began when she began to receive flowers and amorous letters from several inmates. Although she responded by reporting the inmates to the Rules Infractions Board, the letters continued for some time afterwards. At some point, however, the Grievant became attracted to one inmate, but it is unclear whether he wrote any of the above amorous letters. The Grievant expressed her attraction for the inmate in several graphically sexual letters.

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1 Joint exhibit 4.

2 Stipulated facts

3 *Id.*

Eventually, SOCF obtained the Grievant's letters, confronted her with them, and, in November 1996, launched an investigation of the Grievant's relationship with the inmate. After the Grievant denied having written the letters, SOCF submitted the letters together with a sample of the Grievant's handwriting to the Ohio Bureau of Investigation and Identification (OBI) for a handwriting analysis to determine if the Grievant wrote the letters. However, OBI analysts were unaware that the samples were the Grievant's handwriting or that SOCF suspected that she wrote the letters. An SOCF investigator, Mr. Ison (now deceased) interviewed the Grievant on November 14, 1996, before OBI completed its analysis. During that interview, the Grievant acknowledged her acquaintance with the inmate and predicted that, with her luck, BCI would match the samples of the Grievant's handwriting to that in the letters.

She was correct. BCI clearly concluded that the same person wrote the samples and the letters, and Mr. Ison so informed the Grievant. In addition, a Handwriting Analyst (Mr. David Hall) testified during the arbitral hearing that the Grievant wrote the letters. Also, Mr. Hall categorically rejected the likelihood of forgery, given the multiple pages of writing and the calligraphic idiosyncrasies of human handwriting. Finally, Mr. Hall affirmed that he did not know the identity of the person who wrote the samples and the letters, only that the same person wrote them.

Mr. Ison ultimately informed Warden Collins that the Grievant should be disciplined for having violated DR&C Code of Conduct: Rule 40 and 46.[4] Subsequently, the Grievant asked Deputy Warden Hieneman and Warden Collins whether her resignation would end the investigation. Both wardens agreed that if she resigned, there would be no reason to continue the investigation.

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[4] Joint exhibit 5.

Approximately five days after her interview with Mr. Ison, November 20, 1996, with a calm rational demeanor, the Grievant told Ms. Carla Bentley (a personnel officer)that she wished to resign. Ms. Bentley said that it took 24 hours to prepare the resignation forms. The next day, November 21, 1996, the Grievant returned to the personnel office and voluntarily completed and signed a resignation form.[5] The Grievant was absent from work the next day, November 22, 1996, when Warden Collins signed her resignation.

On November 26, the Grievant notified Warden Collins that she wished to rescind her resignation, but the Warden informed her that he had already accepted it and needed to consider her request. Warden Collins then consulted SOCF's legal department to ascertain the scope of his authority to grant or deny employees' requests to rescind their resignations. He was advised that, his signing the resignation constituted acceptance, which afforded him full discretion to grant or deny requests for rescissions. Although the Warden decided to deny the Grievant's request for rescission, he indicated that she was eligible for rehire. Nevertheless, several times after the Warden's first denial, the Grievant requested permission to rescind her resignation. On November 29, 1996, one day before the resignation became effective, the Union filed grievance # 27-25-(96-12-02)-1169-01-09, objecting to Warden Collins' refusal to rescind the Grievant's resignation. The parties were unable to resolve the grievance and, thus, selected the undersigned to hear and resolve it. At the arbitral hearing, the parties raised no issues of procedural or substantive arbitrability; therefore, the foregoing grievance is properly before the undersigned.

IV. The Issue

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[5] Management exhibit A.

Did the Grievant, Brenda Moyer, resign her position on November 21, 1996? If not, then what shall the remedy be?

V. Parties' Arguments

Union Arguments

1. The Grievant's resignation was involuntary.
2. Refusing to rescind the resignation constituted discipline without due process.
3. Warden Collins' signature on the Grievant's resignation does not constitute a valid affirmative action.
4. SOCF used threatened discipline to coerce the Grievant's resignation.
5. SOCF could not accept the Grievant's resignation until it became effective.

SOCF's Arguments

1. The Grievant knowingly and voluntarily resigned on November 21, 1996.
2. According to *Davis v. Marion County Engineer*,[6] and *Davidson v. Village of Hanging Rock*,[7] SOCF accepted the Grievant's resignation on November 22, 1996.
3. Once SOCF accepts a resignation, it has complete discretion to reject requests for rescissions.
4. Effective dates and acceptance dates are not synonymous.

