Chiesa #9

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

-and-

UNION

Gr. (Employee 1/Discharge)

OPINION AND AWARD

ARBITRATOR: Mario Chiesa

THE CASE

The grievance in this matter is dated November 6, 1998. It was filed in response to the grievant's discharge which was effective October 16, 1998. In part the grievance reads as follows:

> "Date of Occurrence November 6, 1998
>
> "Statement of Facts: Employee 1 was notified via letter that she received on November 6, 1998 that she had been terminated from employment for alleged violation of Employer Rules and Regulations, Sec. 2, Rule 19 and Rule 15. Therefore the discharge is without proper cause.
>
> "Articles Violated IV; XI; XXXIII; XXXIV; Entire Agreement
>
> "Suggested Adjustment: Reinstate Employee 1 to her former position with all pay and benefits attached thereto, reimburse for all lost wage and any and all things to make grievant whole."

The notice of discharge followed a suspension pending discharge which was initiated on October 16, 1998. In part the notice of discharge reads as follows:

> "After due consideration of the information which was presented at your discharge hearing on Friday, October 30, 1998, and consultation with Deputy Employer Manager

> Person 1, I have reached a decision regarding your employment with the Employer. Based upon the violations of Employer Rules and Regulations and your previous work record which were cited in my letter of October 20, 1998, your discharge is confirmed and effective as of 5:00 PM on Friday, October 16, 1998.
>
> "Please contact Person 2 at 123-4567 to arrange for a time and date to be able to receive your personal items which have been left at your work location."

It was authored by the Employer Manager, Person 3. He had previously authored a correspondence dated October 20, 1998, which conveyed notice of a discharge hearing which was to be convened on Friday, October 30, 1998. In that letter Person 3 references Section 2, Rule 19 and Section 2, Rule 15 of the Employer's Rules and Regulations.

At the time of her discharge the grievant was working as an Office Assistant II in the Housing Inspections Department. She was initially hired on May 11, 1988 which means she had about nine and one-half years of service. Portions of the Office Assistant II job description appear as follows:

> "NATURE OF WORK
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> "This is highly varied general office and clerical work. Work involves performing numerous duties in which set sequences of guidelines or procedures are applied to the processing of data, forms and records and the typing of such material.
>
> "Work is performed under continuing supervision with the incumbent exercising judgment and independence in the prioritizing of daily tasks and the carrying out of work processes and procedures."

The events which ultimately led to the grievant's termination began in the afternoon of Tuesday, August 25, 1998. The grievant's supervisor was Person 4. She is one of three supervisors in the department and has held the position since approximately January of 1998. She had been employed by the Employer since May of 1986. Person 4 supervises the clerical and nuisance staff and was the grievant's direct supervisor. Sometime in the past the grievant and Person 4 were co-workers and it seems they had a strained relationship.

According to Person 4, just before 4:00 p.m. on August 25, 1998, she and another employee were in the grievant's work area to check on new lighting which had just recently been installed. Person 4 related that she glanced at the monitor screen on the computer the grievant was working at and noticed that it was full of solid typing with Person 5's name on the page and didn't appear as the form-like work the grievant generally was responsible to complete.

According to Person 4, she asked the grievant whether it was work-related and the grievant responded by saying "Yes", and then turned off the monitor. Person 4 related that she then asked the grievant to print it out and the grievant responded by saying "No", it is not for you. Person 4 went on to testify that she told the grievant, "I'm giving you a directive to print out the document." The grievant then saved the work to a disk, took it out of the machine and put it in her purse. Person 4 asked the grievant whether she was refusing a directive. The grievant then began leaving the room. When Person 4 told her to come back, the grievant said she was going to the bathroom. Person 4 tried to secure another supervisor, but none were available, and in about five minutes the grievant returned to her desk. At that point she printed out a document and gave it to Person 4 who looked at it and concluded that it was not the work that was being performed before. According to Person 4, she stated, "That's not the one I saw," and the grievant responded by saying, "The other one is not for you to see, and this one is the only one you're going to get." There was some discussion about the phone being on or off and Person 4 then asked the grievant to print out what she (Person 4) had previously seen. The grievant refused and Person 4 responded by saying, "Are you refusing a direct order?" The grievant did not respond and said that she wanted to see her union steward.

At that point Person 4 secured a steward, Person 6. He came over, briefly talked to the grievant, and then both moved to the front conference room. Subsequently the steward came out

and told Person 4 that the grievant was working on a document for Equal Opportunity. She now understood that she had to work now and grieve later.

