IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION AND AWARD
	)	
TEAMSTERS LOCAL NO. 117	)	
	)	
"LOCAL 117" OR "THE UNION"	)	
	)	
AND	)	
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF CORRECTIONS	)	
	)	PHILLIP HOWSE
"DOC" OR "THE EMPLOYER"	)	GRIEVANCE

HEARING:
November 30, 2015
Seattle, Washington

HEARING CLOSED:
February 10, 2016

ARBITRATOR:
Timothy D.W. Williams
2700 Fourth Ave., Suite 305
Seattle, WA 98212

REPRESENTING THE EMPLOYER:
Kelly M. Woodward, Assistant Attorney General
Nancy Walso, Labor Relations Consultant
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REPRESENTING THE UNION:
Spencer Thal, Attorney
Michelle Woodrow, Director of Corrections, Union President
Phillip Howse, Grievant

APPEARING AS WITNESSES FOR THE EMPLOYER:
Brian Clark, Operations Mg DOC McNeil Island
Bonnie Francisco, HR Manager
Jeannie Miller, Assistant Director Correctional Industries
Danielle Armbruster, Director of Correctional Industries
Dan Pacholke, Secretary DOC

APPEARING AS WITNESSES FOR THE UNION:

Michelle Woodrow, Director of Corrections, Union President
Phillip Howse, Grievant
Mustapha Hydara, Mental Health Provider

EXHIBITS

Union

1. Rebuttal to presumption of resignation letter, 10/31/14 with handwritten notes
2. Email trail beginning 10/24/14
3. Email trail to Madeline Sacha from Michelle Woodrow 11/13/14
4. Letter to Phillip Howse from Danielle Armbruster, 10/22/14
5. Grievance with attachments, 11/7/14
6. Grievance response, 12/23/14
7. Doctor notes from Hydara's Mental Health Services, 9/27 and 10/11/14
8. Email trail beginning with e-mail to Phillip Howse from Jeannie Miller, 9/16/14
9. Email and attachment from Jeannie Miller, 9/16/14
10. Email trail beginning with email to spencer Thal, 10/10/15
11. State of Washington earnings and deductions statement for Phillip Howse

Employer

1. Collective Bargaining Agreement, 2013-2015
2. Grievance Response, Nancy 12/23/14
3. Emails from Howse to Brian Clark regarding emergency sick leave
4. Email from Clark to Miller, no calls from Howse, 9/10/14
5. Email regarding no contact from Howse, 10/22/15
6. DeFlitch email regarding no show by Howse, 10/22/15
7. DeFlitch email regarding no show by Howse, 10/22/15
8. Howse chronology
9. Email regarding no further contact with Howse since 10/5/14, 10/20/14
10. Note by Bonnie Francisco regarding conversation with Michelle Woodrow, 10/24/14
11. Email from Jeannie Miller to Phillip Howse regarding return to work, with attachment, 9/16/14
12. Email regarding welfare check and FMLA, 9/22/14

13. Note by Jeannie Miller regarding call from doctor's office, 9/29/14
14. Letter regarding FMLA, 9/26/14
15. Presumption of resignation letter, 10/22/14
16. Emailed petition for reinstatement with attachment, 10/27/14
17. Email train regarding reinstatement, 10/29/14
18. Grievance regarding presumption of resignation, 11/7/14
19. Email regarding second petition for reinstatement with attachment, 11/13/14
20. Email trail beginning with email to Michelle Woodrow from Melissa Bovenkamp, 10/24/14
21. Email train beginning with email to Richard Flores from Jeannie Miller, 8/28/14

BACKGROUND

State of Washington – Department of Corrections, (hereafter "DOC" or "the Employer") and Teamsters Local No. 117 (hereafter "Local 117" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Seattle, Washington on November 30, 2015. At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. A transcript was made of the hearing and a copy was provided to the Arbitrator.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to submit written briefs and the briefs were timely received by the Arbitrator. Thus the award, in this case, is

based on the evidence and arguments presented during the hearing and on the arguments found in the written briefs.

SUMMARY OF THE FACTS

The grievance in this case is between State of Washington – Department of Corrections and Teamsters Local 117. The Parties are bound by a Collective Bargaining Agreement effective 2013 - 2015. The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

The Grievant, Phillip Howse, was first employed by the state of Washington in February, 1998. At the time of his separation from service he was employed as an Equipment Technician 5 at the McNeil Island Corrections Center (MICC). The Grievant worked a 4-10 standard 40 hour work week -- Monday through Thursday. The series of events that led to his separation from service began in September of 2014 and can be summarized as follows:

- On September 7, the Grievant sent an e-mail from his personal e-mail account to his supervisor requesting 80 hours of emergency sick leave (September 8 through September 18); his return to work would have been September 22.
- On September 19 the Grievant again e-mailed his supervisor and requested an extension of his sick leave from September

22 through October 2 – first day to return to work would be October 6.

- On September 29 Assistant Director Jeannie Miller received a phone call from the Grievant's medical provider's (Mustapha Hydara) office requesting a fax number to fax over a medical release. Ms. Miller provided an e-mail address but not a fax number. No e-mail was received from the medical provider's office and later it was determined that an incorrect e-mail address had been used ("miller" was incorrectly spelled "millier").

- On October 5 the Grievant e-mailed to his supervisor requesting and extension of sick leave through October 16 – first day to return to work October 20. This e-mail also contained the statement that "my Medical Provider was suppose to contact Human Resources concerning my release to return to work. I don't know if this has happened." The October 5 e-mail was the last communication that DOC received from the Grievant until after his separation based on a presumption of resignation.

- On October 17 the Grievant's Union representative contacted Dan Pacholke to discuss issues with the Grievant's return to work.

- The Grievant did not show for work on October 20, 21 or 22 and he did not inform his supervisor of his continuing need for sick leave.

- On October 22 the Grievant was mailed a letter informing him that under the presumption of resignation language found in the CBA (Article 47.12) he was being removed from his employment.

- Article 47.12 C gives the employee the right to petition for reinstatement based on a showing that he or she had an "inability or incapacity prohibiting him or her from contacting the Employer." The Union and the Grievant both filed a petition but it was denied based on the conclusion that the Grievant did not have an inability or incapacity prohibiting him or her from contacting the Employer.

