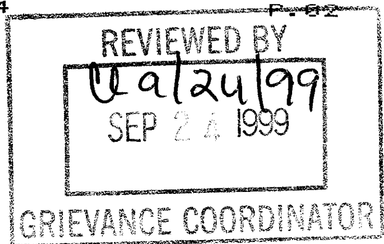


#702

ARBITRATION

BETWEEN

STATE OF OHIO, DEPARTMENT OF
REHABILITATION AND CORRECTIONS,
MANSFIELD CORRECTIONAL INSTITUTION

and Grv. #27-20-980906-3551-01-03

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

Appearances:

For the Department: Meredith A. Lobritz
DAS, Office of Collective Bargaining
Columbus, Ohio

For the Union: Mike Hill
Staff Representative
OCSEA/Local 11/AFSCME
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case:

This case, a discharge case, involves the discharge of employee Steve Johnson. The case was well presented by the parties' advocates in Mansfield, Ohio, on June 25, 1999. At the outset of the hearing the parties entered into the following stipulations:

> "1. Neither party has any procedural objections, and the parties agree that the instant grievance is properly before the Arbitrator for a final and binding resolution on the merits.
>
> 2. The grievant was hired at the Mansfield Correctional Institution (ManCI) as a Correctional Food Service Coordinator on January 24, 1994.
>
> 3. The grievant was terminated on September 3, 1998 from his position as Correctional Food Service Coordinator at ManCI.

The parties also stipulated to the following issue in the case:

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

The Department notified the Grievant that the reasons for his discharge were as follows:

> "You are to be REMOVED for the following infractions: There exists substantial evidence that sometime between 02/26/96 and 10/04/96, you received a medical file from an inmate, which was his own institutional medical file. The purpose of this exchange was for you to take the file home and assist the inmate in contacting an attorney. This action is a violation of Rule 45A of the Standards of Employee Conduct: Without express authorization giving preferential treatment to any individual under the supervision of the Department, to include but not limited to - a) the offering, receiving, or giving of a favor."

The Department has promulgated "Standards of Employee Conduct, Rule Violations and Penalties." At Rule 45 a. the Department has

provided as follows: "Without express authorization, giving preferential treatment to any individual under the supervision of the Department, to include but not limited to - a. The offering, receiving, or giving of a favor." The penalty grid provides as follows: For a 1st offense - a one to three day disciplinary suspension up to removal; for a 2nd offense - a three to five day suspension up to removal; for a 3rd offense - a five to ten day suspension up to removal; and for a 4th offense - removal.

At the arbitration hearing herein, the Department called as its witness Joseph J. Masi, a Department investigator, and inmate Gerald Lupinski who was incarcerated for first degree murder. The Union called as its witnesses Corrections Officer and Union Steward Joseph Soltesz; former Correctional Food Service Coordinator I (and a Manager I at the time of the hearing herein) Lisa Stockbridge; retired Unit Manager Jerry Campbell; and the Grievant. Additionally, Management stipulated that if the Union were to call as witnesses Pharmaceutical Technician Shirley Dilgard and Correctional Food Service Manager I Dan LeClair, they would testify in the same manner as did witness Stockbridge. Similarly, Management stipulated that if the Union called as a witness inmate Martin Woods, an inmate-clerk at all relevant times, his testimony would likewise be a "rehash" of Stockbridge's testimony.

The record reflects that ManCI is a "close" security level prison institution, housing, among others, death row inmates. As an office porter for the Food Service Area, inmate Lupinski had work related contact with the Grievant.

It was investigator Masi's testimony that on March 2, 1998 he was contacted by the Grievant's girlfriend, one Karla Mathews, and told by Mathews that the Grievant had at his home the medical file of inmate Lupinski. She also told Masi that the Grievant had told her that he had the medical of inmate Lupinski. She also told Masi that the Grievant had told her that he had the medical file in order to assist inmate Lupinski contact an attorney. She made it clear that she was at odds with the Grievant. That same day Mathews brought Lupinski's medical file to Masi. The statements to Masi by Mathews were repeated by her in a taped and transcribed telephone interview on 6/10/98. Thereafter, on May 1, 1998, Masi contacted inmate Lupinski by phone and recorded and transcribed his conversation with Lupinski. As of October 12, 1998, Mathews recanted all her prior statements in the matter, attributing said statements to her jealousy over the Grievant's infidelity to her. At that point in time Lupinski had been transferred out of ManCI to Hocking. That transcript reads in pertinent part:

