VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 34-27-030909-0061-01-09
and	*	
	*	
OHIO BUREAU OF	*	Andre Davis, Grievant
WORKERS' COMPENSATION	*	Removal
	*	

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Lori Collins, Staff Representative
Victor Dandridge, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Bureau of Workers' Compensation:

Andrew Shuman, Labor Relations Specialist
Laurie B. Worcester
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:30 a.m. on April 21, 2004, and continued on at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Bureau of Workers' Compensation (the "Bureau") were Sheree Smoot, Manager of Customer Contact Center; Rhonda Bell, Labor Relations Officer; Nancy Kuss, Labor Relations Officer; and Sonja Nallie, Director of Customer Contact Center. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Gwendolyn Murphy, Customer Service Representative; and the Grievant, Andre Davis. Also in attendance was LaTina Forte, Steward. A number of documents were entered into evidence: Joint Exhibits 1-4. 6, 8, and 10-12, State Exhibits 1-5 and Union Exhibits 1-8. The oral hearing was concluded at 4:15 p.m. Written closing statements were timely filed and exchanged by the Arbitrator on May 7, 2004, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his removal, the Grievant had been a customer service representative ("CSR") for the Ohio Bureau of Workers' Compensation for over 18 years. He had a June 4, 2003, verbal reprimand for discourteous/rude treatment of a co-worker (which he grieved), as well as a counseling for being disruptive, but no other discipline on his record.

The Grievant's job involves assisting customers of the Bureau over webchat and telephone. CSR telephone conversations are routinely monitored by supervisors for quality assurance. They have access to the Internet and use a reverse look-up site in the course of their

duties. CSRs are also able to send and receive e-mail both internally and externally. Usage is governed by the Bureau's *Electronic Mail (Email) and Internet Policy* which permits, but regulates, personal usage and expressly reserves management's right to retrieve employee e-mail and electronic files "for any reason." (Joint Ex. 8) Among the e-mail activities specifically prohibited are:

- Download, transmit (send or forward), and/or store any message or information (including graphics) that is defamatory, abusive, obscene, profane, sexually oriented, threatening, or racially offensive;...
- Retain inappropriate, non work related E-mails. Such E-mails should be deleted immediately upon receipt. To delete an E-mail from the system, delete the E-mail from the Inbox, then go to the Deleted Folder and delete the E-mail from it as well. (Joint Ex. 8)

The first incident leading to the Grievant's removal occurred on the morning of July 17, 2003, when a manager, Sheree Smoot, was monitoring the Grievant's phone and overheard a conversation he was allegedly having with two co-workers (Gwen Murphy and Kim Kershaw) who were in or near his pod. The parties stipulated that these employees were using the reverse look-up site to search for manager/supervisor information using a list of manager/supervisors' personal telephone numbers which had mistakenly been e-mailed to one of the two co-workers. Ms. Smoot was disturbed about what she heard, so reported it to the director of the center, Sonja Nallie. Her statement written that day reports what she testified she heard:

Andre (speaking out loud):	How do you spell Reynoldsburg?
Andre (speaking out loud):	Appears to be looking at a map – "...ok here is South James Road and back here must be Berwick..."
Andre (speaking out loud):	Kim, give me a number....Any number....
Kim (speaking to Andre):	237-.....
Andre (speaking out loud):	s-u-e (Andre is spelling the word...)
Gwen (speaking to Andre):	*87 blocks calls and no one will know...
Andre (laughing & giggling)	
Gwen (speaking to Andre):	Note: I could not understand what Gwen was saying to Andre.
Andre (speaking to Gwen):	Oh we can get a crack head to do that.... (laughing between Andre and Gwen.
Andre (speaking to Gwen):	I wanta get that bitch – we should send about 20 pizza's to her house. She lives in a good neighborhood – they deliver there. We can have a big ole party! (laughing)

> Angel Bradley & Andre (speaking to each other): I cannot understand what they are saying – whisper – (laughing) (Joint Ex. 3(d), p. 1)