The grievant's rendition of the events up to this point is different. She related that she was indeed preparing a document for the Equal Opportunity office because she had previously filed a complaint and since the document was critical of management, she was extremely reluctant to give it to Person 4. However, she did testify that ultimately she did give it to Person 4, although not the entire document, but just a portion of it. After being asked for the document before producing it, she called Person 7 at the Equal Opportunity office and asked if she had to turn over the document. According to the grievant, Person 7 replied that she would get back to her. According to the grievant, Person 7 called back and said it might be considered personal work. According to the grievant, it was at that point that she gave Person 4 a portion of the document. She did not provide the full document.

According to Person 4, when she reported for work the next day, she discussed the incident with Person 2, the Director of Neighborhood Improvement. She was told to take another supervisor with her and talk to the grievant and ask for the disk on which the grievant had saved the work. At that point Person 4 asked Person 8 to accompany her and he did. The grievant was in the file room when she was asked to produce the disk. According to Person 4, the grievant went back to her desk, opened the drawer, took out a black disk and turned it over. Person 4 stated that she told the grievant that it wasn't the disk which was used yesterday, describing it as a tan disk, but the grievant said, "This is it, this is all you get, so stop bugging me." Person 8 corroborated much of Person 4's testimony, but didn't recall the grievant telling Person 4 to "stop bugging me."

Labor Relations was contacted and Person 9 commenced an investigation. On Thursday, October 15, 1998, Person 9 interviewed the grievant. There is a substantial amount of testimony dedicated to establishing what the grievant said in response to various questions. It will be analyzed in more detail at a subsequent point. Person 9 did testify that he made a recommendation that the grievant be suspended pending discharge. He related that in doing so he reviewed the grievant's work record, including the September, 1993 letter of instruction, a June 1997 document attached to a performance review, as well as a September 1997 letter of instruction, and a five-day disciplinary suspension which was imposed on April 6, 1998. I note that subsequently the five-day suspension was arbitrated and reduced to a three-day unpaid suspension by Arbitrator David W. Grissom in an Opinion and Award dated June 21, 1999. Person 9's recommendation was forwarded to Person 3, the Employer Manager. In a document dated October 20, 1998, he adopted Person 9's recommendation. In part that document reads as follows:

> "Person 9, Labor Relations Specialist, has advised me that you have been suspended pending discharge effective at 5:00 PM, Friday, October 16, 1998. Person 9 has made his recommendation that you be discharged from employment. The reasons for Person 9's recommendation are as follows:
>
> 1. "On the afternoon of Tuesday, August 25, 1998, you were approached by your supervisor, Person 4, who had observed you working on a document which, when seen on your computer screen, raised a question in her mind as to whether or not it was work related. She chose to question you directly and asked if it was work related. You responded it was; stated it wasn't for her; and then proceeded to turn off the computer monitor to keep Person 4 from seeing what you had been working on. Person 4 directed that you print out a copy of the document. You refused and asked for a union steward. Person 4 asked if you were refusing her direct order to print out the document. You subsequently printed out a document and gave it to Person 4, representing that was what you were working on. Person 4 stated that what you had given her in printed form was not what she had seen on the computer screen. You responded that what you had given to her was all she was going to get.

2. "On Wednesday, August 26, 1998, you were approached by Person 4 and Person 8. Ms. Person 4 asked for the computer disk on which you saved the document the day before. You gave her a computer disk from your desk. Person 4 indicated that the disk you were using the day before which she saw you remove from the disk drive after saving the document was a different color. You indicated that the disk you had just given her was the one you had used to save the document. A subsequent search of that disk shows that the document file claimed to have been saved and printed out on August 25 is not on that disk. The only file created and saved on the disk on August 25 were your own notes of the incident.

3. On Thursday, October 15, 1998, you were interviewed by Person 9. When questioned whether Person 4 had asked you on August 25 whether the document you were working on was work related, you stated you had not been asked that question. You replied that you had just told Person 4 that you were working. You admitted you had turned off the computer monitor and stated that it was 'just a reaction'. When asked if you had refused a directive from Person 4 to print out the document, you stated that you complied with the directive; printed out the document; and then claimed you told Person 4 that the document you were giving her was for another department. When confronted with a copy of notes you typed just after the incident contradicting your statements, you reviewed the notes and conferred with your steward. You then claimed that you eventually printed out the document you were working on.

"Person 9 finds that you have disregarded his previous directives as well as the directives of Person 4 in violation of Employer Rules and Regulations, Section 2, Rule 19. You also misrepresented information requested by management in claiming the disk you gave Person 4 was the one on which you saved the work that you claimed she saw on your computer screen and by stating to Person 9 that you obeyed Person 4's initial directive to print the document. These are violations of Employer Rules and Regulations, Section 2, Rule 15.

"A review of you (sic) work record indicates:

1. "In September 1993, you received a letter of instruction explaining that you were expected to work cooperatively with all employees and that your conduct in the Neighborhood Services office was to be professional at all times.

2. "In June 1997, you were instructed during a performance review to treat all members of the staff and the public in a courteous and professional manner. It was further clarified that this included a respectful tone of voice and respectful words and conduct.