A timely grievance was filed by the Union on behalf of the Grievant contesting the decision to remove him from his employment. In part the grievance reads:

> The action referenced above constitutes a violation of the Collective Bargaining agreement (CBA) including, but not limited to Articles 1,2,8,13,23,24 and 47. Mr. Howse has been on extended leave due to the ongoing discrimination, harassment, retaliation, bullying and unsafe working conditions the Department has exposed him to… The Department has a standard procedure of calling employees when they fail to show up for a scheduled sift, yet in this case they waited out the three days as a way to terminate Mr. Howse without cause. We stand ready to provide you with additional facts supporting the Union's position.

The grievance filed by the Union further demanded that the Employer rescind its action and provide the following remedy:

> The Union requests a full make-whole remedy including reinstating Mr. Howse with full back pay and benefits with interest, restoration of any and all leave used by Mr. Howse since September 7, 2014, cease and deist harassing, discriminating, bullying and retaliating against Mr. Howse, provide a safe work environment and any other relief that is just and equitable.

The Union's grievance was processed through the steps of the Parties grievance procedure but the Parties were unable to resolve their differences over the Grievant's separation from employment. As a result the matter was set for arbitration and submitted to Arbitrator Timothy Williams. This document contains the Arbitrator's final decision on the matter

STATEMENT OF THE ISSUE

The Parties were unable to agree on the issue statement and, therefore, empowered the Arbitrator to frame the issue. The Union proposed the following statement:

1. Did the Employer violate the contract when it separated Mr. Howse from employment based on a presumed resignation?
2. If so, what is the appropriate remedy?

The Employer proposes a statement that would limit the Arbitrator's review to Article 47.12 by submitting the following statement:

1. Did DOC's denial of Mr. Howse's petition for reinstatement violate Article 47.12 of the 2013-2015 Collective Bargaining Agreement negotiated by and between the State of Washington and Teamsters Local Union 117.

The Arbitrator determines that the original grievance filed by the Union raises questions about the separation of the Grievant's employment that are not limited to Article 47.12. Thus, to the extent that the Employer contends that it should be so limited, it is up to the Employer to establish by evidence and argument that the Arbitrator should restrict his analysis to Article 47.12. Thus, the Arbitrator states the issue as follows:

1. Did the DOC violate the Parties' CBA when it separated Mr. Howse from employment based on a presumed resignation and then denied his petition for reinstatement?
2. If so, what is the appropriate remedy?

The Parties stipulated that the grievance was timely and properly before the Arbitrator, and that the Arbitrator may retain jurisdiction for sixty (60) days following issuance of his Award to resolve any issues over remedy, if a remedy is provided.

APPLICABLE CONTRACT LANGUAGE

ARTICLE 9 – ARBITRATION

9.5 **Authority of the Arbitrator**
The Arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case that is heard. The arbitrator will have no authority to add to, subtract from or modify any of the provisions of this Agreement, nor will the Arbitrator make any decision that would result in a violate of this Agreement. The Arbitrator will be limited I his/her decision to the grievance issue(s) set forth in the original grievance unless the parties agree to modify it. The arbitrator will not have the authority to make any award that provides an employee with compensation greater than would have resulted had there been no violation of the Agreement. ……

9.6 Arbitration Costs
The expenses and fees of the Arbitrator, and the cost (if any) of the hearing room will be shared equally by the parties. ……

ARTICLE 23

23.6 Sick Leave Reporting and Physicians Statements
An employee must promptly notify his/her supervisor, as soon as he/she is aware of the need for absence and each day thereafter, unless there is mutual to do otherwise. ……./.

ARTICLE 47
PRESUMPTION OF RESIGNATION

47.12 Presumption of Resignation

A. When an employee has been absent without authorized leave and has failed to contact the Employer for a period of time (3) consecutive workdays, the employer is presumed to have resigned from his/her position. Inability of incapacity shall negate the presumption.

B. When an employee is presumed to have resigned from his/her position, the Employer will separate the employee be sending a separation notice to the employee via certified mail to the employee's last known address.

C. Within seven (7) calendar days (excluding Saturdays, Sundays and holidays0 after the separation notice was deposited in the United States mail. The employee may petition the Employer in writing for reinstatement. The petition must be delivered in person or seven via certified mail. An untimely petition will not be processed and the separation will stand. The petition must contain all of the known facts to show the employee's inability or incapacity prohibiting him or her from contacting the Employer.

D. If the petition is accepted, the separation will be rescinded and the employee will be restored to his or her position. If the petition is denied and the denial is grieved, the Union is limited to presenting only the facts contained in the petition to prove the employee's inability or incapacity.

POSITION OF THE UNION:

Article 47 of the parties' collective bargaining agreement is titled "Presumption of Resignation." The Employer argues that when an employee is absent without contact for three days, resignation is automatically triggered. This is not what the language of the contract provides. Instead, the parties agreed that: "When an employee has been absent without authorized leave

and has failed to contact the Employer for a period of three (3) consecutive days, the employee is presumed to have resigned from his/her position."

The ordinary meaning of the word "presumption," is "an acceptance that something is true until it is proven not true," (Merriam-Webster Dictionary). The use of dictionary definitions in arbitration decisions is now well-established. This definition of "presumption" is one which the Employer's highest ranking official (then Secretary Dan Pacholke) accepted as reasonable and appropriate during the course of the arbitration hearing. In other words, a presumption is just that—a presumption—not an irrevocable determination. In fact, the next sentence of the subsection in Article 47 provides that: "Inability or incapacity shall negate the presumption." The Employer appears to claim that inability or incapacity is the only way that the presumption can be negated, but this is not what the language says, a point acknowledged on cross-examination by then DOC Secretary Dan Pacholke.

In order to accept the Employer's interpretation (that inability or incapacity are the only ways to negate the presumption), the Arbitrator would have to write the word "only" into the last sentence of Article 47. Yet, such a holding would contravene the unequivocal language in Article 9.5.

It is well-established that where the contract language is clear and unambiguous, arbitrators will simply apply that language to give it the meaning that was expressed by the parties.