VI. Relevant Contractual Provisions

The Parties did not bring a contractual provision to the Arbitrator's attention in this dispute. Nor has the Arbitrator found a contractual provision that governs this dispute.

VII. Relevant External Law

Davis v. Marion County Engineer, 573 N.E.2d 51 (Ohio 1991).
Davidson v. Village of Hanging Rock, 747 N.E.2d. 527 (Ohio 1995)

VIII. Sample of the Grievant's Resignation

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[6] 573 N.E.2d 51 (Ohio 1991).

[7] 747 N.E.2d. 527 (1995). Discretionary appeal to the Supreme Court of Ohio denied at 645 N.E.2d 1256 (1995).

To: Warden, Southern Ohio Correctional Facility Date: 11/21/96

From: Brenda Mover

Subject: Resignation

Please accept this as my formal resignation from service at the southern Ohio Correctional Facility. Effective date of resignation will be 11 / 30 / 96

Month day Year

My Reason(s) for Resignation is (are):

Too much evil and too much stress here. Job opportunity at another state agency.

I fully understand that I will not receive my final payroll check until I surrender my keys, badges, uniforms, identification card, etc.

witness

Carla Bentley

Respectfully:

Brenda Mover

Secretary

(Classification)

I acknowledge receipt and accept the above submitted resignation

Terry J. Collins

Terry J. Collins, Warden

11-22-96

Date

IX. Analysis

Given the nature of this dispute and the manner in which it was presented to this Arbitrator in both the arbitral hearing and post-hearing briefs, a preliminary statement about the nature and type of issues formerly placed before this Arbitrator is indicated. The jointly-submitted issue is simply whether the Grievant resigned on November 21, 1996, which the Arbitrator interprets to mean whether the Grievant voluntarily resigned on that date. Therefore, an integral sub-issue is whether SOCF somehow improperly coerced the Grievant's resignation or otherwise constructively discharged her. However, whether the Warden accepted the resignation by signing it technically exceeds the scope of the jointly-submitted issue.

Nevertheless, the parties presented evidence much about this issue in the hearing and in their

post-hearing briefs. Therefore, the Arbitrator assumes that the parties intended to place the issue of acceptance as well as the issue of voluntariness before the undersigned. If not, then the parties may disregard that part of the Arbitrator's opinion discussing the latter issue. Also, this opinion does not seek to address or resolve any issues pertaining to the existence or propriety of any misconduct in which the Grievant is alleged to have engaged before November 21, 1996. Finally, the parties' current contract is silent about what constitutes either a voluntary resignation or valid acceptance thereof. To resolve this dispute, the Arbitrator is, therefore, obliged to look for guiding principles beyond the four corners of the current contract—arbitral precedent and applicable state regulations.

A. The Resignation—Voluntary or Coerced

The Union contends that threatened discipline and SOCF's investigation of the Grievant's relationship with the inmate coerced her resignation, on November 21,1996. In short, the Union alleges that the Grievant was constructively discharged. Specifically, the Union argues that the conditions which triggered the Grievant's resignation included: (1) SOCF's investigation; (2) the recommended discipline flowing from that investigation; (3) Warden Collin's alleged threat to fire the Grievant if she did not resign; and (4) the Grievant's judgmental lapse due to her physical and psychological conditions when she resigned.

In support of this position, the Union offered evidence that the Grievant was sensitive to and suffered from stress when she resigned. Specifically, the Union established that the Grievant: (1) had been under a doctor's care for "anxiety and depression" since 1985;[8] (2) had obtained sick leave for

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[8] Union exhibit 8.

"fever sick stomach, and upset and nerves" on November 26, 1996;[9] (3) was taking medication that affected her judgement;[10] and (4) suffered from diarrhea, vomiting, dizziness, and "hot flashes."[11]

At bottom, the Union seems to make two arguments. First, SOCF's investigation and threatened discipline either triggered or helped to trigger the Grievant's resignation, thereby converting it into either an involuntary resignation or a constructive discharge which should be set aside. Or, second, the resignation resulted from the Grievant's medication as well as her psychological and physical problems and, therefore, should be set aside as being involuntary.

SOCF argues, in contrast, that the Grievant's decision to resign was informed, deliberate, and wholly voluntary. In support of its position, SOCF points out that the Grievant was composed and rational on the two pivotal days in question—November 20, 1996 when the Grievant told Ms. Bentley she wanted to resign, and November 21, 1996 when she actually signed the resignation forms. Moreover, SOCF alleges that the Grievant was a confident and resolute individual.