Ms. Nallie was also concerned because of her personal experience with a crack cocaine addict and so had Ms. Smoot report the matter to Internal Affairs and to Labor Relations. A log retrieved by Internal Affairs shows IP 165.223.10.233 accessing Sonja Nallie, her telephone number, address and a map on anywho.com between 9:47 and 10:09 a.m. as well as information about Dana Kendrick (another supervisor) from 10:16 to 10:19 and, between 9:54 and 9:56, the co-worker Terri Ryan, who had reported the Grievant for allegedly discourteous treatment towards her.

The investigation into this incident also turned up various pieces of e-mail sent by the Grievant between March 11 and July 10 containing obscenities, complaints about supervisors and a co-worker, a picture of Michael Jackson with a dog's head and a vulgar, degrading picture of two black women with sexually explicit content entitled "Yo Peeps."

The Grievant was interviewed by Internal Affairs on July 23 and by Rhonda Bell, Labor Relations Officer, on August 4. During the administrative interview the Grievant admitted having used the search engine to look up information about Mesdames Nallie, Kendrick and the co-worker, could not remember at first what the crack head comment was about but later said it was a general statement about a caller. He was having problems with this girlfriend, he stated, and may have said something unflattering about her. The pizza delivery statement was Kim Kershaw's as a practical joke. As for the e-mail, he admitted he was aware of the e-mail policy and that he had sent the pictures. The only ones he had transmitted, he said, were these, but he had seen worse and reported them to his supervisor who told him to delete them, which he did.

The Grievant went off work beginning August 9. Two days later he was sent a notice informing him disciplinary action was being contemplated for

Neglect of Duty:	(i)	Violation of BWC E-mail or Internet policies
Failure of Good Behavior:	(f)	Menacing/threatening/harassing behavior toward fellow employees, management, or the public and
	(p)	General.

A predisciplinary conference was held on August 18, but before the report was issued, the Grievant, who was still off work, called off 20 minutes late on August 19 and, by voice mail, 16 minutes late on August 20. When he contacted his supervisor later on August 20 to follow up on his voicemail, he told her he would be back when his doctor released him and would provide appropriate documentation. Because his doctor had already provided slips to cover FMLA leave through August 15, those absences were excused. But since nothing had been submitted to cover the dates after August 15, Ms. Bell sent him a letter on August 21 ordering him to return to work by August 25. The Grievant neither reported for work as directed nor sent in his resignation, so Sonja Nallie, who is backup FMLA coordinator as well as a supervisor, telephoned him to ask if he had gotten Ms. Bell's letter and, if not, to read it to him. Present when she made the phone call were Cathy Snider (the Grievant's supervisor), and Ms. Smoot. Ms. Nallie testified that the Grievant told her he had not gotten Ms. Bell's letter but would bring his documentation in the next day after he had seen his doctor. When she told him she had to read him the direct order, he interrupted and said in a loud voice, "You don't read me nothing, but you can read it to my attorney." She could not complete the call because he told her not to call him again and then hung up. Ms. Snider and Ms. Smoot each provided a statement reporting what they heard Ms. Nallie say to the Grievant.

New charges were added in an August 28 notice of Reconvened Predisciplinary Meeting:

Failure of Good Behavior:	(c)	Discourteous and/or rude treatment of a manager.
Attendance:	(h)	Unexcused absence
	(i)	Improper call off.

Said meeting was reconvened on September 4, with the report recommending removal issued the following day. Hearing Officer Nancy Kuss testified that in finding just cause for discipline she weighed the Grievant's credibility which she found dubious inasmuch as he now claimed "crack head" referred to his neighbor. The Bureau has zero tolerance for workplace violence since they had a serious incident involving hostages in 1996, she said. What Ms. Smoot overheard was a

plan of action. The e-mail infraction, by itself, justified discipline, but there were other infractions, too.