The parties here are skilled and experienced. If they had intended that inability and incapacity were the only ways for an employee to rebut a presumption of resignation, they could easily have accomplished that result by inserting the word "only" in Article 47. They did not. The Union respectfully submits that this was not an accidental omission but a recognition that there might well be other reasons that would explain why an employee had failed to contact the employer.

It is undisputed that this presumption was unequivocally negated two days later, on October 24, 2014. It was on that date that Mr. Howse's union representative, Michelle Woodrow, made it clear to DOC representatives that Mr. Howse fully intended to return to work on Oct. 27, 2014 and that he had no intention to resign. Ms. Armbruster acknowledged that—as of Oct. 24, 2014 the Department knew that Mr. Howse had no intention to resign his employment.

The effect of the Employer's interpretation of Article 47 would be the termination of employment for a long-term employee simply because of a miscommunication. The Arbitrator is not required to reach such a harsh and nonsensical result.

Courts have long held that when the principal purpose that the parties intended to be served by a provision can be ascertained the purpose is to be given great weight when interpreting the provision. Arbitrators have therefore shunned excessive technicality.

The provision in Article 47 mirrors language in other collective bargaining agreements that defines a three-day period of absence without leave as a form of "job abandonment." This language is designed to protect employers from the uncertainty that results when an employee simply goes off the radar screen. The purpose of Article 47 is clear: if an employee has gone missing and utterly failed to maintain contact for three work days, the employer can presume that the employee has resigned.

In fact, the Washington State Supreme Court has already ruled on this specific issue. The case was before the Supreme Court on the same "presumption of resignation" language because this was during a time frame when the issue was controlled by a provision of the Washington Administrative Code ("WAC"), rather than collective bargaining agreements. The parties CBA provision regarding "Presumption of Resignation" in Article 47 had its origins in this WAC (which has since been repealed). In the *Munson* case, the Higher Education Personnel Board reinstated an employee who the employer had wrongfully separated on the basis that he was presumed to have resigned. In upholding the HEP

Board decision, the Washington Supreme Court relied heavily on the manifest purpose of the WAC rule regarding presumption of resignation:

> This analysis is consistent with the apparent purposes of the presumption of resignation. The rule in WAC 251-10-180 allows the University to remove from the payroll an employee who leaves his employment without formally resigning. It avoids the problems of giving notice and holding a hearing for an employee who cannot be contacted… The policy underlying the rule, however, does not operate if the employee who has been absent responds to the acknowledgement of presumed resignation. An employee who petitions for reinstatement provides a strong prima facie case that he did not intend to resign.

In fact, this case presents an even stronger case for reinstatement than the circumstance in *Munson* because of the extensive layers of communication that were ongoing during the relevant time frame. First, Mr. Howse had sent regular e-mails requesting leave from the same e-mail address, and the Employer therefore had an easy means to contact him. Furthermore, and perhaps most importantly, Mr. Howse's last communication specifically referenced his understanding that his medical provider would be communicating with the human resources department regarding his need for additional leave and return to work date. The Employer had received contact from this medical provider's office, had their phone number and e-mail address, and had expected to receive some communication after providing an e-mail address (instead of the fax number requested).

Finally, the employee's union representative had been in direct and extensive communication with Employer representatives regarding the circumstances around Mr. Howse's anticipated return to work, and Mr. Howse knew that this communication was occurring.

The Department did not respond to Mr. Howse's email on Oct. 5, 2014, nor did it make any contact with him or his medical provider after that date. Then, during the three-day period from Oct. 20-22, 2014 when Mr. Howse did not report for work, the Employer made a conscious, affirmative decision not to reach out to Mr. Howse or his medical provider.

Such an approach is toxic to the important labor-management relationship that exists between the parties and is wholly inconsistent with the duty of good faith and fair dealing.

Even if the Arbitrator concludes that this approach was acceptable, one thing is clear: on Oct. 24, 2014, the Employer declined to exercise reasonable discretion to return Mr. Howse to work once it learned that there had been a misdirected email from Dr. Hydara's office and that Mr. Howse did not intend to resign. It is difficult to imagine a more arbitrary decision that one which is rooted in discounting what DOC admits it knew on October 24: that Mr. Howse had no intention to resign.

For DOC to continue to maintain that Mr. Howse had resigned is arbitrary, unreasonable and wholly inconsistent with its duty of good faith and fair dealing.

To the extent the Department asserts Mr. Howse resigned his employment, Mr. Howse nevertheless retained an absolute right to withdraw that resignation within 72 hours after submission of the notice. Article 15.8 of the CBA gives permanent employees a protected window of time to "withdraw a resignation" and during this time the Appointing Authority has no discretion to reject or deny that withdrawal of resignation. The obvious purpose of this language is to allow permanent employees a cooling off period during which a too-hastily tendered resignation can be reconsidered. Although the language was obviously crafted to address a situation in which the employee affirmatively acts to resign, the Union respectfully submits that the same language operates to protect employees who have resignations imposed upon them by the employer pursuant to Article 47.

To be sure, the Employer was given every opportunity to reverse course and adopt a more reasonable approach: informally, only two days after the letter issued, formally but without the need for process after the Union submitted a petition for reinstatement but before the grievance was filed, and at any point during the formal processing of this grievance up through the arbitration. Yet, the Employer has steadfastly refused to

wavier, instead relying on a myopic and rigid approach to the contract language and the labor-management relationship.

If the Arbitrator finds that the Department violated the CBA by separating Mr. Howse based on a presumption of resignation, the Union respectfully requests the remedy of reinstatement to his former position, without any loss of seniority. Furthermore, the Union requests a make whole remedy for the time frame from termination through reinstatement. To the extent that the Arbitrator awards back pay, the back pay award should carry interest. An award of interest does no more than restore the parties to the positions they occupied prior to the discharge.

Given this authority, the Union respectfully requests that the Arbitrator add interest to any back pay remedy that the Arbitrator deems appropriate. For the foregoing reasons, the Union respectfully requests that the Arbitrator issue an Award sustaining the grievance and ordering reinstatement and a make whole remedy including back pay, benefits and interest.