> Masi: Now, I have talked to the attorney and he is familiar with you. And he said that he in fact did receive this [medical[file, per you, and can you tell me a little bit about this file?
>
> Lupinski: The file...it is my file that I had.
>
> Masi: Yes, that is correct.
>
> Lupinski: The attorney made a copy of it and...so he made a copy of it and sent my regular file back to me... I gave it to Shorty Johnson.
>
> Masi: Okay and that is Steve Johnson.
>
> Lupinski: Yes it is.
>
> Masi: Okay, now why would you give that to him?

Lupinski: Because he was helping me out when I was trying to get the attorney.

Masi: An attorney for what?

Lupinski: For a lawsuit.

Masi: Okay, and what did the lawsuit have to do with?

Lupinski: Against Ohio State University, Lanny Imboden, and the institution there at Mansfield.

* * *

Masi: Okay, now how did you get this file to Steve Johnson?

Lupinski: I handed it to him.

Masi: Where did that happen at?

Lupinski: Mansfield.

Masi: Okay, up in the food service area?

Lupinski: Food service area.

Masi also interviewed the Grievant on June 2, 1998, in the presence of Steward Larry Stewart. The Grievant indicated that he had cleaned out his locker and personal file drawer and inmate Lupinski's medical file was apparently in among his papers, unbeknownst to him. In this regard the Grievant indicated to Masi, and again at the hearing herein, that clerk-inmates and staff had access to his locker and/or personal files. On this point the Grievant was corroborated by witness Stockbridge, and by virtue of management's stipulations by Dilgard, LeClair, and Woods, as well. There was also the following exchange between Masi and the Grievant:

Masi: Mr. Johnson I asked you to come back down to my office with your union steward, Mr. Stewart. It is 4:00 p.m. and I have one more question that I need to ask you in reference to this matter. When Carla Matthews came to ManCI with the file,

along with handing me the file, she stated to me that you had brought the file home in order to do a favor for that inmate. And that favor would be to contact your lawyer. And then afterwards, as you know I interviewed the inmate and he basically said the same thing, that you had the file to contact your lawyer for him. Would you have an explanation as to why they would both say basically the same thing about this file?

Johnson: Yeah, you know, when I brung it home you know, and I didn't, like I said, I didn't even know that it was even in my files and she was going through there and she was like, "this ain't nothing important or anything is it?" And I told her no and she said, do inmates ever ask you to do favors for them and I said some do some don't, it's no thing. They do that to everybody, pretty much, and I was giving her examples like, you know guys be wanting, you know, to do favors like contact lawyers or contact their parents or something like that for them, cuz they are in the hole, or something like that. I don't do that type of stuff so that's why she might assumed or thought that, I don't know.

Other matters the Grievant related to Masi are also of note. Thus the Grievant indicated to Masi that "she has asked do inmates ask you for favors and stuff and yeah they do, you know. But it's no big thing, it's you know, you should use common sense to know that, don't do it." The Grievant additionally indicated that "when I first got hired in food service, I was told that Larry Imoden had played a joke on Lupinski, some kinda way he was on a table and knocked him down on his shoulder or something, he wa supposed to have been hurt, you know." Lupinski told Masi, and reiterated same in the hearing herein, that he was standing on a desk and Imoden tipped the desk over on him and he hit the floor "messing up" his neck. Lupinski's injury required two surgical operations, apparently at Ohio State University Hospital, and following same he has had reduced functioning of his arms. This condition, in turn, has narrowed and limited the prison assignments to which he can

