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GRIEVANCE COORDINATOR

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION & CORRECTION

AND

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

Grievant: Mark Butler

Case No. 27-35 (010803) 0050-01-03

Date of Hearing: September 20, 2002

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Mike Hill
2nd Chair: Anissia Goodwin

Witnesses:

Mark Butler
Damon Meek
Jack Lay
David Sealscott
Larry Barnett

For the Employer:

Advocate: Dave Burrus
2nd Chair: Kate Stires

Witnesses:

Rob Jeffreys
Wendy Davis
Heskell Wagoner

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: December 12, 2002

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2000 through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Mark Butler ("Butler"), for violating his Last Chance Agreement ("LCA") dated July 20, 1999 and Rule 6-Insubordination, of the Department of Rehabilitation and Correction ("DR&C") Standard of Employee Conduct Rules.[1] The discipline was issued because the Grievant exhibited conduct on May 16, 2001 that the employer concluded required a reasonable suspicion drug test in accordance with the CBA. Butler did not submit to the test.

The removal of the Grievant occurred on July 27, 2001 and was appealed in accordance with Article 24 of the CBA. This matter was heard on September 20, 2002 and both parties had the opportunity to present evidence through witnesses and exhibits. Post hearing briefs were submitted by both parties on or about October 28, 2002.

BACKGROUND

This matter involves Mark Butler ("Butler"), a seven (7) year employee of DR&C. Butler was a Correction Officer ("CO") and worked a the Toledo Correctional Institution ("ToCI") at the time discipline was issued.

ToCI became an operating facility in 2000 and attendant to the normal administrative start-up challenges, the formation of a new union chapter also occurred. Butler was elected chapter President in 2000 and held that position at the time of his removal. The Warden at ToCI was Khellah Konteh ("Konteh") and the Deputy Warden of Operations ("DWO") was Rob Jeffreys ("Jeffreys"). Prior to Butler's election and thereafter, through Konteh's and Jeffreys'

[1] At the hearing the parties stipulated that the Rule 6 alleged incident of insubordination involving the confrontation with DWO Jeffreys shall not be considered as part of this arbitration, the only issue for resolution involves the Last Chance Agreement.

acts, Butler was the target of anti-union animus according to the union. As example, alleged statements were made by management personnel regarding who controlled ToCI and Butler's incarceration, i.e. an inmate was running the union. The atmosphere at ToCI was hostile, and most issues over the CBA were contentious between the union and management, according to the union. DR&C agrees that the parties had legitimate disagreements regarding the interpretation of certain provisions within the CBA, but denies that anti-union animus was a factor in Butler's removal. In any event, neither party had filed unfair labor practice charges with the State Employee Relations Board ("SERB"), nor were any grievances filed by the union alleging anti-union animus.

Butler, prior to his removal had the following active disciplines: (1) July 20, 1999-LCA; (2) March 25, 2000-2 day suspension, Rule 8; (3) June 12, 2000-2 days suspension, Rule 7: and March 10, 2001-3 day suspension, Rule 6. The LCA (JX-3, p. 31) required Butler to submit to a return-to-duty test, complete an Employee Assistance Program ("EAP"), and have six (6) random drug tests within the following year. Additionally, "[It] is agreed by all parties that if the employee violates the Last Chance Agreement, the EAP participation agreement, or if there is continued violation of the Random Drug Testing Policy, the appropriate discipline shall be termination from his/her position. (JX-31) " The LCA was in effect for five (5) years and Butler had successfully complied with the LCA conditions cited above prior to May 16, 2001.

