IN ARBITRATION BEFORE MICHAEL E. CAVANAUGH, J.D.

STATE OF WASHINGTON,)
UTILITIES AND TRANSPORTATION)
COMMISSION,)
)
)
Employer,) ARBITRATOR'S DECISION
) AND AWARD
and)
) AAA No. 75 390 00208 13 TAF
WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
)
Union.)
)
(Kenneth Chapman Arbitration))

For the Employer:

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I. INTRODUCTION

The Union contends that the Commission lacked just cause to discharge Grievant, a long-

term employee in the Transportation Licensing section, for alleged insubordination. As

background, it is undisputed that there were many conflicts over the years between Grievant and

his co-workers, especially his lead, Tina Leipske (although Grievant contends he should not be

assigned most of the blame for that situation). Grievant's supervisor, David Pratt, had unsuccessfully counseled Mr. Chapman and his co-workers about solving their own problems in the workplace.¹ Pratt, who described Grievant as a "challenging employee," had also noted performance issues in his annual evaluations, e.g. that his telephone calls with the public were much longer, on average, than those of his co-workers. In Pratt's view, Grievant made little or no effort to improve in that regard and, in fact, seemed unwilling to even acknowledge the length of his phone calls as a problem to be addressed. In addition, Grievant's co-workers resented what they thought to be interference in their work, such as inserting himself uninvited into their dealings with customers and logging the times they came and went from their desks.

In any event, matters came to a head in August, 2012 when Pratt directed Grievant to close an application from a trucker named David Church who had applied for a hazardous materials common carrier permit. Pratt also directed Grievant to issue a refund of the application fee Church had paid (\$100).² Grievant questioned (at least in his own mind) whether a regulation, specifically WAC 480-14-160, prohibited a refund more than six months after the fee had been paid.³ Pratt, in an email sent Monday, August 20, 2012, specifically directed Grievant to process the paperwork necessary to close the file and to grant a refund, but Grievant (without notifying Pratt) had already taken the matter to the acting Executive Secretary of the

¹ In general, the co-workers blamed Grievant for a tense atmosphere in the office, noting for example, that he unnecessarily inserted himself into their work and was frequently condescending (a "know-it-all") and intimidating in speaking with them in a loud voice at close quarters. They also said that on Grievant's regular days off (Mondays and Fridays), they had no difficulty getting along with each other.

² The application had been open for many months, and I think it is fair to say that everyone recognizes it had not been handled well by the Commission staff, including (but certainly not limited to) Mr. Chapman. Consequently, resolution of the application had been inordinately delayed.

³ The State has argued—and I find—that the regulation cited by Mr. Chapman does not apply to a request for a refund when an applicant decides to withdraw a pending application. Rather, It applies only to "fee contests," e.g. when an applicant challenges the right of the Commission to charge a fee under specific circumstances or contends that an otherwise proper fee has been calculated incorrectly.

Commission the week before, raising his concerns about the legality of the refund.⁴ Pratt sent another email to Grievant two days later, on August 22, noting that Grievant had gone "over [his] head." He added that "we have examined the legal issues you raised and your concerns have no basis." In that email, Pratt told Grievant that he considered his refusal to follow his instructions "insubordination," and he closed with "please take care of this this morning as soon as possible." The following morning, August 23, Pratt spoke briefly with Grievant and asked whether the assigned task had been completed. Mr. Chapman said "I'm still waiting to hear from Danner [the Executive Director]. What are you talking about?" Pratt then notified Grievant by email at 9:25 AM that he had been removed from the file, and that the file had been assigned to the lead worker in the unit, Ms. Leipske. Mr. Chapman responded by email approximately one hour later, noting that he had "heard nothing back to date" from the Executive Secretary.⁵ In the meantime, Ms. Leipske promptly processed the paperwork for the closure and refund and had it signed by the Executive Director, David Danner, within the hour.