3. In September 1997, you were issued a letter of instruction by Person 9 confirming directions given to you in a counseling session. You were told that hostile and defiant behavior toward management representatives as they exercised

fundamental authority to either investigate complaints or address job performance issues was unacceptable and would not be tolerated by the Employer.

4. "Beginning April 6, 1998, you served a five (5) day disciplinary suspension for violation of Employer Rules and Regulations, Section 2, Rules 8, 13 and 19 on March 11, 1998. In that case you initially ignored your supervisor and subsequently engaged in a shouting match when questioned by Person 4 about a phone call which she believed was personal. At the conclusion of the suspension letter issued in that case, you were expressly told that the Employer would not tolerate that type of behavior in the work place and that future behavior of that nature toward your supervisors would result in a recommendation for your discharge.

"Based upon the above, I concur with Person 9's recommendation. You are hereby officially notified that you are suspended pending discharge effective on the date and time referenced above.

"Under Title VII, Section 108 of the Employer Charter, no employee under the classified service may be discharged without being presented with the reasons for discharge in writing and until they have been afforded an opportunity to be heard in their own defense. In addition to this notice of the reasons for your discharge, be advised that you may appear before Deputy Employer Manger James Person 1 at 11:00 AM on Friday, October 30, 1998, in the Labor Relations Conference Room. Under Article XI, Section 3(c) of your collective bargaining Agreement, you are entitled upon request to union representation at that meeting.

"If you fail to appear for the discharge appeal hearing on the date and at the time stated above, or if you do not present persuasive and compelling reasons at the hearing as to why you should not be discharged from employment, your discharge will be subsequently confirmed effective the date of your suspension."

The termination followed, as did the grievance, which was processed through the grievance procedure and presented to me for resolution.

DISCUSSION AND FINDINGS

Over the course of two days there was a full and complete hearing with both parties being afforded every opportunity to present any evidence they thought was necessary. Numerous documents were accepted into the record and testimony was provided by 13 separate witness.

In addition, both parties filed comprehensive and helpful post-hearing briefs. It should be

understood that I have carefully analyzed the entire record even though it would be impossible and probably inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

ARTICLE IV. MANAGEMENT RIGHTS

"Section 1. Except as otherwise specifically provided in this Agreement, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union."

ARTICLE XI. DISCHARGE AND DISCIPLINE

"Section 3.

a. In imposing any discipline on a current charge, Management will not take into account any prior infractions which occurred more than two (2) years previously, provided the employee is not subjected to disciplinary action (excluding letters of warning), during the two (2) year period, nor impose discipline on an employee for falsification of his/her employment application after a period of two (2) years from his/her date of hire. In the event an employee completes two (2) years of service without a disciplinary action, letters of warning and/or suspensions over two (2) years old shall be permanently removed from his/her personnel file upon request to the Human Resources Director.

"Section 6. Investigatory Interview

"In the event a complaint is made against an employee or where any investigation is conducted which may result in disciplinary action, the following procedures shall apply:

a. If, during the investigation, an employee is requested to appear before a member of Management, he/she shall be fully advised of the nature of the investigation and that the investigation may result in disciplinary action.

b. When an employee is questioned under this section, he/she shall be informed of their right to Union representation. Should the employee waive such right, he/ she shall sign a waiver form so indicating and copies will be given to the employee and the Union.

c. Upon request of the employee for Union representation, such request shall be granted and the Union shall immediately provide such representation. When such representation has been requested, no questioning shall commence until the Union representative is present (Steward or Chief Steward or Executive Steward).

d. Employee shall be required to answer questions relating to his/her performance or conduct as an employee of the Employer as it relates to the investigation. Refusal to answer such questions may result in disciplinary action, including discharge."

ARTICLE XXXIII. NO DISCRIMINATION

"Section 1. The parties hereto agree that they shall not discriminate contrary to state or federal law. There will be no discrimination against any employee because of his/her duties as a Union official, steward, or committee member.

"Section 2. Management and the Union acknowledge their continuing responsibility to carry on equal employment practices whereby all employees will be given equal opportunity to be employed in positions which provide the greatest opportunity for use of their abilities."

ARTICLE XXXIV. MAINTENANCE OF STANDARDS

"Section 1. Management agrees that all conditions not otherwise provided for herein relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at the standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement."

Portions of the Rules and Regulations pertinent to this dispute read as follows:

"Committing any of the following violations will be sufficient grounds for disciplinary action, up to and including discharge, depending upon the seriousness of the offense in the judgment of the Management.

"15. Falsifying records, reports, documents or knowingly misrepresenting any information requested by Management.

"19. Disregarding or refusing to obey an order, either written or verbal, from a foreman, supervisor, or other appropriately identified Management personnel."