On May 16, 2001, DWO Jeffreys called Butler to his office to discuss the temporary assignment of union members pursuant to Article 7 of the CBA. Butler, it was alleged, had harassed COs who were assigned to Temporary Working Level ("TWL") positions necessitating the meeting with DWO Jeffreys. It was Butler's belief the management was violating the CBA by assigning COs to temporary appointments for extended periods of time, and informed his members accordingly. DWO Jeffreys stated to Butler that he was harassing the COs and directed Butler to discontinue this practice. Also present were Wendy Davis ("Davis"), Labor Relations Director and Heskell Wagoner ("Wagoner"), former Personnel Director. After being directed not to harass COs in TWL appointments, Butler replied that he would represent his

members and inform them of their rights. The facts indicated that the conversation became loud and an argument occurred between DWO Jeffreys and Butler. On several times, Butler attempted to leave the room but remained when directed by Jeffreys, despite their escalating verbal exchanges. Butler eventually left the meeting and requested that Union Representative Damon Meek ("Meek") join the meeting if discipline could occur.

Upon Meek's arrival the boisterous exchanges continued over TWLs' and whether Butler was harassing COs by informing them that they were going to return to "gray shirts". Several times Butler and Meek made efforts to leave but were ordered to remain by DWO Jeffreys. A typical exchange was the following, according to DWO Jeffreys' testimony:

DWO Jeffreys: "Stop telling members they're going back to gray shirts..."

Butler: "I can do this, if I want to and you can't stop me..."

DWO Jeffreys: "You're harassing them..."

Butler: "I will continue to tell them and you can't interfere..."

Variations of the above occurred for approximately 10-15 minutes, until Butler and Meek left the office at which time DWO Jeffreys followed them into the hallway and a final confrontation occurred. According to Meek, DWO Jeffreys was yelling, "Who do you think you are and this damn silly shit is going to stop" and got into Butler's face before Meek and Captain Smith ("Smith") intervened to separate them. Meek was fearful a fight might occur and testified that DWO Jeffreys bumped his chest into Butler and Jeffreys' fists were clenched. According to DWO Jeffreys, no fight was going to occur but testified to using profanity during the midst of the various exchanges. Davis and Wagoner served as neutral bystanders, provided incident reports attributing the argumentative tone solely to Butler and both noted that Butler's behavior during the meeting was abnormal. However, the testimony of both DWO Jeffreys and Butler suggests their past interactions were often combative and confrontational.

Wagoner, having been specifically trained in reasonable suspicion drug testing, noted that Butler's eyes were wider than normal and believed something was causing Butler to act this way. Wagoner recommended to the Warden to test him for safety reasons.

Davis testified that Butler's trying to leave the meeting several times and throwing his hands up and down was unusual, and she believed his overall demeanor was abnormal. Davis approached Warden Konteh with her concerns and concurred that a reasonable suspicion drug test was appropriate under Appendix M of the CBA.

Appendix M, Section 2(A)(1) of the CBA allows for reasonable suspicion testing with the following provisos:

1. "...reasonable suspicion must be based upon objective facts or specific circumstances...."
2. ""...such reasonable suspicion must be documented in writing and supported by two witnessed..."[and]
3. "[S]uch written documentation must be presented to the employee..."

Warden Konteh in reliance upon Wagoner's and Davis' observations concluded that Butler's conduct necessitated an Appendix M examination. Konteh, Davis, Meek, Butler, and Major Smith met later on May 16, 2001 where Butler was directed to submit to a drug test by Konteh. Butler and Meek requested to see the reports that Warden Konteh was relying upon, but Konteh refused to provide the reports, which according to Meek were on Konteh's desk. Butler refused to submit to the test even though David cautioned Butler that failure to submit would be considered a "positive test" subjecting him to possible disciplinary action. Butler refused, was placed on administrative leave and escorted off the property.

Appendix M, according to the union, was not complied with when the supportive documentation was not given to Butler by Konteh. On the other hand, submits DR&C, it was Butler's refusal to take the exam that prevented Konteh from giving him the supportive documentation. DR&C contends that providing the documentation at any time prior to exam is permissible.

Butler testified that he became ill with a splitting headache during the initial exchange with DWO Jeffreys and verbally asked DWO Jeffreys and later Captain Smith if he could go home. Butler's sick leave requests occurred prior to the meeting with Warden Konteh. Upon informing Konteh of his illness, Butler was directed to take the drug test and then go home. Butler refused to submit to taking the drug test.