daily be assigned and in this manner the quality of the Grievant's life within the prison deteriorated from and after his injury. Union witness Campbell described this Imoden-Lupinksi incident as an "accident," concerning which, as per his assigned duties, he assisted the Grievant with the appropriate ManCI documentation and records of the "accident" in which Lupinski "was pretty banged up," in the event Lupinski should be released from prison and perhaps entitled to SSI benefits at that time. It's noted that Campbell described Lupinski as being functionally illiterate. Campbell expressly denied ever attempting to severe legal counsel for inmate Lupinski. Still further with respect to this Imoden-Lupinski incident, it appears that Lupinski did earlier on obtain an attorney to represent him. The attorney obtained a copy of the Grievant's medical file. According to Lupinski this attorney told him that "he'd waited too long" (apparently a reference to the statute-of-limitations) and that he, Lupinski, didn't have the money to retain him. The attorney did not in fact represent Lupinski. Lupinski indicated that this attorney told him to sue Imoden, the State of Ohio, the Doctor, and the Governor. The record reflects that the attorney returned Lupinski's medical file to Lupinski, and it was this "copy" of Lupinski's medical file which wound up in the Grievant's possession.

Appropriately, a pre-disciplinary hearing was held, on 7/30/98 before Hearing Officer Captain Donnie LeClair. The Grievant, Union representative steward Soltez, management representative Masi, and the Hearing Officer were in attendance. The bulk of the evidence

referenced hereinabove was put before the Hearing Officer. The Hearing Officer concluded:

> "FIND OF FACT: After hearing the evidence and testimony provided by Mr. J. Masi and by Mr. S. Johnson's own admission to having the medical file of inmate Lupinski, this writer feels that these actions were to assist this inmate in the filing of a lawsuit against his supervisor, Mr. Lanny Imboden. 'It is realized that by Steve Johnson's testimony he was unaware that he had the file among his personal effects that he had in his locker that he had taken home. However, this file was in his locker, and was at his residence, and in his possession.
>
> DECISION: There is just cause for discipline."

With respect to the Hearing Officer's "Findings" in light of all the foregoing circumstances, I'm constrained to agree with the Department's construction and understanding of the next to last sentence thereof. As the Department contends it seems clear that the Hearing Officer simply meant that it was the Grievant's testimony at the pre-disciplinary hearing that he was unaware that Lupinski's medical file was in his personal effects.

Following the Hearing Officer's "Decision," on August 12, 1998, Warden Betty Mitchell recommended a "five day suspension . . . based on both the nature of the current offense and the total prior work and discipline record of this employee," to Department Director Reginald A. Wilkinson. However, Central Office modified the Warden's recommendation and recommended removal. Director Wilkinson followed the removal recommendation.

With respect to the Grievant's "prior work and discipline" record the record reflects that the Grievant received good evaluations, and significantly, as the Department stipulated, his evaluations showed steady improvement. Additionally, early on in

his career the then Warden singled him out for commendation for the job he did in preparing Ramadan meals for Islamic inmates.

The Grievant's removal was timely grieved on September 6, 1998. The grievance asserts in pertinent part:

> "Statement of facts . . . The grievant/Union hereby grieves the removal . . . . The discipline imposed is: without just cause; not progressive; not commensurate to the offense; excessive; disparate by comparison with other disciplines involving other employees in similar situations; imposed without taking extenuating or mitigating circumstances into consideration; and imposed solely for punishment."

The Union and the Grievant seek reinstatement with full back pay and benefits. Finally, I find the following excerpt from Management's 3rd Step Answer denying the grievance to be informative:

> ". . . The evidence garnered through the investigation establishes that the grievant was engaged in a relationship with an inmate and accepted a copy of the inmate's medical for the express purpose of assisting him in filing litigation against the Department. These facts clearly establish just cause and I find the removal was commensurate with the infraction."

The Department's Position:

The Department takes the position that the Grievant was discharged for just cause. Thus it asserts that the Grievant, with knowledge that employees should not do or offer to do favors for inmates, such being against the Institution's Rules for Employees, nonetheless accepted from inmate Lupinski the latter's medical file and brought said file to his personal residence, with the purpose and intent of doing inmate Lupinski a favor by assisting inmate Lupinski contact and engage an attorney. Two witnesses, Lupinski, and Mathews, independent of one another and with no knowledge of

one another, gave the same account concerning the Grievant's reasons for being in possession of Lupinski's medical file. The Department argues that one must not forget that this specific favor would have brought a lawsuit against an employee of the State, the Institution, the Department and the Governor, as Lupinski indicated. Accordingly the Grievant's offense was a very serious one and in direct violation of a serious known work rule designed to protect the interests of the institution and all of its employees.