The Employer argues that the discipline was for proper cause. It points out that this is not the first time the grievant has demonstrated disruptive behavior. It maintains that in a letter of

instruction dated September 1, 1997, she was warned about hostile and defiant behavior towards management. It argues that in an attachment to an evaluation, which is dated June 30, 1997, the grievant was instructed to treat all members of the staff and the public in a courteous and professional manner, etc. It points out that in the letter of instruction dated September 14, 1993, the grievant was told that she was expected to work cooperatively with all employees. Further, it maintains that the grievant was given a five-day suspension which was reduced to a three-day suspension by an arbitrator. Further, it states that the grievant engaged in behavior which strikes at the heart of management's basic ability to direct and control the work force. She had been directed by Person 9 to cease defiant behavior and placed on specific notice that further infractions would result in her discharge. Further, it maintains that it is uncontested that the grievant turned off her monitor at her work station. This was done to prevent her supervisor from seeing what she (the grievant) was working on at the time. The Employer points out that during the investigatory interview the grievant said she turned off the monitor as "just a reaction," but then at the hearing she indicated she turned it off to go wait on a customer, but then on cross-examination admitted that she waited on the customer at the counter prior to the supervisor approaching her the first time. Further, it argues that the grievant physically blocked the screen so the supervisor couldn't view it, while the grievant attempted to save the document. The Employer argues that at the investigatory interview the grievant claimed she printed out the document when her supervisor first asked her to. After looking at her own notes, she then indicated that she eventually printed out the document. At the hearing the grievant admitted she printed out six lines and gave it to her supervisor and that represented only a part of the document. It maintains that the grievant's actions were a clear disregard for her supervisor's documented directive and a clear misrepresentation of fact. The Employer argues that the

Union's position that a two-day suspension is all that should have been imposed is incorrect. It maintains that the assertion that similarly situated employees are not discharged is simply not true. It argues that there is no disparate treatment in this situation.

Further, it maintains that it is entitled to consider all of the work history contained in the grievant's file. It points out that the issue has already been decided by Arbitrator Grissom and he found that prior letters of instruction and counseling can be considered. The Employer argues that the grievant was a problematic employee who it had progressively attempted to correct even though her behavior challenged even the most basic and fundamental authority of Employer management. It argues that in this case the grievant clearly ignored a directive given by her supervisor and compounded matters by misrepresenting the truth. It argues that its decision that the grievant is not salvageable as a productive and trustworthy employee is reasonable and should be enforced.

The Union argues that the Employer has the burden of establishing just cause by clear and convincing evidence. It argues that the grievant's discharge was without just cause because the grievant did not violate a directive from a supervisor. It maintains that it must be shown that the Employer's instructions were clear, were understood to be an order, and the employee was informed of the penalty for non-compliance. It argues that in this case none of the conditions were met. Further, it argues that the grievant was in part discharged for violating previous directives. It argues that some of the prior directives were ambiguous and unbelievably broad in scope. Further, it maintains that none of the directives relied upon by the Employer have been violated. Further, the Union argues that it is understandable that since the document the grievant was composing was highly critical of management, she would be reluctant to turn it over to her supervisor, but despite her reservations, did indeed turn over the document. It argues that while

the grievant did not turn over the complete document, there were significant mitigating circumstances. For instance, it points out that the grievant was operating under the impression that she did not have to turn over a document she was preparing for EEO. Further, it argues that the partial document the grievant gave to her supervisor clearly reveals what she was working on. It argues that the document contained information critical of management, and given the past relationship between the grievant and her supervisor, it is questionable as to how the supervisor would have reacted had she been given the complete document. Further, the Union argues that notwithstanding the Employer's claim, the grievant did turn over the disk she had been using. It argues that even though the supervisor contends it is not the correct disk, it is noted that the disk had a tan identification sticker and there was no other disk found. Further, it argues that the discharge is without just cause because the grievant did not intentionally misrepresent material facts at the investigatory hearing. It argues that, at worst, what happened during the meeting was a case of miscommunication between the parties. Further, the Union argues that the discharge was without just cause because it was improperly based upon letters of instruction that should have been removed from the file and a five- day suspension which was reduced to a three-day. It maintains that all of the letters of instruction relied upon by the Employer should have been removed from the grievant's personnel file. It argues that in one case a grievance was settled on the basis that any copy of the letter of instruction given to the grievant would be removed from her personnel file. It argues that this means the Employer is precluded from using the document as evidence or as a basis for imposing discipline in subsequent matters. Further, it argues that the memo completed by Supervisor Person 5 and attached to the grievant's evaluation was to be removed from her file pursuant to an agreement with the Employer. It maintains that Arbitrator Grissom blatantly disregarded the contract and the clear agreements between the parties when he

held that the letters of instruction and the cover memo to the evaluation were factors which could be considered in evaluating whether the discipline in that case was proper. It argues that the arbitrator made a clear error. Further, it maintains that the grievant's five-day suspension was reduced to a three-day suspension and Arbitrator Grissom found that the grievant did not violate Work Rule #19 - Violating a Directive from Management. Further, it argues that the discharge cannot stand because the penalty is too severe in light of the grievant's record and the circumstances of the case. It maintains that if the grievant is discharged, she would be subjected to disparate treatment. Further, it maintains that the grievant never had any intention of being insubordinate when she gave her supervisor only a partial document on August 25, 1998, but was simply acting with a genuine interest to self-preservation.