The Grievant was removed on September 8 for violations of all rules cited in the pre-disciplinary meeting notices. This action was grieved the following day. Meanwhile, the Grievant had applied for disability benefits which were initially denied but then approved from August 23 to September 8 with a waiting period of August 9 to August 22. At Step 3 the Bureau therefore dropped the charge of unexcused absence. Thereafter the grievance came to arbitration, where it presently resides free of procedural defect, on the sole issue of *Was the Grievant removed for just cause? If not, what shall the remedy be?*

In arbitration the Grievant testified the conversation allegedly overheard by Ms. Smoot did not happen. One of his co-workers, Kim Kershaw, came over with the newspaper while he was playing with the search engine. She had a number she wanted him to input, so left and came back with a sheet of paper. Both of them entered numbers and he does not know what she entered. In his predisciplinary meeting he did not mention this because he did not think of it. When he left her at his desk, she was "playing with the system." But he did not see her typing. He was not in his pod the whole time and was never in a three-way conversation. He did have conversation with co-workers in passing, but they were separate conversations . He would not say anything that would get him in trouble because he knows management can monitor his conversations. "Crack head" was not mentioned, but Kim Kershaw mentioned something about pizzas. He did not hear the other co-worker, Gwen Murphy, say that *87 blocks calls. He did say "crack head" to her. They use the term a lot because injured workers act like ruthless crack heads when they call trying to get their checks. He does not use the term to mean anyone in particular. It is just a technique to relieve tension. He hears others use it all the time. He does not recall what he was referring to when he was spelling "Sue," although there is a supervisor in the department named "Sue" with whom he is best friends. He has no idea who the "bitch" was

that he referred to. He was talking with Gwen Murphy at the time. This is not his normal behavior, but he was very upset.

With respect to the e-mail, the Grievant said he always double deletes because he knows the rules. He did forward the "Yo Peeps" e-mail to co-workers, which he admitted was a violation of the policy, but said that it was to only one person. Other people were only warned by an e-mail from Rhonda Bell to delete e-mail that violates the policy. He believes he was treated disparately because everyone else who was a party to the "Yo Peeps" e-mail got less discipline than he did.

Regarding the late call-offs, the Grievant testified he did have slips to cover his absence through August 24, which he submitted before he was removed. One he personally faxed to Ms. Nallie and she acknowledged she had gotten it. He stated he is always timely. He admitted he did call off a little late a few days, but he takes medication that makes him drowsy. He tried to call off on time, but could not get through. Then he dozed off. He tried to call off several times on August 25 and did leave voice mail for his supervisor, which is confirmed by his supervisor's report (Union Ex. 1). He did get a phone call from Ms. Nallie, but never got the return-to-work order until the predisciplinary meeting. Ms. Nallie said she was calling as back-up FMLA coordinator and that it was about the direct order. She also repeated everything he said to her verbattim. His attorney told him not to discuss his FMLA status with anyone but the FMLA coordinator, but he does not have a waiver from the Union allowing the attorney to represent him with the Bureau. Ms. Nallie read Ms. Bell's letter about up to where it says "direct order," then he told her to speak to his attorney. He did not think he was rude and disrespectful to her and did not hang up on her.

Since he was removed, the Bureau has told the Ohio Department of Administrative Services ("DAS") that he was absent without leave, so he had to appeal DAS's denial of disability benefits and ultimately won. His application for unemployment was also rejected because the Bureau said he was AWOL since August 11. The Grievant testified all this shows

the Bureau is out to get him and that the source of his trouble is having spurned and implied sexual overture by Ms. Nallie about eight years ago when they and others from the center were in Cleveland together.