In support of the anti-union animus theory, witness David Seascott ("Seascott"), indicated that Warden Konteh used unflattering words towards the union and made it clear that he was in control of ToCI, not the union. Union witness, Jack Lay ("Lay") testified that the DWO Jeffreys/Butler incident as being out of character for both parties and that DWO Jeffreys admitted so in a subsequent labor management meeting. Meek also stated that this was the first time that he had heard DWO Jeffreys curse as a result of being angry.

On the other hand, Butler's refusal to follow a reasonable and lawful order would support the removal even if the evidence fails to support a violation of the LCA-based upon the just cause standards. However, the language of the LCA states, "It is agreed by all parties that if the employee violated the LCA, or if there is a continual violation of the random Drug Testing Policy, the appropriate discipline shall be termination from his position."
(JX 3, p. 31).

ISSUE

Did the Grievant violate his Last Change Agreement of July 20, 1999? If not, was the Grievant's removal for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA, ORC AND OHIO ADMINISTRATIVE CODE
ARTICLE 24 – DISCIPLINE

24.01 – Standard

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

APPENDIX M

Drug-Free Workplace Policy
Section 2-Drug-Testing Conditions

A. State Testing

1. Reasonable Suspicion

Employees coved by this Agreement may be required to submit a urine specimen for testing for the presence of drugs or a breath sample for the testing of the presence of alcohol:

Where there is **reasonable suspicion** to believe that the employee, when appearing for duty or on the job, is under the influence of, or his/her job performance, is impaired by alcohol or other drugs. **Such reasonable suspicion must be based upon objective facts or specific circumstances** found to exist that present a reasonable basis to believe that an employee is under the influence of, or is using or abusing, alcohol or other drugs. Examples of reasonable suspicion shall include, but are not limited to, slurred speech, disorientation, abnormal conduct or behavior, or involvement in an on-the-job accident resulting in disabling personal injury requiring immediate hospitalization of any person or property damage in excess $2,000, where the circumstances raise a reasonable suspicion concerning the existence of alcohol or other drug use or abuse by the employee. In addition, such reasonable suspicion must be documented in writing and supported by two witnesses, including the person having such suspicion. The immediate supervisor shall be contacted to confirm a test is warranted based upon the circumstances. Such written documentation must be presented to the employee and the department head, who shall maintain such report in the strictest confidence, except that a copy shall be released to any person designated by the affected employee. (Emphasis added)

Employee Random Drug Testing (In part)

Section 404; Number 05

Last Chance Agreement- An agreement signed by the Employer, the respective union, and the employee indicating that a removal order has been held in abeyance pending the successful completion of their EAP Participation Agreement. The Last Change Agreement will be in effect for 60 months. **Any positive drug test** during this time will result in the employee's termination following an appropriate pre-disciplinary hearing. (Emphasis added)

Positive Test Result- When an employee's urine specimen is determined to contain unacceptable levels of illegal/controlled substances. An employee refusing to be tested, adulterating the specimen, or impeding the process will be treated as if they have a positive test result.

POSITION OF THE PARTIES

POSITION OF THE UNION

The Grievant was harassed by DWO Jeffreys and/or Warden Konteh prior to seeking the office of Chapter President and thereafter. Several witnesses (Meek, Sealscott and Lay), including the Grievant indicated that interference in union business including targeting office holders was the practice at ToCI. Specifically, part of the reason the Grievant was removed was due to his union activities as the chapter president.

On May 16, 2001, the Grievant was verbally chastised over the TWL issue, which was precipitated primarily through DWO Jeffreys' conduct. On several occasions the Grievant attempted to remove himself from DWO Jeffreys' office but was ordered back wherein the conversation became more heated resulting in profanity being used by DWO Jeffreys. Union witnesses (Butler/Meek) described DWO Jeffreys behavior overall as enraged with clenched fists at one point in the confrontation. Witness statements (Davis/Wagoner) of management omitted DWO Jeffreys' profanity and enragement and failed to honestly describe Jeffreys' role in this argument. The overall credibility of DWO Jeffreys, Davis and Wagoner must be viewed in light of the testimony, which portrayed a version of the confrontation drastically different from their incident reports and the testimony. Furthermore, Meek observed DWO Jeffreys in such a fit of anger that he bumped the Grievant with his chest after pursuing them in the hallway. The clear aggressor was DWO Jeffreys, and the Grievant was lured into the confrontation by asserting members' rights over the TWL matter.