From the outset it is noted that the Collective Bargaining Agreement makes it clear that any disciplinary action, in this case discharge, must be for "proper cause". The cause, proper cause, just cause standard -- I consider them synonymous -- has been utilized by parties to Collective Bargaining Agreements for decades to establish a criteria which must be met before discipline and, as I said, in this case discharge, can be sustained. Absent a specific and express definition, and I have found none, nor have I been directed to any, I interpret the term "proper cause" to mean that when judged in light of all the circumstances, the Employer's actions must be reasonable. This means that the Employer must first establish conduct which it may respond to, and, secondly, must show that its response is appropriate. There must be a careful analysis of all relevant factors, including rules and regulations, proven misconduct, length of service, disciplinary record, possibility of disparate treatment, mitigating circumstances, etc. However, this does not mean that arbitrators should lightly interfere with management's actions. To do so would be to manage by arbitration which would benefit neither party.

However, if management's actions are arbitrary, capricious, unreasonable or just plain unfair or excessive, then an arbitrator must intervene.

Part of the concept of just cause or proper cause is the realization that, absent contractual prohibition, an employer has the right, and in many instances the need, to implement and enforce reasonable rules and regulations. Employees should know the employer's expectations. If unilaterally imposed rules and regulations are reasonable and reasonably related to a legitimate employer objective, then they should be enforced. In this case the Employer has relied on two rules, #15 - dealing with falsification of records, etc., and #19 - disregarding or refusing to obey an order, etc. Neither of these rules has been challenged as being unreasonable. This is understandable because as they are written, the rules are reasonable. Of course, their application can be challenged in any particular instance.

The Union has suggested that the burden of proof is on the Employer and it must meet that burden by clear and convincing evidence. I agree that in cases of this nature parties have almost universally accepted the proposition that the burden of coming forward with the evidence, as well as the burden of persuasion, is on the Employer. This, however, doesn't answer the question of what quantum of proof is necessary for the Employer to present a prima facie case. Our legal social system in general recognizes three levels of proof, i.e., preponderance of the evidence, clear and convincing proof, and proof beyond a reasonable doubt.

A preponderance of the evidence means exactly what it states and, that is, that the parties whose evidence preponderates or just ever so slightly tips the scale in its favor, shall prevail. Some very important and substantive issues are decided by procedures utilizing preponderance of the evidence as the standard. Almost all civil cases tried in this country utilize this standard.

At the other end of the spectrum is the standard which is utilized in criminal cases when an individual's liberty may be at stake. Proof beyond a reasonable doubt or, as it is sometimes otherwise referred to, as proof beyond a moral certainty, is the highest level of proof demanded in our judicial system.

It is generally recognized that between the two ends of the spectrum is the standard of clear and convincing proof. This means just what it states, and the evidence in support of a proposition must be clear and convincing. It is a higher standard than a mere preponderance, but still recognizes that the standard of proof beyond a reasonable doubt should be allocated to criminal proceedings.

I agree with the Union that in cases of this nature clear and convincing evidence is necessary. At stake in a discharge case is the grievant's livelihood which is a very important aspect of his/her life, and if it is going to be jeopardized, the proof must be clear and convincing. I note, however, that regardless of what standard is utilized in this case, the findings I have made and the conclusions I have reached are supported by any of them.

Often arbitrators, just like any other finders of fact, must make decisions regarding the weight to be given evidence and the credibility to be afforded witnesses. Such decisions should only be made after a thorough and complete analysis of the total record. Not only the quantity, but also the quality and fabric of the testimony must be carefully analyzed. Reliance on often stated principles, such as testimony given by grievants must always be scrutinized because they have the most to lose, sometimes leads to injustice. Some individuals wouldn't distort what they believed to be the truth if their life depended on it, while others would do so even though relating what they believe to be true would be in their best interest. In this case I have had to make such

decisions and while I will not specifically analyze and display each one of them, the results of my analysis should be obvious.

A portion of this arbitration was devoted to presenting evidence and arguing the impact of an arbitration decision issued by Arbitrator Grissom involving the parties to this dispute and specifically involving a five-day suspension which was imposed on this grievant. That five-day suspension was reduced by Arbitrator Grissom to a three-day suspension. Both parties have relied on portions of Arbitrator Grissom's Opinion to support their positions. There are also allegations that Arbitrator Grissom disregarded the contract and the clear agreements between the parties.