After an investigation, Danner determined that Grievant should be discharged, asserting five grounds in support of that decision. Specifically, Danner relied on 1) Grievant's alleged refusal to process the Church refund as described above; 2) his involvement in another license application for an entity named Four Star Trucking and/or Seven Star Transport, in which Grievant copied Pratt on an email to Leipske about a phone call he had taken from the applicant, despite having been specifically directed that all Four Star calls should be transferred to Ms.

⁴ As an aside, August 20, 2012, was a Monday, one of Grievant's normal days off, but Pratt had indicated that he expected the dismissal and refund to be taken care of the next day when Grievant returned to work.

⁵ As will be discussed later, it is somewhat unclear whether this August 23 email from Grievant was intended as a response to Pratt's email that same morning, or whether it was a response to Pratt's email from the day before.

Leipske;⁶ 3) his failure to provide timely input to Pratt regarding his evaluation for 2011, e.g. his progress on the prior year's goals, training needs, goals for the coming year, etc.;⁷ 4) his failure or refusal to reduce the length of his telephone calls with the public so that they were comparable in duration to those of his co-workers; and 5) "tension in the office" allegedly resulting from Grievant's "brusque' and "challenging" manner, including frequent interruptions and attempts to intimidate co-workers (such as keeping a log of the times they were gone from their desks),⁸ as well as "pushing people's buttons" deliberately in an attempt to provoke them into responding in a way that then gave him cause to complain about them to Pratt.

Following the discharge of Mr. Chapman, the Union filed a timely grievance on his behalf, which the parties were unable to resolve in the preliminary steps of their grievance and arbitration procedure. These proceedings followed.

II. STATEMENT OF THE ISSUE

The parties stipulated that a standard just cause formulation of the issue is appropriate:

Did the State have just cause to discharge Grievant Kenneth Chapman? If not, what should the remedy be?

Tr. at 4.

⁶ During the investigation, Danner determined that Ms. Leipske had specifically requested that Grievant take the call and relay a message to the applicant, but nonetheless Danner faulted him for sending an email after the call to Pratt, which Danner described as an instance of continuing "involvement" in the application contrary to Pratt's directive.

⁷ Mr. Chapman notes, however, that the email requesting his input said he had to respond to Mr. Pratt by a certain date "if he wanted any of his feedback to be included" as part of his evaluation. Exh. E-1.3 at 64. Moreover, he claims that he was too busy with Commission business to prepare his input during the workday, and when he expressed that concern to his supervisor, Pratt told him that he should ask his co-workers to take over the phones for a time to allow him to prepare his input. It appears undisputed, however, that the co-workers declined to do so.

⁸ Mr. Chapman contended that he was keeping the log because he had been warned by Pratt about time away from his desk, but he thought his co-workers were gone comparable amounts, yet they had apparently not been counseled. There is insufficient evidence in this record for me to judge the accuracy of Mr. Chapman's claim, but logging his co-workers' movements was certainly not an appropriate approach to the issue even if he was correct about the facts.

III. ANALYSIS

A. Preliminary Observations

Grievant is a 29 year employee of the Commission with no prior formal discipline on his record, although numerous instances of "counseling" with respect to his behavior appear in his personnel file. The Union argues, understandably, that it is inconsistent with long-accepted notions of just cause and progressive discipline to summarily discharge an employee, even one who has been "coached" and "counseled" extensively about defects in his performance, when the Employer—*at the time of those alleged misdeeds*—did not treat the issues as being serious enough to warrant formal discipline. While conceding that a single instance of misconduct may be serious enough to justify dismissal for a first offense under some circumstances, the Union notes that the actions that justify such a draconian disciplinary response are traditionally limited to "cardinal offenses" such as theft, serious dishonesty, workplace violence, gross insubordination, egregious sexual harassment, and similar transgressions. These are the kinds of misconduct, of course, that any reasonable employee would understand are simply intolerable in the workplace and thus are likely to result in immediate discharge. That is not the record here, however, says the Union.