Upon leaving the area the Grievant was feeling ill and informed Captain Smith (in Meek's presence) he wanted to take sick leave and go home. The Grievant and Meek were instructed to go to Konteh's office instead. The Grievant, upon arriving at Warden Konteh's office, was instructed to take a reasonable suspicion drug test. The Grievant indicated that he was ill, but Konteh refused to allow him to leave without taking the drug test. Regarding Appendix M, DR&C blatantly violated this section by failing to provide the documented statements of the two (2) witnesses to the Grievant when requested by Meek in Warden Konteh's office. The argument

observed by Wagoner and Davis did not remotely approach any objective observation that the Grievant was under the influence.

The LCA prohibits violation of the random drug policy as opposed to the reasonable suspicion testing under Appendix M. The Grievant had successfully completed the LCA requirements and removal under Appendix M was inappropriate and not contemplated within the LCA prohibitions.

POSITION OF THE EMPLOYER

The Grievant, a relatively short-term employee, had an extensive active prior disciplinary record including a LCA, effective 1999 through 2004. The Grievant was trained as a union steward and chapter officer at ToCI and was aware or should have been aware of the work now and grieve later concept.

The termination resulted from the refusal to submit to a drug test in violation of the LCA. In addition to the other prohibitions within the LCA, a violation of the random drug testing policy is also included within the prohibitions. Butler's refusal must be viewed as a positive test, requiring removal under the LCA.

On May 16, 2001, as a result of the Grievant's behavior, observed by Davis and Wagoner, he was directed by Warden Konteh on several occasions to submit to a reasonable suspicion test in accordance with Appendix M of the CBA. The Grievant was put on notice by Davis that a refusal to comply was considered a positive test result and he would be subject to discipline. The incident occurred, and the employer has proven a violation of the LCA and the arbitrator is precluded from modifying the discipline. Appendix M of the CBA is incorporated into the prohibitions of the LCA and the only appropriate discipline was removal.

In the alternative, just cause for the removal was established, and the facts indicate that the Grievant was looking for a confrontation with DWO Jeffreys and his refusal to obey a reasonable and lawful order supports discipline. Mitigation is not an option, and the alleged sickness and/or chest bumping allegations do not supplant the Grievant's refusal to follow a

reasonable directive. Moreover, if the Grievant was sick, why not take the test and then go home?

Regarding the alleged chest bumping on May 16, 2001, the facts do not support such an incident. Meek's incident report dated May 20, 2001, contrary to his testimony, is silent as to this assertion. If Meek could vividly recall this incident at the hearing, why is this critical factor omitted from his report? Finally, the anti-union animus attributable to management at ToCI cannot serve as mitigation since no supportable incident reports, unfair labor practice charges or other documentation exists or was offered regarding the anti-union animus in general, and the Grievant specifically.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997).

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DR&C burden to prove that the Grievant was guilty of wrongdoing in violating the LCA. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984). With an LCA at issue, the agreed upon discipline is termination if the Grievant violated the agreement.

DISCUSSION AND CONCLUSIONS

After careful consideration of this matter, including all testimony and evidence of both parties, I find that the Grievant's conduct warranted discipline-but not removal. The Grievant will be reinstated subject to the conditions contained herein within seven (7) calendar days of

receipt of this award, with no back pay or any other economic benefit for the reasons contained below:

The May 16, 2001 incident provided the spring-broad for the removal and the imposition of the reasonable suspicion drug test. The relationship between DWO Jeffreys and the Grievant was portrayed as good and bad. DWO Jeffreys testified the Grievant has good qualities and is very 'boisterous' [2] in presentations involving youth offenders in the Scared Straight Program. They have worked together at TCI since the facility was activated in 2000, and I find that friction has existed between them since 2000. DWO Jeffreys testified that both of them are very passionate people who disagree over certain issues relating to the CBA. The TWL incident is an example of the variance of views and represents the bad side of the relationship.