The contract provides that decisions on grievances, assuming they are within an arbitrator's jurisdiction, shall be final and binding. The language goes on to indicate that the decision is final and binding on the employee or employees involved, the Union, and management. Decisions involving the same parties should also be recognized by subsequent arbitrators. To ignore a previous arbitrator's decision, especially in this setting, creates a serious potential of instability which should only be risked in the most serious of circumstances. I view the contract language as requiring me to follow a prior arbitration decision between the parties even though I may disagree with the result. While thankfully this issue is presented infrequently, I would think that if I were convinced that a prior arbitration decision was absolutely and unequivocally incorrect, then my duty to interpret and apply the Collective Bargaining Agreement would supersede my responsibility to follow a prior arbitration decision. These are the general principles I have followed in this type of dispute and they shouldn't be interpreted at this point as being a criticism of anyone's argument or of Arbitrator Grissom's decision. I am just explaining the general principles that I have utilized in the past.

Of course, there is the issue of the prior letters of instruction and related matters which must be dealt with. To begin with, it is important to explore the meaning of the language in Section 3.a. of Article XI - Discharge and Discipline. As I read the language, there are two separate propositions. The first makes it clear that when discipline is being imposed on a current charge, management will not take into account "any prior infractions" which occurred more than two years previously. That provision is subject to the employee not receiving disciplinary action during the two- year period, etc. That's the first proposition. The second is that if an employee completes two years of service without disciplinary action, letters of warning and/or suspensions over two years old, it shall be permanently removed from his/her personnel file. However, such documents will only be removed "upon request" to the Human Resources Director. In other words, those documents can remain in an employee's file forever unless they meet the criteria in the language and the employee requests that they be removed. A condition precedent to removing them from the file is the employee's request.

Nonetheless, there is nothing in this language which allows the Employer to take into account disciplinary actions in the file if those disciplinary actions fall within the prohibition of the first portion of the language. In other words, the mere fact that the disciplinary actions are in the file doesn't mean they can be used. Without question, they can be used if they occurred within two years, and they can be used if they occurred more than two years previously, provided there was additional discipline in the interim. However, if neither of those criteria are met, then regardless of whether the letters of instruction or the suspensions appear in the file, they cannot be used, for the beginning portion of paragraph 2 makes it clear that "management will not take into account any prior infractions which occurred more than two (2) years previously . . ."

This brings us to the specific letters of instruction and document attached to the grievant's evaluation. The evidence seems to establish, and I agree, that the letters of instruction standing alone are not discipline. The Union suggests that their issuance is not grievable, but it is unnecessary to deal with that assertion at this point and I note that the September 1, 1997 letter of instruction was specifically referenced in a September 29, 1997 Step 1 grievance report. Also falling within this category of letter of instruction is the September 14, 1993 letter which was issued to the grievant by Supervisor Person 5.

Generally speaking, it seems that the parties agreed that letters of instruction are not discipline. As a result, they cannot be viewed as discipline and cannot be utilized as discipline. Yet, before dealing with the specific circumstances, I note that the language in the contract references the Employer's ability to take into account "prior infractions" which occurred more than two years previously. Given the fact that letters of instruction are not disciplinary in nature, it is questionable whether their use in this case violates that provision of the contract, or was otherwise inappropriate.

I want to be very clear on this point. Since letters of instruction have been agreed by the parties to be non-disciplinary, they can't be used as prior discipline. In that regard, I completely agree with the Union. But the issue and the real question is how can they be used, if at all? While surely they cannot be used as prior discipline, they can be used as an indication of notice. For instance, if the Employer promulgated a new set of rules and asked an employee to sign a receipt for those rules, the signature on the receipt establishes that the employee received the rules, assuming no contrary evidence, and thus is put on notice that they were issued and of their content, assuming they are not totally ambiguous. A letter of instruction works the same way. It is nothing more than a memorialization that the grievant knew that the conduct described in the

letter of instruction was inappropriate and would not be tolerated. Since the letter of instruction is not discipline, it can't stand for the premise that the conduct referenced in the letter has been established. That would be totally inappropriate. The only thing that the letter of instruction can stand for is that the employee is put on notice that the conduct referenced in the letter will not be tolerated. I agree that the distinction between the use of a letter of instruction as notice, and use of prior discipline as a basis for intensifying a current response, is slight, but nonetheless, the difference is very important. I think the Employer realizes the difference, for it articulated the following position in its answer to Grievance 28-98:

> ". . . It is the Employer's position that the counseling sessions were appropriately taken into consideration; they make it perfectly clear that Employee 1 knew her behavior, as repeated in this case, was no longer going to be tolerated and that she was directed by this respondent to cease from challenging the normal functions of Management in directing the work force."