POSITION OF THE EMPLOYER

Because this case involves contract interpretation, the Union bears the burden of proving by a preponderance of the evidence that the Employer violated the CBA. The Union has failed to meet its burden in this case. Additionally, under the

CBA, the grievance process is limited to claims of an alleged violation of this Collective Bargaining Agreement. Moreover, the CBA dictates that grievances will be processed in accordance with the provisions of the Collective Bargaining Agreement in which the grievance was originally filed.

CBAs are governed by ordinary rules of contract law. The arbitrator cannot ignore the plain language of the CBA. Where the language of the CBA is clear, the contract language controls. Only when a contract clause is ambiguous in its meaning is it proper for an arbitrator to consider extrinsic evidence to help make the meaning clear. DOC properly presumed Mr. Howse had resigned because he made no effort to contact DOC, and there was no agreement anyone other than Mr. Howse would be requesting leave on his behalf. In Mr. Howse's petition for reinstatement, the Union contends Mr. Howse had an intention to return to work and that DOC was aware of this intention, despite Mr. Howse's failure to communicate with his supervisor regarding his absences.

Specifically, the Union contends that there was "dialogue" or some sort of "agreement" between DOC and Mr. Howse's healthcare provider so that DOC knew Mr. Howse would be returning to work. The Union's position is without merit and is directly contradicted by the evidence in this case.

There was no discussion of the dates which would be covered by the release. Ms. Miller testified that she believed that the release would return Mr. Howse to work on the following Oct. 6, 2014, which would have been the first work day after the expiration of his most recent leave request.

Mr. Howse was fully aware of his obligation to notify his supervisor if he was unable to report to work, as demonstrated by his consistent communication with his supervisor, even after he believed his health care provider may also have been communicating with Human Resources. When pressed on whether he personally had contacted his supervisor on Oct. 21, he responded, "from my Union contact, I wasn't to return to work until the 27th."

Even more importantly, the Union provided no evidence justifying why Mr. Howse was unable to make a simple phone call or send an email to his supervisor to inform Mr. Clark of his inability to report for work, as required. He was not hospitalized or otherwise medically incapacitated in any way that would prevent him from contacting DOC. In his own testimony, Mr. Howse revealed that he remained fully capable of communicating during the time of his absence in September and October 2014.

After the presumption of resignation, on Oct. 24, 2014, Ms. Woodrow called then human resources consultant Bonnie Francisco

to discuss Mr. Howse's situation. Ms. Francisco testified that during the conversation, Ms. Woodrow told her that "Phillip Howse had emailed his supervisor, Brian Clark, that he'd be out until the 26th."

Ms. Francisco informed Ms. Woodrow that DOC had not been notified that Mr. Howse would continue to be out. Ms. Francisco testified that Ms. Woodrow told her that Mr. Howse had originally asked Ms. Woodrow to notify the employer that he wouldn't be at work, and that she declined, telling him that he needed to call DOC himself.

The unambiguous language of CBA Article 47.12 articulates no duty for DOC to make any attempt to contact Mr. Howse prior to issuing the presumption of resignation. Furthermore, the Union did not establish that DOC had a practice of calling employees prior to issuing a presumption of resignation. The evidence shows the opposite.

The CBA clearly required Mr. Howse to prove he had an inability or incapacity prohibiting him from contacting DOC. The State of Washington and Teamsters Local Union 117 agreed to the following pertinent language of Article 47.12:

> 47.12 Presumption of Resignation:
> When an employee has been absent without authorized leave and has failed to contact the Employer for a period of three (3) consecutive workdays, the employee is presumed to have resigned from his/her position. Inability or incapacity shall negate the presumption.

Howse was required to submit a petition in writing, either delivered in person or sent via certified mail. Because Mr. Howse's separation notice was mailed Oct. 22, 2014, the petition was due by Oct. 31, 2014. Although the emailed petition from Ms. Woodrow was not submitted in one of the two ways required by the CBA, Ms. Armbruster accepted it.

Mr. Howse made three attempts to submit a petition to DOC — once through Ms. Woodrow, once through a faxed copy of a petition he drafted himself, and once through a certified mail copy of the latter. In none of these three attempts did Mr. Howse attach any medical documentation to demonstrate that he had a note covering the dates of Oct. 20, 21, or 22, 2014.

Although the Union also grieved Article 1 and 2 of the CBA, during the hearing, the Union stipulated it would not be pursuing any alleged discrimination claims in this proceeding. Additionally, although Article 8, Discipline, was also grieved, during the hearing, the Union attorney agreed with DOC that the matter in this hearing is non-disciplinary. As such, the Union has waived any argument that the presumption of resignation somehow constituted "improper discipline."

The grievance also cited violation of Article 23, Sick Leave. During the hearing, the Union provided no evidence that DOC violated this Article of the contract. In contrast, DOC

presented evidence that Mr. Howse was the one who failed to follow the requirements of Article 23 in order to receive continued sick leave. Article 23.6 provides that, "[a]n employee must promptly notify his/her supervisor as soon as he/she is aware of the need for the absence and each day thereafter, unless there is mutual agreement to do otherwise."

Even if Mr. Howse had accrued sufficient sick leave to cover the three days at issue in this hearing, that fact is irrelevant in determining whether DOC properly applied the Presumption of Resignation Article. Article 47.12 does not condition presumption of resignation on an employee's exhaustion of accrued leave. If the employee fails to show for work and fails to contact the employer for three days, the employer is entitled to presume that the employee has resigned, whether or not the employee has sick leave on the books.

The grievance also cited violation of Article 24, Family Medical Leave. It would have been unreasonable for DOC to assume Mr. Howse had a serious health condition which would have qualified him for Family Medical Leave Act (FMLA) leave. However, in order to aid Mr. Howse, DOC provided FMLA information to Mr. Howse; he never returned the paperwork or otherwise communicated any need for FMLA leave. The most DOC could do — and what DOC did do — was provide the pape1work to

Mr. Howse and inform him of how he could reach the appropriate person at DOC if he needed assistance with the process.

If Mr. Howse had wanted his leave in Oct. 2014 to be designated as FMLA leave, it was incumbent upon him to communicate that to the agency, to follow through by applying for FMLA, and to provide a medical certification to support the requested leave.