According to DWO Jeffreys, the Grievant was called to his office because several COs felt harassed because the Grievant informed them their TWL assignments were ending and they were going back to gray shirts. DWO Jeffreys, indicated that this type of conduct was borderline harassment and ordered the Grievant to stop this behavior.

According to the Grievant, the TWL matter is governed by Article 7 of the CBA and the overall discussion and resolution was a topic for the Labor Management Committee. When confronted by DWO Jeffreys in the presence of Davis and Wagoner, the Grievant testified that DWO Jeffreys started yelling and he took exception to DWO Jeffreys' position and stated that he **could** and **would** tell the COs about returning to gray shirts.

During the meeting, the facts are unrefuted that both participants escalated the verbal intensity and a full scale argument occurred. The Grievant attempted to leave the meeting room, but returned reluctantly when ordered by DWO Jeffreys to do so on several occasions. Wagoner and Davis were observers and their recollection of the argument is pivotal to Warden Konteh' s involvement.

The Grievant requested that a union observer join this meeting due to DWO Jeffreys' behavior and the TWL issue. Meek arrived and based upon the testimony of Jeffreys, Meek and

[2] Boisterous-defined as unmannerly, rough, stormy, noisy and unruly, Webster's New World Dictionary, Second College Edition (1982).

Butler, the argument and loud talk continued; DWO Jeffreys gave a direct order that the Grievant stop talking about the TWL's to COs; Meek stated that in a Labor Management context all parties are equal and direct orders are inappropriate; the Grievant stated the meeting is going nowhere and got up to leave; DWO Jeffreys ordered Meek and the Grievant back into the room; the Grievant indicated "I'm getting a headache and you (DWO Jeffreys) can't tell us we can't leave"; DWO Jeffreys stated that "this damn silly shit is going to end."; Meek and the Grievant walked out the office where upon DWO Jeffreys pursued them into the hallway; DWO Jeffreys and the Grievant continued the passionate exchanges to the extent that they were chest to chest; and finally Meek and Smith intervened and separated the parties.

Clearly, ill will existed over the TWL issue on May 16, 2001and Meek was informed by Butler to hold him down because he didn't like talking to DWO Jeffreys. On the other hand, Meek testified that this was the first time that he heard DWO Jeffreys use profanity, and this type of behavior was foreign to Jeffreys. The evidence indicates that both DWO Jeffreys and the Grievant acted inappropriately by engaging in angry exchanges that are apparently fueled by personal animosity towards each other.

This Arbitrator, in absence of documented evidence to support the anti-union animus claims, and despite the obvious ill will between the parties, does not find persuasive this argument by the union. Anti-union animus has to be established through convincing and objective evidence. See, In re: Arizona and American Guld of Music Artists, 105 LA 1126 (Wayman 1996). Such a showing is absent from the evidence in this matter and no inference exists to find that anti-union animus was a factor in the discipline. DR&C pointed out the defects, by establishing no grievance was filed or that nor any unfair labor practice charges with SERB exists. Simply, the mere fact that a union officer was disciplined does not point to anti-union animus, if so then this argument could be made in every disciplinary grievance involving a union officer. See, In re: PQ Corporation and O.L. Chemical and Atomic Worker International Union Local 5-312, 101 LA 694 (Pratte 1993).

To address the relationship of the LCA and Appendix M of the CBA, a pivotal credibility issue must be addressed. Did the circumstance surrounding the confrontation on May 16, 2001 comply with the precedents in Appendix M? Namely, Appendix M requires that reasonable suspicion must be based upon objective facts or circumstances, documented in writing by two witnesses, and the documentation must be presented to the employee.