The State counters that Mr. Chapman's history demonstrates that he has refused to respond to repeated notice that his Employer finds his conduct unacceptable, that he has made little or no effort to change his ways, and thus that there is no reason to believe that additional opportunities to alter his behavior would be successful. Thus, argues the Commission, the Arbitrator should uphold the discharge. I think the Union has the better argument under these circumstances. To be clear, I have no doubt that Mr. Chapman has been a "challenging" employee, as Mr. Pratt aptly described him in his testimony. On the other hand, I find the

evidence before me insufficient to convincingly establish that progressive discipline, combined with specific and objective performance expectations (coupled as well with clear notice that failure to meet those expectations would result in escalating disciplinary penalties), were destined to fail in the effort to improve Mr. Chapman's performance. And even if the chances of success of that approach were considerably less than 50-50, as the State has reason to believe, Mr. Chapman is a 29 year employee with no prior discipline, and thus he presumptively deserved an opportunity to demonstrate that he could, in fact, meet his Employer's expectations once the consequences of failing to do so had been made clear to him. Consequently, I find that Grievant was entitled to such a course of progressive discipline—unless the record establishes one of the cardinal offenses for which just cause principles allow summary termination.⁹

I am also troubled by the fact that many of the incidents cited in support of Mr. Chapman's termination occurred (or were continuing from) several years prior to the precipitating event—which appears to have been the handling of the Church application. Those "old" or "ongoing" performance issues included his alleged failure to provide timely input into his 2011 evaluation, his failure to substantially reduce his call times, and the "tension in the office" allegations. Yet none of these incidents or allegations, taken singly or together, were apparently considered serious enough by Mr. Pratt to warrant discipline when they occurred. Consequently, it is simply too late to utilize them to justify discipline now. Rather, an employee and the Union are entitled to prompt imposition of discipline once an Employer has judged that an employee has engaged in improper conduct or has failed to meet clearly enunciated standards

⁹ The Commission's best argument on that score, it seems to me, is that Mr. Chapman's handling of the Church application and/or his involvement with the Seven Star/Four Star application constitute the kind of "insubordination" that justifies summary termination. Both of these incidents occurred in August 2012, and I find the Commission addressed them in a timely manner (unlike the other allegations for which discipline was not imposed, let alone imposed within a reasonable time frame). *See*, discussion in the following paragraph. I will consider in a moment whether those allegations of insubordination have been established and whether they are sufficient to sustain a summary discharge of a long-term employee.

of performance. *See*, e.g. St. Antoine, ed., *The Common Law of the Workplace* § 6.15 at 210 (2d Ed., BNA, 2005).¹⁰

Similarly, while the record establishes that Pratt worked with Mr. Chapman on many of these performance issues, *see*, e.g. Exh. E-1at 65 *et seq.*, nothing in the evidence suggests that he specifically told Mr. Chapman that his continued employment depended upon progress on the performance issues identified. Grievant was never placed on a formal performance improvement plan, for example. Some of the issues cited in Mr. Danner's termination letter appeared in nearly every evaluation of Mr. Chapman, e.g. the length of his phone calls. But despite the fact that Mr. Pratt felt that Grievant was actively resisting making any attempt to shorten his phone calls with customers, I do not find in the record any formal discipline or even a warning to Mr. Chapman that discipline might be forthcoming if he failed to improve. By choosing not to follow a course of progressive discipline, despite Grievant's continued failure to meet expectations, the Commission effectively sent a message to Mr. Chapman that continuing to fall short of defined expectations was not serious enough to cost him his job.

With these observations as background, I turn to the two timely allegations on which the Commission has relied in support of the discharge.