Employees' resignations generally are rebuttably presumed to be voluntary, absent clear evidence to the contrary.[12] The presumption stands rebutted upon establishment of either of two facts. First, an employer's coercion or deception can directly or indirectly deprive the employee of free choice by: (1) not giving the employee an alternative to resignation; (2) not assuring that the employee understood the choices in question; (3) not giving the employee a reasonable time within

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9 *Id.*

10 The Grievant's testimony.

11 *Id.*

12 The employee's behavior and the surrounding circumstances afford a window through which one may assess this underlying intent.

which to make an informed choice; (4) not permitting the employee to select an effective date to resign; or (5) not permitting the employee to obtain advice from union representatives.[13] Second, physical, psychological, or emotional circumstances beyond the control of both the employer and the employee can so compromise an employee's rational judgmental capacity as to nullify his/her facially valid resignation.[14]

In the instant case, however, evidence in the record as a whole is insufficient to rebut the presumption that, on November 21,1996, the Grievant voluntarily resigned from her position as secretary with SOCF. Several reasons support this holding. First, the record contains inadequate corroborative evidence supporting the Grievant's physical and psychological condition on November 20 & 21,1996. The Union alleges that the Grievant was taking judgement-altering medication, suffering from stress-induced physical problems as well as emotional and physical problems of other origins. Still, the preponderance of evidence in the arbitral record simply does not support this allegation. For example, Dr. Duncan's note broadly states that the Grievant had a history of problems with anxiety and depression.[15] However, the doctor's statement lacks specifics such as the Grievant's capacity to make important decisions while actually suffering from these ailments. Nor does evidence in the record show that the Grievant's historical problems influenced her when she either expressed her desire to resign on November 20, 1996 or actually signed the resignation form

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[13] *See, e.g.*, State of Ohio, Dept. of Rehabilitation and Correction v. OCSEA/AFSCME Local 11, 110 Lab. Arb. (BNA) 655 (1998, Florman, Arb.).

[14] ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 656 (4th ed. 1985).

[15] Union exhibit 8.

the next day. Furthermore, there is insufficient evidence to support a reasonable inference that any other of the Grievant's specific physical and emotional problems *caused her* to resign on November 21, 1996. This conclusion is only strengthened by Ms. Bentley's credible testimony of how calm and rational the Grievant seemed on November 20 and 21, 1996.

Second, the record does not establish that the Grievant was either taking judgement-altering medications or under the influence of such medications on the foregoing dates. As SOCF correctly pointed out, the record contains no actual evidence such as prescription bottles, labels, or medication.

Third, the record does not establish that SOCF employed coercion or deception to deprive the Grievant of her free choice. The Union alleges that Warden Collins advised the Grievant that she could either resign or be discharged. Nevertheless, Warden Collins vehemently denied improperly threatening the Grievant in this or any other manner. Since, no one witnessed this alleged incident, it becomes a matter of the Grievant's word against the Warden's. On the other hand, both Warden Collins and Deputy Warden Hieneman testified that the Grievant broached the subject of her resignation while conversing with them. The Arbitrator finds the testimonies of the Warden and Deputy Warden more credible in this instance. Compared with the Grievant, they have less to lose by misrepresenting the truth. Finally, independent evidence in the record does not corroborate the Grievant's specific allegation of coercion. Consequently, the more credible position here is that the Grievant: (1) raised the issue of resigning while speaking with Warden Collins; (2) questioned Ms. Carla Bentley about the resignation process; (3) requested Ms. Bentley to prepare the necessary forms for the Grievant's resignation; and (4) ultimately followed through by signing those forms. There

is simply a lack of credible evidence to establish that either Warden Collins or any other member of management played an impermissible role in the Grievant's resignation.

Fourth, the Arbitrator remains unconvinced that either the investigation itself or the associated threat of discipline coerced the Grievant's resignation. The Grievant's behavior toward an inmate triggered the investigation, which very well could have resulted in her suffering discipline as well as profound public embarrassment. As a general proposition, one who faces the possibility (or even the likelihood) of discipline due to one's own misconduct cannot resign under those pressures and subsequently use them to invalidate the resignation. If so, then all resignations rendered under disciplinary clouds would be suspect, perhaps fatally so. The threatened discipline that confronted the Grievant was the natural result of forces that she seemed to have set into motion. Therefore, an investigation that could end in discipline was entirely proper.