During the petition for reinstatement process, the grievance process, and even during the arbitration hearing, Mr. Howse did not provide any evidence he was unable to comply with the employer's usual and customary notice and procedural requirements. The Union's allegation that DOC failed to provide a safe workplace also fails, as the Union did not establish that the workplace was unsafe.

Mr. Howse seems to suggest that the unsafe environment was created by the fact that he was investigated for misconduct. Although it is true that Mr. Howse had been the subject of several misconduct investigations during the year prior to his separation for presumption of resignation, one investigation was unfounded and the others resulted in letters of expectation, which are not considered discipline under the CBA. During the hearing, the Union did not establish that any of the investigations were improper.

Mr. Howse was absent without authorized leave and failed to contact DOC for three consecutive days on Oct. 20, 21, and 22, 2014, and DOC properly presumed that he resigned from his position. DOC had no obligation to contact him to determine the cause of his absences. DOC followed the procedural requirements of CBA A1ticle 47.12 by notifying Mr. Howse in writing that he was presumed to have resigned his position, prohibiting him from contacting DOC. Mr. Howse failed to provide proof within the required seven days or any time thereafter that he had any such inability or incapacity prohibiting him from contacting DOC. For the foregoing reasons, Mr. Howse's grievance should be denied.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' Collective Bargaining Agreement (CBA) and the issue that is presented to him. The pertinent contract language comes from Article 47.12 and it provides that an employee that has been absent without authorized leave and has failed to contact the Employer for a period of three consecutive workdays is "presumed to have resigned from his/her position." The issue before the Arbitrator is whether the decision by the Employer to separate the Grievant from his employment base on a

presumption of resignation (Article 47.12) violated any term of the CBA.

The Arbitrator begins his analysis by noting that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters, the union is assigned the burden of proof. As the instant grievance does not involve a matter of discipline, the burden of proof resides with the Union. In order to meet this burden, the Union must show by a preponderance of evidence that the Employer's action did constitute a violation of the CBA.

The Arbitrator carefully reviewed the transcript of the hearing, the documents presented into evidence and each Party's brief. After thoughtful consideration he concludes that the Union has successfully provided a case sufficient to meet its burden of proof. As a result of this conclusion, the Arbitrator sustains the grievance and will direct the Employer to implement an appropriate remedy.

The Arbitrator emphasizes that, while he carefully reviewed all of the points raised by the Parties in their briefs, he chose to focus the remaining analysis on the arguments and evidence that he found weighed most heavily on the final decision. The fact that a contention or point is not discussed does not mean that it was not considered. It does mean that it

was not determined to be a major factor in arriving at the conclusion that the grievance should be sustained. The reasoning and the primary factors that led to this conclusion are laid out in the following analysis.

Article 47.12 is a Choice

Article 47.12 grants to the Employer the right to separate an employee from his or her employment whenever an employee fails to show for work for three consecutive days and fails to provide notice of the need for the days off; absent without leave. The Arbitrator emphasizes that nothing in this decision should be interpreted as minimizing the importance of this provision. Work needs to be performed and the failure of employees to report to work particularly when no notice is given can create substantial harm to the Employer.

Moreover, there are at times legal issues involved when an employee is taking time off work that add to the importance of the presumption of resignation language. For example, under the FMLA an employer is required to keep open a position for the employee during a potentially lengthy absence. If that employee fails to return to work at the end of the designated leave and fails to provide notice to the employer, what is the employer's continuing obligations? Under the presumption of resignation language it would be just for three days.

The Arbitrator emphasizes that the nature of the right granted to the Employer under the language of Article 47.12 is not unique to collective bargaining agreements. CBA's often provide discretionary rights to management in certain areas. For example, a CBA may contain language granting to the employer the right to promulgate reasonable work rules so long as those rules do not conflict with any provision of the contract. What is important to note, however, is that while language may give discretionary right to management, that right is usually not totally unfettered. The union will typically have the right to challenge an action based on whether it was arbitrary and capricious or whether it failed to meet the test of good faith and fair dealing.

Elkouri and Elkouri, most often considered the primary source for determining arbitrable precedent, express this right as follows:

> The implied covenant of "good faith and fair dealing" is similar to the principle of reason and equity, and is deemed to be an inherent part of every collective bargaining agreement.... The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, and it applies equally to management and labor. The covenant does not arise out of agreement of the parties, but rather out of the operation of the law. (Seventh Edition, p 9-49) [citations omitted]

Addressing specifically management's discretionary rights as set forth in the agreement, Elkouri and Elkouri provide:

> … Arbitrators may tend to modify the residual rights theory by imposing a standard of reasonableness as an implied term of the agreement. Certainly, many arbitrators are reluctant to uphold arbitrary, capricious or bad faith managerial actions that adversely affect bargaining-unit employees. Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the "sole judge" of the matter, management's action must not be arbitrary, capricious, or taken in bad faith. (Seventh Edition, p 13 - 7, 8) [citations omitted]

Turning specifically to the language of Article 47.12, the Arbitrator emphasizes that there is nothing in this language that makes it compulsory or automatic. An employee is not automatically removed from service after the third day of no notice. The DOC is not required to mail a notice of separation of service following the third day of absence without leave. Sending the letter notifying the employee that his or her employment has been ended is a choice made by the DOC. Clearly, Article 47.12 grants to the Employer the right to make this choice but it is still a discretionary choice and consistent with the above discussion that choice must be made in good faith and it must not be arbitrary and capricious.

Presumption of Resignation

Clearly, the Grievant never intended to resign. The evidence for this is extensive and includes the fact that, prior to having received a letter informing him that he was separated from his employment per a presumption of resignation, his Union

representative had made contact with the DOC for the second time to work out the Grievant's return to active duty. Moreover, the Arbitrator's review of the totality of the evidence indicates that at no time did the Grievant ever expressly or even indirectly send a message to the Employer that he had an intention to resign. As a result, the Arbitrator concludes that the Employer's actions are entirely dependent on a technical reading of the language of Article 47.12 and that the Employer relied on this language, over the immediate and strong objections of both the Union and the Grievant, to maintain its position that the Grievant was no longer employed by the DOC.