B. The Church and Seven Star Applications

The central issue here is whether Mr. Chapman was "insubordinate" in his involvement in the two applications above. Each application has a long and tortured history, but that history is largely irrelevant to the specific allegations of insubordination which, in each case, occurred in August 2012. With respect to 7 Star Transport, on August 9, 2012 Mr. Pratt "verbally told Ken to

¹⁰ It is a separate question, of course, whether these prior incidents—at least those that resulted in contemporaneous counseling or coaching—may be taken into account by the Arbitrator in determining the extent to which Grievant was on notice about the unacceptability of any later conduct on which the Commission has timely moved to disciplinary action, and thus what an appropriate disciplinary penalty might be for any such misconduct established by the evidence.

stop taking calls from this carrier and to transfer to Tina [Lead Tina Leipske]." Exh. E-1 at 62 (handwritten note). After investigating, however, Executive Director Danner specifically found that the call from 7 Star in question did not violate Pratt's directive because when the call came in, Grievant attempted to refer it to Ms. Leipske, but she asked him to relay a message to the applicant instead. Exh. E-1 at 9-10. Mr. Danner did find, however, that Grievant had violated Pratt's directive by "being involved" in the 7 Star application when he sent a one line email to Leipske (on which he copied Mr. Pratt) describing, in shorthand fashion, the status of the application ("Called, still closed Rev Account. She can refax if we want."). Exh E-1 at 62. Pratt then replied to Mr. Chapman noting that "Tina is handling this application," and further reiterated that Mr. Chapman should transfer any calls to Ms. Leipske. *Id*. In the meantime, Pratt said, "work on your applications." *Id*. Mr. Chapman responded "I am working on my applications. I have a bunch in the same boat, waiting on UBI." *Id*.

While conceding that this email exchange did not rise to the level of an independent basis for discipline, Mr. Danner nevertheless considered it an example of "meddling" in the work of colleagues "despite direction to focus on your own work." *Id.* at 10. But that recasting of the allegations does little or nothing to establish the kind of misconduct for which summary dismissal of a 29 year employee with no prior discipline can be justified. Insubordination, of course, involves conscious defiance of a direct and specific order. But with respect to 7 Star, the clear directive involved was to refer all *calls* to Ms. Leipske. Mr. Chapman, in fact, attempted to do just that with the specific call at issue. I do not find in the record, however, any specific directive to cease any and all "involvement" with the 7 Star application. In Mr. Danner's view, Mr. Pratt's directive apparently went so far as to prohibit Mr. Chapman from sending a one line email *to Ms. Leipske*, with a *copy* to Mr. Pratt, regarding the status of the application as reflected

in a call he had taken *at the specific request* of Ms. Leipske. In my view, however, nothing before me demonstrates that Mr. Chapman had been given fair notice that he could face serious discipline for copying Mr. Pratt on a short email under those circumstances.¹¹

I turn, then, to the remaining issue. Was Mr. Chapman insubordinate in his response to Mr. Pratt's clear directive to ensure that the Church application was promptly dismissed with a refund? After carefully reviewing the evidence, I believe he was. First, I find there was a clear directive. In an email August 20, 2012, Mr. Pratt instructed Grievant to "dismiss the David Church application . . . on Tuesday, August 21. And since Mr. Church requested a refund before we dismissed, go ahead and issue the refund as well." Exh. E-1 at 18.¹² Mr. Pratt closed with "If you have any questions, let me know, otherwise I expect to see both of these actions completed Tuesday, August 21." *Id.* Mr. Chapman responded by email¹³ the following day at 4:51 PM, just before the end of his workday:

The request for refund was sent up last week to the acting Exec. Sec. per WAC 480-14-160. I'm waiting for a response back on that. The Dismiss/withdraw order is drafted and waiting for the fee refund response.

¹¹ There is some suggestion in the record that Mr. Chapman copied Pratt on the email because Ms. Leipske had said she saw no need to inform Pratt about the status of the application, whereas Grievant believed she should do so. Even if that is true, however, there is nothing in the record to establish that Mr. Chapman had been specifically directed to have no "involvement" in the 7 Star matter.