Finally, on her resignation form, the Grievant stated that she was resigning because she had secured a position with another agency and that there was too much evil in the facility. Although the reference to "evil" is sufficiently cryptic to resist interpretative efforts, the revelation of alternative employment tends to support the proposition that the Grievant fully considered her choices of remaining with SOCF and fighting to clear her record (while risking discipline) or resigning and finding employment elsewhere. Her resignation indicates that she freely chose the latter. Ultimately, there is just insufficient evidence in the record as a whole suggesting that the Grievant's resignation was coerced or that she was constructively discharged.

B. What Constitutes Valid Acceptance

When deciding whether an employer has accepted an employee's resignation, arbitrators

basically embrace the equitable contract principle of detrimental reliance as well as the legal principles of offer and acceptance.[16] In this case, the parties' contract is silent on the issue of acceptance of employees' resignations and the record reveals no evidence of a past practice in that regard. Consequently, the parties' status as state employees means that the question of acceptance of resignations is subject to standards found in applicable Ohio law and, if that fails, arbitral precedent. Two decisions by the Ohio judiciary offer some guidance on the issue of valid acceptance.

1. *Davis v. Marion County Engineer*

Davis v. Marion County Engineer[17] marks the Ohio Supreme Court's first confrontation with valid acceptance of resignations. A full understanding of the holding in *Davis* necessitates a brief summary of its facts. Family illness forced James G. Davis (the plaintiff) to submit his resignation to his employer (Marion County Engineer) on April 3, 1987 to become effective on April 10, 1987. The Marion County Engineer (Mr. Jack Tozzer) counseled the plaintiff to carefully consider such a momentous decision. The plaintiff remained steadfast and actually suggested two replacements for himself. In an attempt to fill the vacancy, Mr. Tozzer interviewed three applicants when the plaintiff first submitted the resignation and six others Monday, April 6, 1987. That same day, the plaintiff told Mr. Tozzer that he wished to rescind his resignation. Mr. Tozzer rejected the rescission, and a subsequent written request to the same effect got the same response. There is no indication or

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[16] Pope & Talbot, Inc. v. United Paper Workers Intl. Union, Local 1189, 1996 Westlaw 885780 (Levak, Arb.) (holding, "Employers may properly refuse to recognize retractions of executory resignations that are made after they have hired a replacement employee or after they have taken other action in reliance upon the intended resignation").

[17] 573 N.E.2d 51 (Ohio 1991).

claim that the employer suffered a detriment by interviewing eight applicants for the plaintiff's position. The plaintiff worked through April 10, 1996 and attended a supervisor's meeting on April 13, 1996 where he was told that he was no longer an employee of the Marion County Engineer. Finally, the Employer replaced the plaintiff on April 20 and the plaintiff sued to recover his job. The Ohio Personnel Board ordered the plaintiff reinstated, the Marion County Court of Common Pleas reversed, and The Ohio Court of Appeals reversed the lower court

Finally, the Ohio Supreme Court (*Davis)* reversed the appellate court. In so deciding, *Davis* faintly sketched the boundaries of valid acceptance as follows:

1. Legal effectiveness of an attempt to rescind a resignation before its effective date turns on "the *manner* of acceptance *conveyed* by the employer to the employee."[18]
2. Mere receipt of letters of resignation in the public sector does not constitute valid acceptance. Instead such acceptances "*should* be" written and "*should*" involve "some type of affirmative act," which clearly indicates that the resignation has been accepted by one whom the public employer has authorized to accept employee resignations.
3. Preferably, submission and acceptance of resignations as well as withdrawal before acceptance should be written. Oral actions are, nevertheless, recognized. In short, writings of the foregoing acts are preferred but not required.

With these explanations and caveats in mind, *Davis* explicitly held:

> [A] public employee may rescind or withdraw a tender of resignation at *any time prior to its effective date*, so long as the public employer has not *formally* accepted such tender of resignation. Acceptance . . . occurs where the public employer or its designated agent initiates *some type of affirmative action*, preferably in writing, that *clearly* indicates to the employee that the tender of resignation is accepted by the employer.[19]

In applying the foregoing rules to the facts in *Davis*, the supreme court could find no valid

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18 Davis at 53.