Gwendolyn Murphy, a co-worker of the Grievant testified that at no time was she involved in a three-way conversation on July 17 and she never said that dialing *87 blocks calls. She found out they were being monitored seven days after the incident when she was called to be interviewed without the benefit of being shown Ms. Smoot's report. She did hear the Grievant say "crack head" when he was walking by her pod. She originally told the investigator that she and the Grievant did laugh about how you could get a crack head to do anything, but that was about a separate incident, before July 11, and she only remembered that it was a different incident after she had time to think about it. "Crack head" was all he said on July 17, and she thinks he directed it to a caller. He never said anything about 20 pizzas and made no derogatory remarks about management. For her part in this incident, she got a 10-day suspension, which she has grieved.

III. ARGUMENTS OF THE PARTIES

Argument of the Bureau

The Bureau contends that the conversation overheard by the supervisor between 9:40 and 10:40 a.m. on July 17 combined with the mistakenly released manager/supervisor list and the log shows a search for people in the workplace with whom the Grievant has had an issue in the past. The log shows "237" was more than a coincidental telephone number. Terri Ryan, who lives in Reynoldsburg, appears on the log before Ms. Nallie, which is the same sequence reported by Ms. Smoot, who recognized the voices she heard during normal monitoring. When the Arbitrator compares the Grievant's testimony in arbitration with what he said in the administrative investigation and at his predisciplinary hearing, she will find him and his explanations not credible. In addition to the menacing comments she overheard, the Grievant's e-mail shows him freely expressing his opinion about management, specifically referring to Ms. Smoot and Ms.

Nallie as "bitch." Many are also about Ms. Ryan, the co-worker who had gotten him into trouble. Moreover, he testified he found Ms. Nallie's monitoring of him as intimidating. The fact that he was in trouble and concerned over a grievance meeting suggests that he may have a reason to "get" the supervisors involved. Management cannot ignore what the Grievant says is "just a form of expression to release anger or frustration." If it ignores or allows it, it is liable when the Grievant "releases" and decides to "get" someone himself or sends a crack head to do it for him. Contrary to what the Union claims, this is not a free speech issue because CSRs have no expectation of privacy on the telephone as even the Grievant admitted. Moreover, this is not a plot to single out one employee. Management conducted a full and fair investigation after receiving the report of menacing remarks. This revealed additional work rule violations. The other employees on the "Yo Peeps" distribution chain were not similarly situated to the Grievant as they had not threatened any co-workers as had the Grievant, so they were not terminated.

The Bureau continues that it proved a violation of the call-off procedure on August 19 and 20. He knew the rule and he admitted calling in later than his starting time on those two dates. Nothing prohibits him from calling in prior to his starting time, so he had from 7:30 until 9:30 to reach a supervisor at one of ten phone lines plus the 1-800 number. The fact that he was able to comply on every other date but these two suggests his reason for not getting through on these two dates is not credible. That his absences on these dates were later approved (after his removal) does not excuse the late call-offs because call-offs are required until disability leave is approved.

As for the rude behavior toward Ms. Nallie, she telephoned him on August 25 after he was out of FMLA hours and had been absent on August 20. She had no way of knowing at the time whether his absence would later be covered by disability leave. This was not harassment. She was simply doing her job. But again he showed he does not like taking direction from her, as he did in his e-mail of July 10. This was just another example of a "release," in this case of him giving a manager an order.

The Bureau concludes that this removal is not just about one rule violation, but several which collectively demonstrate a pattern of disregard for co-workers, management, and the rules of the agency. The seriousness of his conduct, when viewed as a whole, justifies termination. The arbitrator must defer to management's discretion and judgment in light of his historical contempt for co-workers, his use of his computer to look up employee addresses, his menacing remarks, and his lack of remorse. The vulgar e-mail pictures and improper call-offs may seem minor, but are part of the Grievant's pattern of hostility. Management acted out of concern for the safety of Bureau employees and its responsibility to provide a safe workplace. For these reasons it asks that its decision be upheld and the grievance denied in its entirety.