It is the Department's contention that employees dealing with inmates has led to arbitral sanction of the discharge penalty in several arbitration decisions. Thus the Department notes that in Award 658, Grievance 257-15-901218-0136-01-03, R. Speer v. DR/C, Arbitrator Anna Smith upheld the grievant's removal for giving preferential treatment to an inmate. As in the instant case, no actual deal or exchange took place, but the fact that the offer was made is what created the breach in security for the institution. On page 25, she writes:

> "Very plainly, the Grievant here dealt with an inmate, soliciting from him information about another employee and promising certain favors in return. That no actual deal was cut or exchange took place . . . is of little importance. The Arbitrator is well convinced that dealing with inmates or offering to do so is among the most serious offenses within the penal setting, constituting as it does a breach in security and thereby striking at the very heart of the institution's mission. In expressing a desire to exchange a sort of favor with an inmate, the correction officer lets it be known that he is willing to deal and makes himself vulnerable to solicitation, blackmail, and the like. Despite the Grievant's length of service and prior disciplinary record, the Employer has not abused its discretion in imposing the penalty of removal."

Arbitrator Nels E. Nelson, in Award 1349, Grievance 27-33-980713-0050-01-03, A. Underwood v. DR/C, upheld the removal of the grievant for having an improper relationship with a parolee. Arbitrator Nelson stated on page 9:

> "The Arbitrator recognizes that removal is an extremely severe penalty. However, any relationship between a correction officer and a person under the supervision of the department can put the correction officer in a position where he can be manipulated. The threat that this creates to the security and safety of employees and inmates justifies strict rules and harsh penalties for the violation of the rules.

In Award 866, Grievance 27-09-920617-0091-01-03, K. McClendon v. DR/C, the grievant was also removed for an improper relationship. Arbitrator Harry Graham upheld the removal, and wrote the following on page 11 to justify his reasoning:

> "Obviously a prison is a place where those found to imperil society have been incarcerated. Those who are charged with the custody of such persons must not be placed in a compromising position. If that occurs the potential for serious problems within, and perhaps without, of the facility exists."

Finally, in Award 1138, Grievance 23-05-95-07-01-09, N. Musto v. ODMH, the grievant's removal was upheld by Arbitrator David M. Pincus. The hospital where the incident occurred not only housed patients, but also was occupied by mentally ill inmates in the custody of DR/C. It was found that the grievant had sustained an intimate relationship with an inmate that went sour. On page 14, the Arbitrator has quoted part of a transcribed phone conversation between the grievant and the inmate, and says the following in reference to this conversation.

> 'Here, Collier (the inmate) appears to be threatening the Grievant with blackmail to gain or sustain his social relationship. Such threats, however, are not that far removed

from threats leading to the conveyance of drugs or other contraband within a corrections facility."

It must therefore be said, argues the Department, that the Grievant's removal was reasonable and commensurate with his offense. Anything less than termination for the Grievant's offense is unacceptable asserts the Department. That the Grievant did not in fact contact an attorney on Lupinski's behalf is of no consequence since the workrule violated proscribes "offering, receiving or giving" of a favor, argues the Department.

As for the Grievant's defense to the effect that someone other than him put inmate Lupinski's medical file in his, the Grievant's, locker, and that he thereafter inadvertently brought said medical file home when he cleaned out his files and locker, the Department argues that the Union and the Grievant have not met their burden of proof to establish such a scenario. Thus none of the Union's witnesses testified that they put Lupinski's medical file in the Grievant's locker, or that they saw another staff member or an inmate put the file in the Grievant's locker and/or personal file. At best they only indicated that certain employees and inmates had unhampered access to the Grievant's locker and/or personal file. But this latter testimony only raises the possibility of the proposition the Union urges, falling short of the probability and preponderance of evidence necessary to establish the proposition. Furthermore, argues the Department, a Food Service Coordinator such as the Grievant is not listed in Department Policy 320-05, "confidentiality of Medical and Mental Health Files," as a member of personnel who is allowed to have direct access to an inmate's

medical file, thereby making it highly unlikely that the Grievant obtained inmate Lupinski's medical file from anyone other than inmate Lupinski. Moreover, argues the Department, if a medical file of an inmate were to have been found in the Grievant's possession upon exiting the Institution, a supervisor would have been contacted and a conduct report would have been written. Since no evidence of same exists, the inference is that the Grievant concealed the medical file the day he brought it home.