¹² As previously noted, this email, dated August 20, was sent on one of Mr. Chapman's regular days off, i.e. a Monday, but Mr. Pratt gave him until the end of the following day to accomplish the required tasks. Thus, I could not find that Mr. Chapman was given insufficient time to complete the directed actions. In fact, he had already drafted the paperwork the prior week in Mr. Pratt's absence, but had taken the refund issue to the Acting Executive Director (in Mr. Danner's absence) because he believed a refund under these circumstances was unlawful under WAC 480-14-160, a concern that the legal experts dismissed—correctly, in my view.

¹³ The content of this email, contained in the following block quote, is the kind of issue I would have expected a responsible employee to attempt to deliver in person to his supervisor, especially when the supervisor has already indicated that he expected that the dismissal/refund would be processed by the end of the day on August 21—or, if Grievant had any questions, that they were to be promptly raised with his supervisor. Instead, Mr. Chapman responded by email just before he was scheduled to leave for the day, a timing that he might reasonably expect would make it difficult for Mr. Pratt to seek him out for discussion before the deadline passed.

After learning that Grievant had raised the issue of the legality of the refund, Mr. Pratt consulted with experts on the Commission's governing statutes and regulations. They concluded that the cited regulation applied only to "fee contests" challenging the propriety of a fee set by the Commission, not to a "refund" of a concededly proper application fee upon the withdrawal of an application.¹⁴ Without relating the precise substance of the legal advice he had obtained, Mr.

Pratt responded by email to Grievant:

Ken, per the August 20 email below, I gave you clear instructions to dismiss the David Church application and issue a refund. *Rather than discussing with me, I've learned that you went over my head. We have examined the legal issues you raised and your concerns have no basis.* I consider your refusal to follow my instructions and dismiss the application and issue the refund as insubordination. Please take care of this this morning as soon as possible.

Id. (emphasis supplied). This email was sent at 9:21 AM (August 22). Mr. Chapman testified that

Pratt came to speak with him the next morning (August 23), asking "Is it done?" Tr. at 258.

According to Mr. Chapman, he replied "I'm still waiting to hear from Danner. What are you

talking about?" Tr. at 258-59.¹⁵ Shortly after this conversation, at 9:25 AM on August 23, Mr.

Pratt emailed Grievant that "following up on the conversation we just had this morning regarding

this application, I am relieving you of responsibility for this application." The matter was then

turned over to Ms. Leipske who completed it promptly that morning.

The chronology outlined above describes a wholly unjustified passive-aggressive

response by Mr. Chapman to his supervisor that I find insubordinate, i.e. conduct that was

¹⁴ The Union argues that the fact Mr. Pratt had to consult with experts establishes that the concerns raised by Mr. Chapman were substantial enough that they could not be dismissed out of hand. I tend to agree, but for reasons that follow, I do not find the fact consequential in reaching my decision.

¹⁵ The Union suggests that Mr. Pratt should have given Grievant a full explanation of the resolution of the legal issues he had raised, and while I agree that might have been preferable, Mr. Chapman is hardly in a position to complain about the lack of a full discussion given that he made no effort to engage Mr. Pratt on the issue the day before, despite having been specifically directed to raise any questions he might have had about promptly dismissing the application with a refund.

inexcusably resistive to Mr. Pratt's supervisory authority. First, Grievant was given a direct order to draft a dismissal order and issue a refund by the end of the day of August 21, and he was also advised that if he had any concerns, he should let Mr. Pratt know. *See*, August 20, 2012 email, Exh. E-1 at 48. When Grievant returned to work on Tuesday, August 21, however, he waited until the end of the day to inform his supervisor by email that he had already sent the refund issue to the acting Executive Director the week before—*without telling his supervisor*. *Id.*, August 21 email. In other words, he failed to promptly raise his concerns with Mr. Pratt, or even to promptly let Mr. Pratt know that he had raised his concerns about the legality of the refund with the acting Executive Director. That would have been simple courtesy, and the failure to do so was certainly disrespectful.¹⁶