The above statement seems to indicate that the Employer realizes that it can only use the counseling notices to show that the type of conduct outlined in the notice would not be tolerated. recognize that the way the response is written it could also be interpreted to mean that the Employer has, at least to some degree, relied on the character of the conduct outlined in the counseling session. However, I want to make it absolutely clear that it would be inappropriate to do so. While the letter must be issued in good faith, the only purpose for which the letter of instruction can be used is to show that the employee has been put on notice that the described conduct is unacceptable. It is a personalized notice and the counseling is with the employee directly. Thus, the notice received is even clearer and more substantive. It should be noted, however, that I do not hold the same view that was expressed in the prior arbitration decision. In that case the arbitrator stated:

> "The point here is that pursuant to these prior written admonitions and counselings, Grievant Employee 1 was on notice that her negative attitude, lack of professionalism and courtesy and related conduct, would not be tolerated.
>
> It is recognized that Letters of Instruction and counselings do not constitute discipline. However, these prior warnings do demonstrate that the Employer had previously experienced considerable difficulty with Grievant Employee 1 as an employee and that she knew that similar behavior in the future could mean disciplinary action. . ."

Since the letters of instruction are not considered discipline, and if the Union is correct that they cannot be grieved, then I will not utilize the letters of instruction to establish that the Employer has had previous "difficulty" with the grievant. As I said, such notices must be issued in good faith, but the only purpose which I will use the letters for, and the only thing I find the Employer can use the letters for, is to show that the grievant is put on notice that such activity would not be tolerated.

There are specific circumstances surrounding each document which should be explored further. For instance, the cover letter to the May 11, 1997 evaluation was the subject of the Union's allegation that it should have been removed as part of an understanding. However, those circumstances are referenced in Arbitrator Grissom's decision and he seems to indicate, as does some of the evidence, that the letter would be removed once the grievant signed the evaluation and then was re-evaluated. She didn't sign it, so apparently the condition precedent to removal of the letter didn't take place.

In relation to the September 1, 1997 letter of understanding, I note that in Step 1 of the grievant's investigative report, the parties resolved the matter as follows:

> ". . . As a result, the grievance was resolved by agreeing to remove any copy of the letter of instruction from Employee 1's personnel file. It was understood that Labor Relations and perhaps the department head may still maintain a copy of the letter of instruction in their respective files."

The above establishes that the Employer has the right to keep a copy of the letter in both Labor Relations and department head files. It is not explained what the significance is of removing the letter from a personnel file and then allowing it to remain in the Labor Relations and the department head files.

As a result, the Employer's reliance on the two letters of instruction and the reference to the June 30 letter attached to the evaluation doesn't require that this grievance be granted. I have outlined how the letters can be used and that's the fashion in which they will be used to analyze this record. They cannot be used to establish that the events outlined in the letters took place.

There is also Arbitrator Grissom's finding that the five-day suspension was not for just cause, but that there was just cause for a three-day suspension. I note that he did find that there was no violation of Rule 19 which deals with disregarding or refusing to obey an order, but there were violations of Rule 8 – using abusive language, etc., and Rule 13 - horseplay, etc. The Union suggests that because of these findings and the fact that the Employer based its actions on progressive discipline, the Employer's current action must fail. Frankly, I am not convinced. In its October 20, 1998 notice, it is clear that Person 3 stated that a review of the grievant's work record showed, inter alia, a five-day suspension based on violation of Rules 8, 13 and 19. While that five-day suspension was reduced to a three-day suspension, I am not sure that the two-day reduction is tantamount to eliminating the suspension as an appropriate consideration in imposing discharge in the current case. Furthermore, there is nothing in the contract, nor is there anything which convinces me that the Employer is not engaging in progressive discipline, even if it is required. There is nothing stating that progressive discipline can only be based on an infraction of the same rule. While it is true that the five-day suspension was reduced to a three-

day suspension, it is still nonetheless true that there was a finding that the grievant had violated Rules 8 and 13.

In examining the specific elements of the transaction which took place on August 25, 1998, and the following day, August 26, 1998, I am persuaded that the grievant disregarded and refused to obey an order given by her supervisor. Person 4 related that she told the grievant to print out the document she was working on and followed up by stating, "I'm giving you a directive to print out the document." In response to the first directive, the grievant said, "No, it is not for you to see," and in response to the second, she turned, blocked the monitor, saved the document to disk, or at least appeared to, and then when asked if she was refusing a directive, walked out of the room indicating she was going to the bathroom. Notwithstanding all the rhetoric regarding receiving part of the document, whether the disk in question was the one utilized by the grievant, etc., it is clear that Person 4 never received a copy of the entire document. There is no claim made by the grievant that it was erased by mistake, or inadvertently she failed to comply with the directive. Nor am I persuaded that the Union's argument that there were mitigating factors serves to bolster its position. For instance, when the grievant was ordered to turn over the document, she should have done so, and then filed a grievance. She didn't have the prerogative to check with EEO to decide whether she was going to follow the order. She was working on the document on Employer time at the Employer work station which she normally works at, in the presence of her supervisor. When the grievant engaged in such conduct she should have every expectation that she may be questioned on what she was working on and directed to produce it. When she was asked to produce it, she should have done so and not engage in an investigation to determine whether she had to. If she wanted to avoid the circumstance, she should not have worked on it at her work station on Employer's time in front