Argument of the Union

The Union contends that management is the guilty party here. In the past, management notified the Union of its intent to order an employee back to work. It deviated from this established practice by calling the Grievant with a verbal order to return to work, which was just an attempt to harass and menace the Grievant, and to block him temporarily from getting disability. The Grievant made every effort to keep management informed of his status. Ms. Nallie tried to conceal the purpose of the call by representing herself to be back-up FMLA coordinator though the call had nothing to do with FMLA. In fact, it never sent him the written direct order and there is no proof it did so.

The Union continues that in charging the Grievant with violating the call-off procedure, management ignored express contract language which allows for mitigating circumstances. In this case the Grievant had taken prescribed medications which made him drowsy and made it impossible for him to notify a supervisor within 30 minutes of his starting time. He did comply with the requirement to keep management advised about his disability status on a daily basis and supplied doctors' excuses, but management ignored all this in its hasty attempt to stack the charges.

Turning to the e-mail charge, the Union contends that management broadened the intent of the e-mail system by allowing personal use. Thus, the allegation that he violated the policy is false. Moreover, the other employees who were involved in e-mail conversations with him were not disciplined. Thus, the Grievant was given disparate treatment. Management witness Rhonda Bell admitted that the "Yo Peeps" piece, alone, is a minor violation and some in that piece's chain were given only a warning in the form of a direct order. The Grievant, by contrast, was terminated, which the Union claims was solely for punishment and not for correction coming as it did on top of only a verbal reprimand and with disregard for his long service.

Finally, the Union takes up the charge of menacing and harassing, which it says is based on flimsy, inconclusive, circumstantial evidence. Management relied on inconsistent, incoherent mutterings lasting two minutes or less, overheard by a supervisor. What she heard was a disjointed conversation that was general in nature. The Union argues that is is biased and unfair to base a discharge on 15 fragmented sentences with no target identified.

The Union concludes that the Bureau failed to carry its burden to prove just cause, asking that the grievance be sustained, the Grievant returned to work and restored lost pay, time, leave and seniority accruals and any other benefit due him.

IV. OPINION OF THE ARBITRATOR

There is really no question that the Grievant has violated a number of work rules, and been less than candid about it. But though disciplinary action was warranted, removal was not. No single offense taken by itself nor all of them collectively were so serious as to justify termination of an eighteen year veteran employee without giving him an opportunity to learn from the experience and correct his behavior.

To begin with the simplest incident, the documentary evidence and the Grievant's own admission establish that he called off late two days in succession. The Arbitrator has a hard time believing his explanation because it was never offered until arbitration. Moreover, his testimony throughout the hearing including this incident had the quality of tap-dancing in that he offered

multiple excuses or explanations as if hoping at least one would impress the arbitrator: he had trouble getting through, he never got the full list of telephone numbers, his medication makes him drowsy. But even if all of those were true, it is suspicious that suddenly they caused two consecutive days of late call-offs where there were none before. It seems to the Arbitrator that, in light of that history and having been late on August 19, he did not take care to call off timely the next day. Discipline is warranted. This is a first absenteeism offense (two counts), so the Grievant will receive a reprimand separate from discipline imposed by this Arbitrator for his performance offenses.

Looking next at the telephone call from the center's director, even if everything the Union says about management lapses is true, that does not excuse the manner in which the Grievant terminated the call—with an order and abruptly hanging up. It was a legitimate call from a person in his chain of command. The Grievant knew the purpose of the call. No doubt he was put out by it, but that does not justify his rude display of disrespect. By itself, this behavior is not so egregious as to warrant termination even though he has a prior reprimand for a violation of the same rule (directed towards a fellow employee). It does, however, warrant progressive discipline.

Like the late call-offs, the Grievant does not deny that he forwarded the "Yo Peeps" e-mail and kept his own copy. He does not contest that having such material and transmitting it violates the policy, nor does he claim ignorance of the policy. His complaint is that others in the distribution chain were not as severely treated as he was. The Arbitrator would agree that this infraction alone does not warrant termination, but the Grievant overlooks the facts that first, unlike others in the chain, he both stored and sent the file, and second, that he is guilty of other misconduct. That other misconduct and his prior reprimand justify greater discipline than what others, who only sent but did not store the picture and who had an otherwise clean record, received.