Then too it is the Department's contention that the Union's focus at the hearing herein on the pre-disciplinary hearing report's reference reading "it is realized that by Steve Johnson's testimony he was unaware that he had the file among his personal effects that he had in his locker that he had taken home" is irrelevant. The Department contends that the Hearing Officer's observation and reference in this regard is not acknowledging that the Grievant was actually unaware that he had the file. What the hearing officer meant was that it was the grievant's testimony at the hearing that he was unaware it was in his personal effects.

As for the testimony of Jerry Campbell, it too is irrelevant, argues the Department. The Union called Jerry Campbell to testify that he was involved with inmate Lupinski concerning the inmate;s accident that created the necessity for inmate Lupinski's operation, Mr. Campbell testified that he helped inmate Lupinski fill out some paperwork regarding this case, but that he would do so for other inmates if necessary - it was part of his job. Mr.

Campbell also provided testimony that he had never offered to assist inmate Lupinski in obtaining legal representation.

Based on all the foregoing, the Department urges that the grievance be denied.

The Union's Position:

The Union takes the position that the Department's case is heavily dependent on information furnished to it by two witnesses, namely, inmate Lupinski, a felon convicted of first degree murder, and Ms. Karla Mathews, the Grievant's spurned ex-lover, neither of whom were credible. Thus with respect to inmate Lupinski, the Union asserts in effect that as a convicted felon, Lupinski's testimony "is suspect in and of itself." Additionally, the Union points out certain inconsistencies in Lupinski's testimony. Thus the Union notes that Lupinski told the Department's investigator, Masi, that he had given his medical records to the Grievant in the Food Service Area, and confirmed same in testimony at the hearing herein, yet when at the hearing he was asked to point out where it was that he gave his medical files to the Grievant, Lupinski pointed to an outside crosswalk a football field away from the Food Service Area. Moreover Lupinski could not remember significant matters. Thus he could not remember when he purportedly gave the Grievant his medical file; he could not remember whether it was warm or cold at the time of the purported handing over of his medical file to the Grievant; and he could not remember when he was sent to Mansfield Correctional Institution, or when he left or how long he was there.

With respect to Ms. Mathews the Union contends that investigator Masi knew that she and the Grievant had been arguing and that she held a grudge against the Grievant, yet Masi (and the Department) have elected to credit her initial account to Masi. Still further with respect to Mathews, the Union asserts that as Management relied heavily on this witness for their discharge of the Grievant, they should have produced her as a witness at the arbitration hearing, and their failure to do so raises an adverse inference. In this regard the Union quotes from the treatise of authors Hill and Sinicropi, Evidence In Arbitration, at page 102, to the effect that the failure to call a potential witness ". . . serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the . . . witness, if brought would have exposed facts unfavorable to the party . . ."

The Union also challenges the adequacy of investigator Masi's investigation, pointing out that Masi did not question any employees other than the Grievant, and did not question any of the inmates who worked in Food Service with the Grievant and inmate Lupinski.

In contrast to the State's case, the Union contends that the Grievant credibly testified that: he never offered a favor of any sort to inmate Lupinski; that inmate Lupinski never gave him his medical file; and that he never knowingly took inmate Lupinski's file out of the institution. Conceding that he cleaned out his file and locker, and noting that Lupinski and other inmates, and

staff, had access to his file and locker (as confirmed by other witnesses and stipulations regarding what witnesses not called would testify), the Grievant suggests that Lupinski's medical files were put in his locker or file by a third party and that he inadvertently took said file home with him when he cleaned out his file and locker. In its opening statement the Union asserts that in retrospect the Grievant should have looked through the property he cleaned out of his locker and personal file more carefully before taking said property home. But the Grievant's negligence in that regard does not constitute an intent on his part to violate Rule 45-a. Nor does his negligence constitute a relationship with inmate Lupinski. At worst it constitutes bad judgment.