Davis described Butler's conduct as abnormal in that his arms were continuously going up and down. Wagoner indicated the uncharacteristic conduct of Butler and observed "his eyes seemed to be open wider than normal" as a physical condition suggesting Butler might be under the influence of something. Davis's incident report described Butler's conduct as erratic and abnormal, but describes DWO Jeffreys' conduct as follows:

> "Again an argument ensued with Butler, Jeffreys tried to calm him...
> When Jeffreys followed him this time, an argument ensued between the two..."

Davis's statement is void of any descriptions regarding DWO Jeffreys' conduct. Wagoner's incident report contains no reference whatsoever to DWO Jeffreys' conduct or participation in an admitted argument. In fact, Wagoner's incident report attributes all of the boisterousness to Butler which is in consistent with the testimony of DWO Jeffreys, Butler or Meek. Davis' and Wagoner's credibility is pivotal, in that they are disinterested onlookers who are required to recount accurately, and without bias, what took place. See, In re: Golden States Foods Corporation and Teamsters, Local 63, 108 LA 705 (Gentile 1997), The importance of credibility in this case centered around provocation and aggression. DWO Jeffreys' anger towards Butler is not contained in their (Davis/Wagoner) statements and the verbosity including the admitted profanity by DWO Jeffreys is omitted as well. Meek and Butler's assessment of the confrontation, particularly DWO Jeffreys' role, is clearly at odds with Davis' and Wagoner's accounts. Based upon the facts I find that DR&C's objective facts and circumstances relied upon by Konteh to request an exam are tenuous at best, and failed to satisfy the "reasonable" requirement under Appendix M. In other words, the evidence was not persuasive that Butler's abnormal conduct was qualitatively different than DWO Jeffreys' behavior. I find that both parties demonstrated equal provocation and aggression in the argument.

The lack of "credible" documentation to support the reasonable suspicion proviso under Appendix M is a fatal flaw in what occurred thereafter. Simply, the heated exchange which became a loud argument between two passionate individuals was not the doing of only Butler. Butler's reaction, and based upon common experiences, is probably accurately portrayed by Davis's incident report. The missing piece is DWO Jeffreys' reaction, but according to Butler and Meek, Jeffreys was in a fit of rage, yelling, had clenched fists, and ultimately cursed at Butler. Arguments contain no scripts or bylines. Butler and Jeffreys both acted emotionally and inappropriately but under the state of the facts, Butler's conduct was not more onerous or erratic than DWO Jeffreys. In sum, Butler's behavior, in all deference to Davis and Wagoner, did not catapult itself to the standard of "reasonable" under Appendix M.

The second flaw under Appendix M for DR&C required that the documentation be provided to Butler to support the random screening. The language as negotiated is unambiguous in that "... the written documentation must be provided to the employee." Meek and Butler testified, unrefuted, that when ordered to take the test they asked Warden Konteh for the written documentation who turned some papers over on his desk but refused to provide the documentation to the Grievant. Even though Appendix M is silent as to when the documentation must be provided to the employee, a logical interpretation of Appendix M would require that the employee received the documentation prior to or at the time the drug test is ordered. Any other construction would render nugatory the procedural protections regarding this process. The employer argues that Butler's conduct by refusing to take the test precluded Warden Konteh from providing the documentation to Butler prior to taking the test. I disagree. In compliance with Appendix M whatever documentation that is relied upon to order the reasonable suspicion drug test must be provided to the employee prior to or at the time the test is ordered.

Regarding the LCA, the union argues that Appendix M is a procedural quilt for reasonable suspicion testing as oppose to a LCA which addresses random drug testing for an employee to return to work. The LCA in this matter required a return to duty test; six (6) random follow-up tests; and a completion of an EAP program. The Grievant LCA was for sixty (60)

months and any violation would result in removal. The Grievant and the union were signatory to the LCA and no evidence suggest that they were not aware of the dire employment consequences attendant to a violation of the LCA. Nevertheless, the union argues that Appendix M is distinct from the testing under LCAs and the Grievant could not be removed for violating Appendix M under the LCA..