The Arbitrator notes that the language of Article 47.12 clearly provides that after three days of absence without notice, the Employer can send a letter notifying the employee that he or she no longer has employment status with the DOC. A review of the record in the instant case provides substantial evidence that the Grievant was absent without leave (no notice) on October 20, 21 and 22, 2014. As per Article 47.12 B, the letter of separation from employment was sent by certified mail on October 22. The Arbitrator finds somewhat surprising the fact that it was actually sent on the third day and wonders if the DOC did not set an all-time speed record in issuing the letter. Nevertheless, the letter was sent consistent with the technical requirements of Article 47.12.

The Arbitrator emphasizes, however, that the Employer is not entitled to a lockstep application of the provisions found in Article 47.12 if the action taken might violate other provisions of the CBA and/or was taken in bad faith. Labor agreements are read as a whole and reasonable rules of contract interpretation need to be applied. The Union, in its brief, strongly emphasize that Article 47.12 is intended as a safety valve not as a substitute for the disciplinary process and a backdoor method of removing an undesirable employee (U Br 13-14). The Arbitrator concurs.

The Arbitrator concludes that if the Employer is or should be reasonably certain that an employee does not intend to resign his or her position because of indicators other than direct notice to his supervisor, then separating an employee under the terms of Article 47.12 would be done in bad faith -- we know you don't really intend to resign but we chose to use the technical language of 47.12 to separate you from your employment. Article 47.12 is intended to protect the Employer not as a tool to punish the employee. Good faith usage of the provision requires not only the three days of no notice but an overall record that reasonably indicates an abandonment of employment.

The Arbitrator additionally concludes that it may be commonplace, as in the instant case, for employees to assert that they had no intention to resign, once they receive a letter

indicating that the employer has separated them from their employment under a presumption of resignation. Whether or not that assertion has any impact on the final outcome will depend first on whether the employer's actions were made in good faith and, second, on whether or not the employee can establish by petition that he or she had an inability or incapacity to have communicated with the employer.

Good Faith

As noted above, the Grievant strongly communicated to the DOC, following the letter separating him from his employment, that he had had no intention to resign his position. The evidence clearly establishes, however, that the Grievant had not provided his supervisor notice of the need for continuing medical leave on the dates of October 20, 21 and 22. The last e-mail received by his supervisor was sent on October 5th and specifically requested sick leave for "10/06/2014 thru 10/16/2014 total 80 hours" (E 3). The 20th of October would have been the Grievant's first scheduled date back to work and the 22nd would have been the third day.

Since the Grievant was technically AWOL for those three days, obviously the Employer had a choice under the language of Article 47.12 as to whether it was going to issue an end of employment per a presumption of resignation letter. The

Arbitrator emphasizes that for the decision to be good faith there had to be an absence of indicators that the Grievant was not resigning his employment. However, the simple fact is that there were a number of rather strong indicators that the Grievant had no intention to resign his position. One is the fact that his Union representative had made contact with the DOC on October 17 to initiate a discussion over resolving issues with his return to work (Tr 23, 26). In this Arbitrator's view, that phone call alone should have put a pause in the Employer's rush to send out the letter indicating an end to employment based on a presumption of resignation.

There was also the fact that the Grievant's medical provider had made contact with the DOC and indicated that it was forwarding information related to his medical condition and his need for sick leave. That information was never received and it turns out that the reason was an incorrectly spelled e-mail address (Tr 27). The important point is that the DOC had made contact with the medical provider, was aware that the medical provider was attempting to provide information and had the necessary contact information to have checked on why that information had not been received. The Arbitrator reemphasizes that the standard of review is good faith and ending an employee's employment should not occur with an indifference to the information that is reasonably available to the Employer.

The Arbitrator also has substantial concerns over the evidence that establish is that the Employer had an internal discussion amongst the key decision makers in which they considered whether or not to contact the Grievant to let him know that his employment was in jeopardy because of a failure to provide notice. The end result of this discussion was a specific decision not to call contact the Grievant because of his lack of responsiveness to earlier requests for information (Tr 94, 159). When Ms. Armbruster was asked on cross-examination whether she could see that it might make a difference to the Grievant if he understood that his employment was in jeopardy, which it was not earlier in September, she refused to answer (Tr 159).

The Employer's position, as the Arbitrator understands it, is that the language of Article 47.12 does not require that the Employer attempt to make contact. As far as the Arbitrator can determine, that is a correct statement but it ignores the primary responsibility of the employer to demonstrate that the decision to invoke the discretionary right found in Article 47.12 was made in good faith. A deliberate decision not to contact the Grievant appears to be exactly the opposite; or, as the Union argues, a game of gotcha (Tr 12).

In summary, the Arbitrator emphasizes that had there not been contacted by the grievance medical provider, had there not

been an effort by the grievance Union representative to work out his return to active duty and had the Employer made even a minimum effort to inform the Grievant that he had not provided proper notice then the Employer's decision to invoke its right under Article 47.12 could have easily been found to be in good faith. But, none of that happened and thus the Arbitrator concludes that decision was made in bad faith.

Arbitrary and Capricious

At page 19 of its brief, the Employer strongly contends that the only considerations that the Arbitrator should make involve whether or not the Grievant, in his petition for reinstatement, provided evidence of an inability or incapacity to notify the Employer. For the Arbitrator to consider extrinsic information, contends the Employer, such as the failed e-mail message from the medical provider would make meaningless the restrictions found in Article 47.12 and would put him in danger of violating the provision in the CBA (Article 9) that prohibits him from modifying any provision of the CBA.

The Arbitrator gave thoughtful consideration to this argument and finds that he disagrees at all levels. For one thing, as extensively previously discussed, discretionary rights granted in a labor contract almost always carry with them the right of the Union to contest actions of the Employer based on

whether they were made in good faith or were arbitrary and capricious. There is absolutely nothing in the Parties CBA that suggests the Employer has the right to apply Article 47.12 in bad faith and/or to be entirely arbitrary or capricious in the way that it applies it.