In any event, argues the Union, even if the Department can be said to have met its burden of proof that the Grievant accepted Lupinski's medical files from Lupinski, the penalty of discharge "is far too harsh," especially in light of the facts that the Grievant's alleged acceptance was two years prior to the imposition of discipline; that the Grievant never in fact contacted an attorney on behalf of Lupinski; and that the Grievant has no other current discipline on record. In this regard the Union points to Arbitrator Mollie Bowers' decision in Janice Thomas vs. State of Ohio. The Union asserts that "in that case the employee actually placed a telephone call to inmates' parents asking them to get in touch with the inmate's attorney. Even though the state in that case listed similar security concerns Arbitrator Bower noted, "The only unauthorized relationships misconduct prohibited by Rule 46

for which removal is the only recognized disciplinary penalty for a first offense involves sexual acts between inmates and employee under rule 46 d..... This case is dissimilar factually from the close personal relationships involved in the award of Arbitrator Dworkin and in the cases cited therein involving extremely egregious misconduct." Janice Thomas vs. The State of Ohio, pp. 23.

Based on all the foregoing the Union urges that the grievance be sustained and that the Grievant be reinstated without loss of seniority, and made whole for all lost pay and overtime pay and benefits, and further that the Department pay all the Grievant's past Union dues to OCSEA for the period following the Grievant's discharge.

Discussion and Opinion:

First addressed is the analytical framework within which the "facts" of the case must be considered. In this regard Rule 45 a. makes clear that the Department regards one of its employees "offering . . . of a favor" to an inmate as an instance of giving preferential treatment to an inmate. And as the Departmental arbitrators cited by the Department made clear, such conduct "is among the most serious offenses within the penal setting, constituting as it does a breach in security and thereby striking at the very heart of the Institution's mission." Such conduct makes the employee vulnerable to "solicitation, blackmail, and the like." Such conduct can put the employee "in a position where he can be manipulated. The threat that this creates to the security

of employees and inmates [alike] justifies strict rules and harsh penalties for the violation of the rules." Thus, the disciplinary grid recognized that for a first offense, removal may be warranted. The rule also reasonably recognizes that offering an inmate a stick of gum is simply too minor a matter, even though "the principle" to insure security is broken. Thus there is a range of penalties for the "offer of a favor," as a first offense commencing with at the very least a one day suspension, in and of itself a rather serious penalty and well along on the spectrum of progressive discipline. Given the rules range of penalties and hence recognition of gradations of seriousness within the same basic offense of a breach of security, a question arises concerning what justifies the high end of the range, removal. In this regard logic dictates that the nature and character of the "offer of a favor" can certainly serve to aggravate the offense and thereby warrant the ultimate penalty of removal forewarned in the disciplinary grid. Here the Department clearly asserts that the nature and character of the Grievant's purported offer of a favor entailed facilitating an inmate bringing litigation against the Department. In the Department's view, this was an aggravating circumstance of such proportion as to warrant removal, especially in light of the seriousness of the underlying offense, even in the absence of this aggravating circumstance. The Department's view in this regard finds well established support in arbitral principles. Thus as Arbitrator Lennart Carson long ago noted in Moore Business Forms, Inc., 57 LA 1258, at 1261 (1971): "[a]n employee owes a broad duty

of loyalty to his employer. This means that . . . the employee may not . . . denigrate his employer's business or give harmful information or do other acts impairing the Employer's [business]." Clearly an employee's offer to assist a third party to sue one's Employer breaches that employee's broad duty of loyalty to his Employer.