of her supervisor. Indeed, her own steward went to the supervisor and said that the grievant realized that she had to work now and grieve later, and apologized. There was no claim that what the grievant did was appropriate either under the rules or under the Collective Bargaining Agreement. I am sure the grievant felt very nervous and anxious because the document was highly critical of management, but if she would have worked on the document at some other location at some other time, she wouldn't have been placed in that position.

I don't dispute the Union's allegation that just a portion of the document would have revealed what it was about, but I do not accept the assertion that the supervisor did not need the entire document. That is a conclusion which is easily drawn at this point, but at the time the supervisor saw the document on the monitor, she had every right to ask that it be printed out and made available to her. Nor am I persuaded that the suggestion that it could have been printed out later because the supervisor didn't say when she needed it to be printed out, is viable. To the contrary, it is clear from the supervisor's statement that she wanted the document at that time. Given the grievant's reaction of turning off the monitor, taking procedures which appeared to save the document to disk, and removing the disk, establishes that she well knew that the supervisor wanted the document then and not later.

Nor I am convinced that the fact that the document was critical of management and of the specific supervisor in question is a reason to protect the grievant from not turning it over pursuant to a directive from her supervisor. The obvious solution would have been to not prepare the document at the time and in the location she did. Given the above, it is clear that in relation to production of the document, the Employer has met its burden of establishing a violation of Rule 19.

There is certainly conflicting testimony regarding the disk, but it must be understood that the conflict began because of the grievant's conduct regarding the disk. Person 4 testified that the disk she originally saw was tan, but the one she received was black. Nonetheless, it is impossible to reach any conclusion regarding the production of the disk.

It is often very difficult to reach conclusions regarding the validity of statements made by grievants during investigatory hearings and whether there were intentional misrepresentations. However, there is a substantial amount of evidence in this matter which establishes the Employer's assertions.

For instance, at one point during the investigation when the grievant was asked whether she had refused a directive to print out the document she stated that she didn't, that she printed out the document and gave it to Person 4. A review of the grievant's own notes indicates that when Person 4 indicated she wanted a copy of the information on the screen, the grievant indicated, "I refused to provide it to her and told her again that I wanted to see my union steward."

It is also noted that in a related stream of events at the investigatory hearing when asked why she had turned off the monitor, the grievant responded by saying, "Just a reaction." At the arbitration she indicated she had turned off the monitor because she went to help someone at the counter. It is also noted that when the grievant gave the disk to Person 4 on August 26, 1998, she didn't tell her that the document in question wasn't on it. I recognize that the grievant's testimony suggests that she handed over the disk that "she was working on," and it just so happened that it didn't contain the document in question. However, it is clear what the grievant was being asked to produce.

The Union has suggested that the grievant has been treated differently than other employees similarly situated. In other words, it suggests the Employer is guilty of disparate treatment. Generally employees who are essentially the same must be treated essentially the same. To treat employees differently, who should have been treated the same, would indeed be disparate treatment. However, while there is some suggestion that other employees have been treated differently, the proof does not establish such an assertion. I cannot find that in relation to the Employer's response to the events beginning on August 25, 1998, it acted in a discriminatory fashion or that the penalty it imposed establishes disparate treatment.

There was also the suggestion that the grievant was watched more closely by supervision than were other employees. It was indicated that her phone calls were more closely monitored and her actions more closely observed. Certainly that seems to be the impression of the individuals who gave it, and it is significant to note that I was presented with no grievances wherein the grievant indicated she was being subjected to such conduct. Further, there are obvious limits to the probative value of such impressions.

In summary, I am compelled to find that the Employer has met its burden of proof. This is true even if the letters of instruction and the attachment to the evaluation are ignored. Surely the Union left no stone unturned in representing the grievant, but I must conclude that the Employer's actions in this case were not unreasonable. The standard isn't what I would have done, for I may not have discharged the grievant. The standard is whether there was proper cause in this case, and given the totality of the record, I am compelled to find that there was proper cause for the Employer to discharge the grievant. As a result, I have no alternative but to find that the Employer's actions did not violate the contract and, thus, I must deny the grievance.

MARIO CHIESA Dated: March 21, 2000