19 Davis at 56 (emphasis added).

acceptance of the plaintiff's resignation, despite the employer's having interviewing eight applicants before the plaintiff sought to withdraw his resignation. The question now becomes which part of the *Davis* standard of valid acceptance did the employer fail to satisfy. That standard comprises three elements: (1) an element of timing; (2) an element of affirmative action; and (3) an element of communication.

As to timing, the rescission must predate the acceptance. Clearly, the Employer, in *Davis*, satisfied this standard by first relying on the resignation to interview two applicants on the day the resignation was submitted, fully two days before the plaintiff attempted to rescind it.

Regarding the affirmative action criterion, interviewing eight total applicants would seem to satisfy any reasonable requirement for affirmative action. Finally, there is the communication requirement which focuses on the mode of communication. Here, in the Arbitrator's opinion, is where the employer in *Davis* "dropped the ball." Recall, at the outset, that *Davis* rejected the purely reliance-based approach in *State, ex rel. Kraft, v. Massillon*,[20] adopting instead a more "balanced rule of law," the pith of which is "the *manner of acceptance conveyed* by the employer to the employee."[21] Because reliance (interviewing applicants) is the only manner of acceptance that the Employer manifested, one might reasonably conclude that reliance was the manner of acceptance that *Davis* rejected. Equally important, the Employer's reliance, in *Davis*, probably was not detrimental. In *Nilavar v. Osborn*,[22] for example, the court stated: "[W]e agree . . . that Nilavar's failure to seek other

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20 102 N.E.2d 39 (Ohio1951).

21 Davis at 54.

22 1998 WL 403859, 10 (Ohio App. 2 Dist.).

employment cannot constitute detrimental reliance to support his estoppel claim. Reliance to support an estoppel claim must be "'of a sufficiently definite and substantial nature so that *injustice* will result if the 'promise' is not enforced.'"[23] Consequently, *Davis* would seem to reject nondetrimental reliance as valid acceptance of an employee's resignation.[24]

In addition, *Davis* required resignations to be "*formerly* accepted"[25] and preferably in writing, though oral acceptance is adequate. On the other hand, reliance as a manner of acceptance is naturally *informal*, constituting constructive notice of acceptance. Defining valid acceptance as a formal, affirmative action ensures that employees are clearly—though not necessarily directly—notified that their resignations have been accepted. Ultimately, then, employers should embrace some type of affirmative act which constitutes formal acceptance of employees' resignations.

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[23] *Id.* (emphasis added). (citing in Talley v. Teamsters, Chauffeurs, Warehousemen, & Helpers, Local No. 377, 357 N.E.2d 44, 47 (1976). *See also*, State v. Sycamore City School Dist. Bd. of Ed., 641 N.E.2d 188, 196 (1994) (holding "Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment") (citing Madden v. Windham Exempted Village School Dist. Bd. of Ed., 537 N.E.2d 646, 647(1989)); Evaul v. Bd. of Education of the City of Camden, 172 A.2d 654, 657 (Supreme Court of New Jersey 1961) (holding,

> School Teacher submitted a harshly worded resignation while extremely and to some extent justifiably upset and sought to rescind it. Two days later, the teacher sought to resign the resignation but the board informed her that it was accepted. The court held that the unusual circumstances surrounding the teacher's resignation and that the board had not acted in reliance on the resignation justified permitting the teacher to rescind her resignation).

Nuzum v. Bd. of Education of the School Dist. of Arnold, 417 N.W.2d 779, 783 (1988) (agreeing that detrimental reliance existed where an employer actually filled the position of an employee who had resigned but finding no detriment where the employer merely advertised a position in the newspaper. In the court's view, such an action does not "in and of itself . . . [preclude] the withdrawal of an unaccepted tender of resignation."

If advertising a position—not a cost-free endeavor—falls short of detrimental reliance, then one might reasonably conclude that interviewing of applicants might also miss the mark.

[24] As a matter of equity, detrimental reliance may rise to the level of valid acceptance.

[25] Davis at 55 (emphasis added).

2. *Davidson v. Village of Hanging Rock*

Later, in *Davidson v. Village of Hanging Rock*,[26] an Ohio appellate court interpreted *Davis*. In *Hanging Rock*, a chief of police submitted his application for retirement on March 27, 1990 to be effective on April 16, 1990. On April 2, 1990, both the village council and the village mayor interpreted Plaintiff's letter as a resignation and accepted it. The plaintiff learned of this on April 3, 1990 and appeared before the village council, on April 7, 1990, to object to his application for retirement being construed and accepted as a resignation. On April 12, 1990, the Plaintiff followed up with a letter to the Mayor, stating that he wished to withdraw his application for retirement. On May 8, 1990, in a newspaper article, the Plaintiff again denied that he had intended to resign. Nevertheless, on May 11, 1990, the village council met, in executive session, approved its April 2 interpretation of the Plaintiff's March 27 letter as a resignation, and in a public meeting that same day, voted to accept the plaintiff's resignation.