If the chronology ended there, it might be questionable to label Mr. Chapman's conduct insubordinate. But it did not end there. Mr. Pratt emailed Grievant at 9:21 AM on Wednesday, August 22 noting that despite his clear instructions to dismiss the Church application and issue a refund, Mr. Chapman had failed to do so. He further told Mr. Chapman that he considered his "refusal to follow my instructions and dismiss the application and issue the refund as insubordination." *Id.*, August 22 email. He also specifically advised Mr. Chapman that "we have examined the legal issues you raised and your concerns have no basis." *Id.* He again directed Grievant to "take care of this this morning as soon as possible." Despite this notice of what was expected of him and why, when Pratt came to speak with Mr. Chapman the following morning (August 23) and asked "Is it done?" Grievant responded, by his own admission, "I'm still waiting to hear from Danner. What are you talking about?" Tr. at 258-59. In context, I find that response to exhibit continuing disrespect for Mr. Pratt's supervisory authority. Then, even after

¹⁶ It is clear that Mr. Pratt regarded it as disrespectful to take the issue "over [his] head" with no notice, and I think he was justified in that reaction under these circumstances.

Pratt emailed Grievant at 9:25 AM on August 23 to notify him that he had been removed from

processing the Church application—an email that followed the conversation between them

described immediately above—Grievant still was not taking his supervisor's authority seriously:

You were not here when the request for refund was made. I provided it to the acting Exec. Sec. per my understanding of WAC 480-14-160. I have heard nothing back to date.

Exh. E-1 at 48.¹⁷

In sum, I find that Mr. Chapman's refusal to complete what was required to dismiss the

Church application and process the refund request was insubordinate and deserving of significant

discipline. See, e.g. Brand & Biren, eds., Discipline and Discharge in Arbitration at 197-98 (2d

Ed., BNA, 2008) ("An employee may also be found insubordinate . . . for exhibiting a general

attitude of defiance or disrespect"). On the other hand, not every case of insubordination justifies

summary termination:

Insubordination has been "generally recognized as being an offense of such magnitude as to constitute 'just cause' for a severe disciplinary response, including termination, even for a first offense, whether or not there has been progressive discipline." Discharge, however, is not the appropriate penalty in every case of insubordination.

¹⁷ Technically, this email is a response to Pratt's email of August 22 at 9:21 AM, not to Pratt's email of August 23 removing Mr. Chapman from the Church matter. But whichever email it was intended to respond to, it exhibits a continuing disrespect of Mr. Pratt's authority. For example, if it was intended to be a response to the August 23 email, it appears to demonstrate a belief that Mr. Chapman had some continuing role in the Church matter, e.g. "I have heard nothing to date" from Mr. Danner, despite the fact that the August 23 email clearly informed him that he had been removed from the case. If it was intended to reply to the August 22 email, it constituted a continuing refusal to take the directed actions even though Mr. Pratt informed him that "we have examined the legal issues you raised and your concerns have no basis." From time to time, and after the fact, Mr. Chapman has apparently parsed the directions or information he was given by Mr. Pratt, e.g. he has questioned who is the "we" who examined the legal issues? Or he has claimed that it was impossible for him to comply, i.e. to "dismiss" the application or "refund the fee," because those actions require someone else's signature. In other words, he has argued that he could not simply perform the required actions on his own. I agree with Mr. Danner, however, that these sorts of directions ("dismiss with a refund") were accepted shorthand within the section. But more importantly in this context, if Mr. Chapman had any such concerns or doubts, he should have raised them with Mr. Pratt directly in a timely way rather than passively resisting the orders and attempting to parse what they might mean at a later time. Given the chronology recited above, it was clear, at a minimum, that Mr. Pratt expected certain things to happen promptly or Mr. Chapman's actions would be considered insubordinate. At least in this context, I think the repeated orders were clear enough to require Mr. Chapman either to comply or to take some affirmative action to determine why Mr. Pratt had determined that his concerns were not legitimate.