The Arbitrator concludes that there are two separate sub-issues that are properly before him. One is the question of whether the Employer acted in good faith when it made the discretionary decision to apply the terms of Article 47.12 and ended the Grievant's employment. The second sub-issue is whether the Grievant's petition for reinstatement established that he had an incapacity or inability to provide the required information. Most important, if the Employer establishes the first, then the employee is restricted to the second – the restrictions found in Article 47.12 are given full regard. With regard to this second sub-issue, the Grievant clearly had the capacity or ability to provide the information and thus, had the Employer been able to establish that its action was taken in good faith, the matter would have ended there.

The problem all along for the Employer's case has been the questionable decision to apply the terms of Article 47.12. As previously discussed, the Arbitrator found that this decision was made in bad faith because the Employer had numerous indicators that the Grievant had no intention to resign his

position. Article 47.12 is a safety valve not to be use with an indifference to the overall context within which the Employer's discretionary rights are applied.

The Arbitrator is particularly mindful that, even before the Grievant had actually received a letter informing him that his employment had ended, the Union was already contesting the action on his behalf. Part of the Union's action was to uncover what had happened with regard to the information that the medical provider intended to give the DOC; it was sent but to a bad e-mail address. The point the Employer appears to be making in its argument is that under the restrictions found in Article 47.12 no evidence can be considered that the decision was made based on an incorrect factual understanding; the only pertinent information is incapacity or an inability and everything else is to be excluded. To exclude factual information that was missing at the time the decision was made seems at best to this Arbitrator nonsensical and not supported by the language of Article 47.12. The restrictions found in Article 47.12 to limit information to that showing incapacity or inability can be given full value so long as it's not interpreted as taking away from the Union the right to challenge the initial decision to apply the terms of Article 47.12 based on a contention of bad faith.

The missing note from the medical provider sets forth that the Grievant's need for medical leave is extended to October 26

(U 7). On cross examination, Ms. Armbruster was asked whether she would have moved forward with a presumption of resignation if she had received the note from the medical provider. Her response was, "if I had received it prior to October 20, no" (Tr 166). The Arbitrator finds it arbitrary and capricious to have been provided information of a miscommunication by a failed e-mail message and refused to consider it because it did not establish incapacity or inability. This is particularly true since the Employer is willing to fully acknowledge that had it received it when it was sent it would have altered the course of events. Refusing to modify an initial decision based on new information that substantially compromises the basis of that decision is simply unacceptable within the context of a collective bargaining agreement.

Grievance Sustained

The Union provided to the Arbitrator a 1983 decision of the Washington State Supreme Court with a fact pattern surprisingly similar to the instant dispute. While the case arose under Washington Administrative Code (WAC) it addressed similar presumption of resignation language and the fact that a decision of the University of Washington had been overturned by the Higher Education Personnel Board. Superior Court had reversed the Board and the Washington State Supreme Court affirmed the

action of the Higher Education Personnel Board. In upholding the reinstatement of the employee whose employment had been ended as a result of a presumption of resignation, the Washington State Supreme Court set forth as follows:

> The University, however, has attempted to transmogrify this rule of administrative convenience into a summary dismissal procedure which circumvents the employee's due process rights provided by RCW 28B.16. It appears from the Director's findings that the real basis for the University's action was not Manson's being presumed to have resigned, but rather his history of irregular attendance at his job. In fact, Manson made clear by his timely petition for reinstatement that he had no intention of resigning his position. The proceeding constituted, therefore, in substance if not in form, dismissal for cause rather than acknowledgment of Manson's resignation. Under the University's constriction of WAC 251-10-18, Manson had the burden of proving that he should be reinstated to his position, and had only 7 days in which to furnish the proof. This is a severe abridgement of the 30-day right of appeal provided by RCW 28B.16.120(2). Such administrative efforts to curtail the effect of a statute will not be upheld. Agency rules and regulations, or agency interpretation thereof, cannot amend legislative enactments. *98 Wash.2d 552 (1983)*

The Arbitrator notes that the above description by the Washington State Supreme Court mirrors his view of the facts of the instant case. The pronouncement of the court can easily be restated in the context of the Grievant and the collective bargaining agreement. That restatement is provided below:

> The DOC, however, has attempted to transmogrify this discretionary provision of the collective bargaining agreement into a summary dismissal procedure which circumvents the employee's due process rights provided by both constitution and the CBA. It appears from the facts that the real basis for the DOC's action was not Howse's being presumed to have resigned, but rather his history of

> refusing to respond to reasonable request for information by the Employer. In fact, Howse made clear by his timely petition for reinstatement that he had no intention of resigning his position. The proceeding constituted, therefore, in substance if not in form, dismissal for cause rather than acknowledgment of Howse's resignation. Under the DOC's constriction of Article 47.12, Howse had the burden of proving that he should be reinstated to his position by showing that he had an incapacity of or inability to provide the required information, and had only 7 days in which to furnish the proof. This is a severe abridgement of the right of appeal provided by the CBA for a discharge case. Such bad faith efforts to curtail the effect of a CBA will not be upheld.

Unquestionably, the Employer has discretionary rights established by Article 47.12 and those rights can be an important aid in effectively managing operations. However, applying the terms of Article 47.12 must be done in good faith and without being arbitrary and capricious. Where there is substantial information that the employee does not intend to resign his position, then Article 47.12 cannot be used as a back door process for removing an undesirable employee without constitutional due process and/or the rights of the just cause standard found in the collective bargaining agreement.

In the instant case, the Employer had substantial information that the Grievant did not intend to resign even though he had failed to provide proper notice on the three days in question. Thus the Employer's decision to use Article 47.12 as a shortcut to his removal is viewed as a bad faith action not

to be upheld by this Arbitrator. The grievance is sustained and the Arbitrator will proceed to discuss remedy.

REMEDY

At the hearing, in its opening statement, the Union advocate stated:

> It's not often that I get angry at an employer, but this is truly an awful case, and I think by the time you're done with it you'll agree that it involves the worst kind of labor relations. (Tr p 12)

While the Arbitrator, in sustaining the grievance, has found the Union's arguments compelling, he does not share the Union advocate's anger. Rather, after reviewing all of the facts of this case, he comes much closer to sympathizing with the Employer's frustration over dealing with a recalcitrant employee; an employee who chose to ignore repeated and reasonable requests from his Employer to provide information regarding aspects of his request for sick leave.