A second point about the Grievant's e-mail needs to be made. That is that these conversations show he is no stranger to using obscenities in referring to co-workers and supervisors. This casts doubt on his credibility (because he claims he rarely uses the term "bitch") and shows antipathy towards supervisors and co-workers and resentment over legitimate direction, factors that must be considered in finding the facts of the remaining charge and fixing an appropriate level of discipline.

Finally, there is the matter of the web search and conversation surrounding it. The Arbitrator has taken some care to compare the Grievant's explanations and answers from one telling to the next (exclusive of the Internal Affairs investigation material which, except for the log, was not submitted). She does find some inconsistencies from one telling to another, but, even taking those into account, the Grievant's explanation of what they were doing and why is at least as probable as the Bureau's, and perhaps more so. As the Arbitrator understands it, the Grievant's story is that he and his co-workers had just been shown how to use anywho.com to convert a telephone number to a name and address. The stipulations support this. Playing with the tool, which was new to them, using whatever information was at hand or that came to mind (which, again, is part of his story) would be expected. This is what people do and, in fact, what they are told to do by trainers, to reinforce and extend their learning. There is nothing in the record to dispute that this, rather than planning bad acts, is why the Grievant was using the search tool. So this, too, is likely. Then, purely by coincidence, a list of supervisor's phone numbers had recently been mistakenly distributed to employees including one of those involved in the incident. So here were some numbers to try. One might look up oneself, a relative, a friend and/ or just use whatever list is handy. A supervisor's list would definitely be interesting, more so if it were illicit, as was this one. Perhaps the Grievant used supervisors' numbers knowingly from the list, perhaps not. If he did, knowing the list was not intended for him, he was wrong to do so. But that is a far cry from plotting to get a number in order to use it for the deliberate purpose of getting an address so that you can do something mean, nasty and harmful to your boss. And even

if the idea of sending a crack cocaine addict to deliver a quantity of pizzas to a co-worker's or supervisor's house did occur to the Grievant in the context of "playing with the system" (which the Arbitrator thinks it probably did, given his lack of candor on other matters) and he shared this idea with his work friends, that does not make it an evil plot or a credible threat. What was the tone of their voices? Other than shaking his finger at someone, had the Grievant ever done anything more than talk? Where is there evidence this so-called plan was ever further developed or that any steps to execute it were taken? In other words, other than the fact that the Grievant displays contempt rather than compassion for a co-worker, has an insubordinate attitude, uses foul language, and apparently resented being corrected and reprimanded, where is there evidence of this being a plan of intended harm rather than a private bad joke? The Arbitrator agrees that an employer may prohibit expressions of hostility in the workplace, even when they are merely bad jokes, and take corrective action. She also agrees that the Grievant cannot be allowed to continue as he has. For this reason, the charge of Failure of Good Behavior (f) Menacing/threatening/harassing behavior is to be removed from his record and replaced with Failure of Good Behavior (a) Making false, abusive, inflammatory or obscene statements. In addition, the removal is vacated, to be replaced with a major suspension for the three performance violations in addition to the aforesaid reprimand for improper call-offs.

V. AWARD

The Grievant was not removed for just cause. He is to be reinstated to his former position forthwith and will receive the following discipline:

Verbal reprimand for Attendance (i) Improper call off;

10-day suspension for Neglect of Duty (i) Violation of BWC E-mail or Internet policies; Failure of Good Behavior (a) Making false, abusive, inflammatory or obscene statements; and (c) Discourteous and/or rude treatment of a manager.

The Grievant is granted full back pay and benefits less what he would have earned while on suspension. The Bureau may deduct any earnings the Grievant had in the interim on account of

his dismissal and may require reasonable evidence thereof. The Arbitrator retains jurisdiction for a period of sixty (60) days for the sole purpose of resolving any dispute in the interpretation and application of the remedy.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 30, 2004

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