Discipline and Discharge in Arbitration, supra, at 208. Consequently, "unless the first offense is egregious, progressive discipline is often required." *Id.* at 209. And the "most important mitigating factor that arbitrators normally consider is the employee's past work record," often a "long and exemplary work history, with little indication of past disciplinary problems." *Id.*

I recognize that the Commission would dispute that Mr. Chapman has an "exemplary" work history, but it is undisputed that he has a long history free of prior discipline. That is, the Employer had chosen to treat many of his prior issues as matters of "performance" to be improved through coaching, counseling, and the annual evaluation process, *not* conduct deserving of "discipline." Thus, it would be manifestly unfair to convert those performance issues into disciplinary issues after the fact. I well understand the Employer's point that there is little reason to believe that Mr. Chapman can change after so many years of being a consistently "challenging" employee, but as I noted earlier, it would also be unfair to simply assume at this point that Mr. Chapman would not have responded positively to progressive discipline had the Commission followed that course over the years. And while I share the State's skepticism that Grievant will ultimately be successful, it would be unfair for the same reasons to assume now that Mr. Chapman is incapable of altering his conduct without giving him a genuine opportunity, through the progressive discipline process, to demonstrate whether he can consistently comply with his Employer's legitimate expectations.

As to the specific disciplinary penalty that is appropriate here, nothing in the concept of progressive discipline requires that the first disciplinary event be met with the lowest form of discipline, e.g. a documented oral warning or a written reprimand, nor that discipline for any subsequent misconduct must follow a lockstep progression up the disciplinary ladder. Rather, the penalty appropriate for a first (or any other) offense will depend on the precise facts presented,

keeping in mind that the central purpose of progressive discipline is to rehabilitate a wayward employee whenever reasonably possible. In applying those principles here, I note that acts of insubordination, even those that do not rise to a level egregious enough to justify immediate discharge, nevertheless support a "severe disciplinary response." Discipline and Discharge in Arbitration, supra. That is appropriate because of the corrosive effect defiance of supervisory authority has upon the workplace. The challenge, in any particular case, then, is to find a penalty that is sufficient, under all the circumstances, to impress upon the employee the seriousness of his misconduct—and the consequences of failing to meet the Employer's reasonable expectations going forward—while still offering a genuine opportunity for a grievant to demonstrate the ability to conform to those expectations. Clearly, this is more a matter of art than of science, but I find that the appropriate penalty here, in light of Mr. Chapman's serious disrespect of Mr. Pratt and open defiance of his directives, is a five-day disciplinary suspension without pay. I will therefore order that the discharge be reduced to a five-day suspension. I will order that Mr. Chapman be reinstated without loss of seniority or benefits, and that he be made whole for lost wages (less customary offsets and deductions) for the period beyond the suspension.¹⁸

¹⁸ Mr. Chapman would be wise to consider this result the functional equivalent of a last chance agreement, i.e. any further acts of insubordinate behavior in the foreseeable future are likely to result in his discharge, and an arbitrator is likely to uphold his termination if the evidence establishes the misconduct alleged.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the

following AWARD:

- 1. The Employer did not have just cause to terminate the Grievant, Kenneth Chapman, but did have just cause to impose a five-day disciplinary suspension without pay; therefore,
- 2. The grievance must be granted to that extent, and
- 3. Grievant shall be promptly reinstated without loss of seniority or benefits, and he shall be made whole for lost wages beyond the period of the suspension.
- 4. The Arbitrator will retain jurisdiction for the sole purpose of resolving any disputes over remedy that the parties cannot resolve on their own; either party may invoke this reserved remedial jurisdiction by fax or email sent, or letter postmarked (original to the Arbitrator, copy to the opposing party) not later than sixty (60) days from the date of this Award or within such reasonable extensions as the parties may mutually agree (with prompt notice to the Arbitrator) or that the Arbitrator may order for good cause shown;
- 5. Consistent with the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 7th day of July, 2014

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Michael E. Cavanaugh, J.D. Arbitrator