The Arbitrator emphasizes that the Grievant's initial request for sick leave and the two follow-up requests for extensions identified the period of time that the Grievant needed as time off but did not identify the reason (E 3). The e-mails did indicate that a medical provider was involved but offered no information as to the type of medical provider nor the condition for which the Grievant needed sick leave. The third e-mail did state that:

> … my Medical Provider was supposed to contact human resources concerning my release to work. I don't know if this has happened. (E 3)

Altogether the Grievant sent the Employer four emails during the time period of September 8 through October 5. Three of the emails dealt with the need for time off and the fourth requested that the Employer not send the police[1] to his home.

From page four through six of its brief, the Employer outlines the multiple efforts that DOC made to have direct contact with the Grievant during this time. The Arbitrator reviewed the facts and found that the Employer's overview is substantially correct. The following is a summary of the pertinent facts as related to efforts to have communication with the Grievant.

1. On September 9, 2014 the Grievant's supervisor e-mailed him requesting a telephone call – no response from the Grievant.
2. On September 10, Danielle Armbruster called the Grievant's personal cell phone number and asked him to call her – no response from the Grievant.
3. On September 10, Danielle Armbruster called the Grievant's emergency contact number and asked him to call her – no response from the Grievant.
4. On September 22 Ms. Miller e-mailed the Grievant again providing contact information and information with regard to how he could apply for FMLA protection for his absences – no response from the Grievant.

[1] The DOC had sent the police to his home for purposes of conducting a welfare check. The evidence indicates that this was standard practice when an employee requests sick leave over a long period of time and makes no further contact with the Employer even when such contact is requested.

The Arbitrator reviewed all of the evidence with regard to the Employer's efforts to have contact with the Grievant over his requests for medical leave. He finds none of these requests onerous, unduly intrusive or poorly motivated. This conclusion is drawn within the context that the Grievant was not asking for two days of sick leave but what turned into almost a month and half. DOC's requests for contact are legitimate and reasonable requests that an employee receiving full compensation on sick leave should have responded to or at least provided a reason why he was not responding. Any claim by the Grievant that his condition made it difficult for him to communicate with the DOC is given little credit since he was fully able to communicate with regard to the fact that the Employer had sent the police on a welfare check. Also, the Grievant cannot rely on any claim that information was supposed to have been provided by his medical provider since he failed to follow up with his medical provider.

Michelle Woodrow is the Grievant's Union representative. She is the person who was working on addressing issues with regard to the Grievant's return to work and ultimately was the person who filed a grievance on his behalf when he was separated from his employment based on a presumption of resignation. The evidence establishes to this Arbitrator's satisfaction that Ms.

Woodrow clearly communicated to the Grievant[2] that he personally needed to keep the Employer informed (Tr 88-89).

What is particularly troubling to the Arbitrator is the e-mail sent by the Grievant to his supervisor on October 5, 2014 when he asserted that his medical provider was supposed to have contacted the DOC but he wasn't sure if this had happened. The Arbitrator's concern is obviously that if one is not sure and it is your responsibility to provide information, then why not make at least some effort to be sure.

The bottom line of all this discussion is that while the Arbitrator has found that the Employer did not have a good faith basis to separate the Grievant from his employment based on a presumption of resignation, he is also fully aware that much of the problem was created by the Grievant's own refusal to act in his own best interest. As a result, the remedy for this case is limited to a directive for the DOC to reinstate the Grievant's employment, restore his seniority and restore any unused leave balances that were not cashed out at the time that the Grievant's employment with the DOC was severed. No other element of a make whole remedy is ordered.

[2] The evidence also indicates that Ms. Woodrow had been misinformed about whether the Grievant had personally submitted a request to the Employer for the extension of his sick leave through the 26th of October (– she was under the impression that he had Tr 88).

C**ONCLUSION**

The Arbitrator was tasked with the responsibility to determine whether or not the decision by the DOC to separate the Grievant from his employment based on a presumption of resignation violated the CBA. The Arbitrator noted that Article 47.12, which grants to the Employer the right to end employment when an employee fails to provide notice of absence for three consecutive days, is a discretionary right granted by the CBA. Discretionary rights granted to an employer provide substantial latitude but are still subject to review based on whether or not the right was exercise in good faith and without being arbitrary and capricious. The Arbitrator determined that the DOC did not act in good faith because it had several indicators that the Grievant had no intention to resign his position but rather was preparing to return to work. The Arbitrator further concluded that the DOC acted arbitrarily and capriciously when it refused to give full consideration to information provided by the Union that the Grievant's medical provider had attempted to e-mail information related to an extension of sick leave which would have covered the days that the Grievant was found to be AWOL. Based on these conclusions, the Arbitrator sustained the grievance but provided only the limited remedy of reinstatement since the Grievant had, during the pertinent period of time,

consistently refused to respond to reasonable requests of his Employer for communication over his use of sick leave.

An award is entered consistent with these findings and conclusions.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION AND AWARD
	)	
TEAMSTERS LOCAL NO. 117	)	
	)	
"LOCAL 117" OR "THE UNION"	)	
	)	
AND	)	
	)	
STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS	)	
	)	PHILLIP HOWSE
"DOC" OR "THE EMPLOYER"	)	GRIEVANCE

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The DOC violated the Parties' CBA when it separated Mr. Howse from employment based on a presumed resignation and then denied his petition for reinstatement.
2. The grievance is sustained and the DOC is directed to reinstate, within thirty days of the date of this award, Phillip Howse's employment, to restore his seniority and to restore any unused leave balances that were not cashed out at the time the Employer removed him from the payroll.
3. The Arbitrator retains jurisdiction for sixty (60) days following issuance of his Award to resolve any issues over the above remedy.
4. Article 9.6 provides the expenses and fees of the Arbitrator, and the cost (if any) of the hearing room will be shared equally by the parties. …… Accordingly, the Arbitrator assigns his fees 50% to the Union and 50% to the Employer.

Respectfully submitted on this, the 29th day of March, 2016, by

Timothy D.W. Williams
Arbitrator