On May 2, 1991, the plaintiff sued the village, and a referee held that the plaintiff had intended to resign but that the village had not properly accepted the resignation before the plaintiff withdrew it. A district court reversed and the plaintiff appealed.

In reversing the referee's decision, *Hanging Rock* distinguished *Davis* and held that the village's acceptance was adequate. The plaintiff stressed that *Davis* required the acceptance to be communicated *directly* to the employee. The appellate court offered two reasons for rejecting this argument. First, *Davis* did not *explicitly* require employers to communicate acceptances directly to

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[26] 747 N.E.2d. 527 (Discretionary appeal to the Supreme Court of Ohio denied at 645 N.E.2d 1256 (1995).

employees. Second, constructive notice in the form of public voting was the mode through which county engineers and villages ordinarily communicated their decisions to both the public and to employees. Then, *Hanging Rock* distinguished *Davis* by observing that the manner of acceptance there (reliance) was not the usual or customary type.

In short, *Hanging Rock* holds that employers may use ordinary or customary manners or modes of communication to accept employees' offers to resign, even if those modes involve public voting, a form of constructive notice. Although reasonable minds may differ, *Hanging Rock* roughly comports with the basic principles in *Davis* and in the law of contracts. The public vote, in *Hanging Rock,* was a formal affirmative action. Moreover, because it was the employer's customary mode of communication, the plaintiff should have expected the employer to respond through that mode. Finally, the use of a customary mode of communication complies with the First Restatement of Contracts that "absent contrary indications, the offer authorizes the means of communication used in transmitting the offer and *any other means customary* at the time and place received.[27]

Davis, as interpreted in *Hanging Rock*, governs the issue of whether SOCF properly accepted the Grievant's offer to resign. According to *Davis* and *Hanging Rock*, SOCF's acceptance was proper for several reasons. First, Ms. Carla Bentley, credibly testified that, according to past practice or custom, resignations were accepted when the Warden signed them. This was the practice under Wardens Morris and Tate, Collins, and Huffman.[28] Thus, SOCF has long used Wardens'

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[27] JOHN D. CALAMARI & JOSEPH M. PERRILLO, THE LAW OF CONTRACTS 108 (4th ed. 1988).

[28] SOCF's brief at 7.

signatures at the bottom of resignation forms to signify SOCF's acceptance of employees' resignations. Second, employees have adequate notice that the Warden's signature represents acceptance, since directly below the Warden's signature line is the term "accepts." Third, SOCF specifically designed the resignation form to achieve this result. Fourth, the "acceptance" (the Warden's signature) was written and sufficiently formal to satisfy *Davis*, which did not specifically require direct notification of the Grievant. Finally, *Davis* did not hold that a specific magnitude, level or type of affirmative action was necessary to constitute valid acceptance. Therefore, a reasonable conclusion is that any level of customary affirmative action likely to catch an employee's attention constitutes proper acceptance, especially if that acceptance is reduced to writing. Consequently, *Davis* is satisfied where, as in the instant case, the Warden affixes his signature to the bottom of a resignation form which clearly notifies the employee that the signature constitutes acceptance of the employee's resignation.

C. Discharge vs. Resignation

The Union vainly attempts to convert this case from one of resignation to one of discharge. Considering the foregoing discussions, however, the Arbitrator cannot agree. The Grievant voluntarily resigned on November 21, 1996, changed her mind, and submitted a tardy rescission to her previously accepted resignation. Under these conditions, SOCF had no duty to rescind the resignation and its refusal to do so does not constitute discipline.

X. The Award

For all of the foregoing reasons, the grievance is hereby, DENIED.

NOTARY CERTIFICATE

State of Indiana)

)SUPERVISOR:

County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 26 day of April, 1999

Signature of Notary Public: Bruce Kleinschmidt

Printed Name of Notary Public: Bruce Kleinschmidt

My commission expires: April 3, 2000

County of Residency: Marion

Robert Brookins

Robert Brookins