The LCA is silent on the interaction with Appendix M of the CBA but contains the following language "... if there is a continued violation of the Random Drug Testing Policy..." A violation of the LCA would occur. DR&C, Random Drug Testing Policy (JX4) defines what a Last Chance Agreement is and states. "The Last Chance Agreement will be in effect for 60 months. Any positive drug test during this time (emphasis added) will result in the employee's termination...". I conclude that LCA incorporates not only random drug tests but also reasonable suspicion tests by specific language, and a violation of either drug test subjects an employee on a LCA to discipline. Moreover, the 60 month duration is a clear indication that the parties intended the LCA to be in effect way beyond the completion of the initial random tests which are concluded within the initial twelve (12) months. Simply, under different facts Butler's refusal to submit to a proper reasonable suspicion drug test would have violated the LCA warranting removal.

Given my prior conclusion that the employers' evidence failed to establish that the suspicion was reasonable based upon the objective facts required under Appendix M of the CBA, the remaining issue involves whether Butler's conduct on May 16, 2001 violated the LCA? Or in the alternative, if the LCA was not violated, did just cause exist for discipline?

The Grievant testified regarding his training as a union steward as well as an officer. The Grievant presented himself as articulate, confident, and knowledgeable about the CBA. On the other hand, the Grievant is also confrontational and defiant regarding aspects of his relationship with management. The Grievant's conduct as manifested by his aggressive approach on May 16, 2001 was viewed by this arbitrator as unacceptable. The verbal exchanges with DWO Jeffreys highlighted by "...you can't tell me what to do! Don't call me into this office for stupid

matters! I'm not your child!..." underscore the mistaken belief of invincibility by the Grievant. My decision should not be interpreted as condoning the behavior of the Grievant in any respect. The Grievant's discipline record demonstrates a pattern of reprehensible conduct over a relatively short period of time consistently involving his inability to follow orders or proper interaction with management. The Grievant's conduct was not blameless and the admitted ill will, if continued, will certainly lead to his removal.

The Grievant's failure to obey Warden Konteh's order provided reasonable and just cause to impose discipline in this matter even though the order was technically deficient under Appendix M. The Grievant's background put him on notice that discipline would occur if he failed to comply with reasonable orders. On May 16, 2001, as in the past, the Grievant's misconduct is related to behavior not performance. I find that a violation of Rule 6 for failing to comply with Warden Konteh's direct order, as distinguished from the parties stipulation regarding DWO Jeffreys' orders, and impose a suspension until the Grievant is reinstated. I further find the overall state of the evidence requires reinstatement, but no back pay or any other economic benefit to the Grievant is awarded.

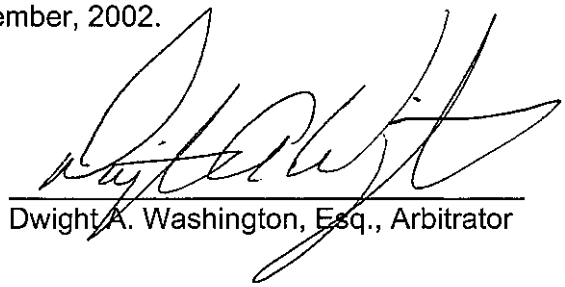
Finally, due to the volatility of the relationship at ToCI, I direct the Grievant to **enroll** and **complete** an EAP under the auspices of the Ohio Employee Assistance Program regarding their anger management program. Whatever enrollment forms that are required must be executed and the program commenced within thirty (30) days of this award.

AWARD

The grievance is granted, in part. The Grievant's removal for violating his Last Chance Agreement is denied. The Grievant is suspended for violating Rule 6 and reinstated with no back pay or economic benefits. The Grievant shall be entitled to his service and/or institutional seniority rights contained in the CBA. As a condition of reinstatement the Grievant shall enroll in an EAP anger management program within thirty (30) days of this award.

The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any dispute that may arise in the implementation of this award and/or regarding the enrollment and completion of an EAP by the Grievant.

Respectfully submitted this **12th** day of December, 2002.



Dwight A. Washington, Esq., Arbitrator