Given the foregoing analytical framework, the case comes down to whether in point of "fact" the Grievant took inmate Lupinski's medical records and offered to seek out an attorney for him looking toward a lawsuit over the Imoden-Lupinski incident. If it's found that the Grievant did so, it must be concluded that the Department has established the kind of aggravating circumstances of an offer of a favor that warrants removal even for a first offense. No progressive discipline would be necessary. Whether such an offer for such a purpose transpired depends upon the undersigned's credibility resolutions. In this regard the Union is quite correct concerning the inconsistencies it points out in Lupinski's testimony with respect to times and places. But this circumstance is somewhat undermined by the fact that witnesses in general are often uncertain about time frames. Could it be that such uncertainties as to time are exacerbated (perhaps mercifully so) by those long incarcerated such as Lupinski has been? And one can't lose sight of the fact that he is functionally illiterate. Concerning his status as a convicted felon, well, nothing mollifying can be said. Nevertheless, the surrounding circumstances present here serve to create a preponderance of

evidence, indeed a rather compelling case, favoring crediting Lupinski's account to the effect that he gave his medical files to the Grievant upon the offer of the Grievant to seek out an attorney for him to sue Imoden and the Institution for the physical consequences to him of the Imoden-Lupinski incident. Ironically, while the Union challenges the quality of Masi's investigation, one aspect of it was in any event beyond reproach. His long experience as an investigator shows in the manner in which he questioned Lupinski about "his medical file." Masi simply asked Lupinski if he could tell him "a little bit about this file." The broad and non-suggestive question engendered the immediate and spontaneous response that he gave his medical file to the Grievant. Immediately thereafter, and logically so, Masi asked why. Lupinski again immediately indicates that he gave the Grievant his medical file to get an attorney. Masi presses: "an attorney for what?" Lupinski responds: "for a lawsuit." Subsequently Lupinski indicates that the Imoden-Lupinski incident would be the subject of the lawsuit. This interchange between Masi and Lupinski, and Lupinski's responses, simply have the ring of truth. If Lupinski's perception of the Imoden-Lupinski incident is correct, he certainly had strong motivation to pursue such a lawsuit, and seek assistance in doing so. The suggestion that such a lawsuit might be barred by the statute of limitations, as well as the fact that apparently the Grievant never followed through on obtaining Lupinski an attorney, are irrelevant here, for as Arbitrator Anna Duval Smith, in the case cited by the Department, noted, it was the willingness of the

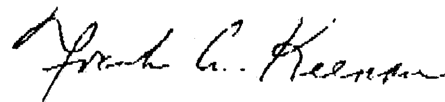
Grievant to offer to do such a favor for an inmate which is at the heart of the breach of security and the aggravating breach of loyalty of which the Department found the Grievant guilty. This credibility resolution is bolstered by the concededly "possible" but "highly improbable" alternative scenario the Grievant suggests. This is especially so in light of the lack of even a suggestion as to what motive any inmate, even Lupinski, or staff member, would have to put Lupinski's two (2) inch medical file into the Grievant's locker or personal file cabinet. And the intimation that some medical files wound up in the kitchen area because of dietary restrictions of inmates is even less persuasive, given the sheer size and thoroughness of the Lupinski file in question here. It would hardly be necessary to retain such a ponderous document in the kitchen just to ascertain dietary restrictions. Furthermore, having credited Lupinski (as I do) there was no good reason to interview other inmates or kitchen staff. Hence I find no shortcoming in Masi's investigation, contrary to the Union's contention. Nor is there any merit to the Unions' apparent contention that disparate treatment exists here in light of the Mollie Bower award it cites to me, or in light of Manager Campbell's assistance, with impunity, to Lupinski. Arbitrator Bowers expressly found that there was no disloyalty involved in her Grievant's conduct. At page 26 she expressly found that "the Employer's contention that the Grievant made the call [i.e., the grant of a favor] to 'discredit the Institution' . . . is highly speculative and <u>unsupported by the facts of record in this case</u>"

(emphasis added). Hence Bower's case is not a "like circumstance." As for Campbell, unlike the Grievant, Campbell's assistance to Lupinski was simply in the normal course of his duties. Again not a like circumstance, hence no disparate treatment is made out.

There remains for consideration the Grievant's good work record. This is somewhat undermined by the rather short tenure of the Grievant's employment. In any event, directly to the point, although the Grievant concededly has a good work record, this circumstance is simply insufficient to mitigate and outweigh the seriousness of his offense. Accordingly it must be found that the Grievant was removed for just cause. It follows that the grievance must be denied.

Award:

For the reasons more fully noted above, the grievance is denied.



Dated: September 21, 1999

Frank A. Keenan
Arbitrator