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ARBITRATION DECISION NO.:

645 (see also decision clarification #645hesA)

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Corrections

DATE OF ARBITRATION:

May 20 and June 3, 1997

DATE OF DECISION:

August 25, 1997

OCB GRIEVANCE NO.:

27 04 (96 06 18) 0154 01 03

ARBITRATOR:

Anna DuVal Smith

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KEY WORDS:

Just Cause
Credibility of Witnesses
Inmate Abuse
Inmate Fraternization
Inmate Testimony
Removal
Sexual Abuse

ARTICLES:

Article 24 – Discipline
§24.01 - Standard

FACTS:

This case concerned the removal of a Correction Officer (CO) with nine years of service and no prior discipline on his record. The grievant was accused of engaging in inmate fraternization and of engaging in sexual activity with two female inmates while the inmates were incarcerated at the Corrections Medical Center (CMC), and at the Ohio State University (OSU) Medical Center.

In the early months of her incarceration, one of the inmates was confined at OSU Medical Center in order to receive physical therapy. The inmate testified that while she was there, the grievant "felt on her" several times, and that during the first alleged incident, the grievant inserted a finger into her vagina. After another similar incident, the inmate made a request to return to the CMC at the Ohio Reformatory for Women in Marysville. The same inmate testified that after she was transferred to the CMC, the grievant, who had begun working a transportation post at CMC, entered her room several times and on several occasions inserted a finger into her vagina.

A second inmate testified that on several occasions the grievant masturbated her with his finger and sometimes touched her breast. This inmate also testified that the grievant talked about performing cunnilingus; on one occasion, she performed oral sex on the grievant. Allegedly, these encounters took place in the recreation room, shower, and in the bathroom of her own room at CMC. Additionally, the inmate stated that the grievant's penis was very small.

Two other CO's testified that they saw the grievant alone with one of the inmates on separate occasions. Neither CO reported the incidents because neither had witnessed any infraction.

EMPLOYER'S POSITION

The Employer argued that credible witness testimony and documentary evidence clearly and convincingly showed that the grievant engaged in sexual misconduct with the two inmates. The investigation was conducted by a well trained and experienced investigator. The investigator's compiled reports revealed that the testimony of each of the inmates was candid and consistent, and was corroborated by the testimony of other CO's. The inmate's testimony should not be discounted simply because they are inmates.

The grievant's testimony, on the other hand, was self serving, inconsistent with facts independently established, and lacked any reliable corroboration. Moreover, other Union witnesses did nothing to rebut the Employer's case. Becoming physically involved with an inmate or establishing a pattern of fraternization is a serious breach of security for which progressive discipline is not appropriate. The removal order should be upheld and the grievance denied.

UNION'S POSITION:

The Union took the position that there was not enough evidence to discipline the grievant for acts of misconduct, let alone remove him. In the Union's view, the evidence showed the grievant to be a by the book CO with a clean record against whom a case was built by a biased investigator. The case, the Union asserted, was based on statements coerced from inmates, statements lacking in substance from other CO's, and a desperate interpretation of agency rules. The Union pointed to holes in the Employer's argument, noting that the Employer had not called officers whom the inmates allegedly told about their ordeals. Neither inmate was able to provide specific dates, nor did either inmate file incident reports.

The Union concluded its argument by claiming that the investigator assigned to the case began with the assumption that the grievant was guilty and that the investigator did what she had to in order to support that belief. Furthermore, the Union claimed that the investigator coerced the inmates to get what she wanted from them in the form of allegations.

ARBITRATOR'S OPINION:

If found to be true, the Arbitrator stated that the actions for which the grievant was disciplined, in particular the sexual involvement, constituted a serious enough breach of institutional security to justify removal. The evidence, however, did not clearly indicate the grievant's guilt. Although the report prepared by the Labor Relations Officer was persuasive on its face, a close reading and analysis revealed what the Arbitrator deemed to be an investigator too zealous to be impartial. In particular, the Arbitrator was concerned about the investigator's difficulty recalling facts during her testimony; also, it concerned the Arbitrator that the investigator repeatedly referred to the report she had compiled as if it were primary evidence of the facts alleged.

Additionally, the Arbitrator found another instance in which the report differed materially from other evidence and testimony, namely in regard to the size of the grievant's penis.

The Arbitrator also could not give substantial credibility to the second inmate's testimony. Among the problems were a physician's contradiction of the inmate's testimony, and discrepancies in the estimate of how many times she and the grievant engaged in sexual activity. Six or seven times was often mentioned by the inmate, but on other occasions the inmate stated that there were too many times to count. The Arbitrator concluded that the inmate's testimony was an exaggeration, or possibly totally fabricated.

AWARD:

The grievance was sustained, and all references to the grievant's unjust removal were expunged from his record. The grievant was restored to his former position with full back pay, benefits, and seniority.

TEXT OF THE OPINION:

* * *

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. 27 04 960618 0154 01 03

and

OHIO DEPARTMENT OF James Hess, Grievant
REHABILITATION & Removal

CORRECTIONS

Appearances

For the Ohio Civil Service Employees Association:

George L. Yerkes, Staff Representative
Mike Hill, Staff Representative

For the Ohio Department of Rehabilitation and Corrections:

John McNally, Ohio Office of Collective Bargaining
Colleet Ryan, Ohio Office of Collective Bargaining

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Hearing

A hearing on this matter was held at 9:00 a.m. on May 20, 1997 and continued on, June 23 at the Corrections Medical Center (CMC) in Columbus, 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 Employer were Barbara Cotton (Labor Relations Officer), Warden Rodney Francis, Corrections Officers Chris McMillen and Keith Averette (both by subpoena), and Inmates Merri Mallette and Virginia Stowers. Testifying for the Union were Corrections Officers Joan Jones, Connie Fry, Norbert Leasure and Geraldine Winfield, Capt. Charity Stover, Sandra Leasure, R.N. and the Grievant, James Hess. Also in attendance was Bill Polt, Chapter President. A number of documents were entered into evidence: Joint Exhibits 1 - 8 and Union Exhibit 1. In camera inspection of subpoenaed inmate medical records occurred on May 20 at CMC, May 21 at the Ohio Reformatory for Women in Marysville, Ohio and on June 15 at the Ohio State University Medical Center in Columbus. the oral hearing was concluded at 2:40 p.m. on June 23. Written closing statements were timely filed and exchanged by the Arbitrator on July 9, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

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Issue

Was the termination of James Hess for just cause?
If not, what shall the remedy be?

Statement of the Case

This case concerns the removal of a corrections officer (C.O.) and former Union vice president with nine years of service and no discipline on his record. He is accused of sexual acts and other improper relations with two female inmates while they were incarcerated at the Corrections Medical Center (CMC), a facility of the Ohio Department of Rehabilitation and Corrections (DR&C) and the Ohio State University Medical Center, under contract to the DR&C.

One of the inmates, Merri Mallette, was convicted of aggravated vehicular homicide in March 1993. She was severely injured in the accident that led to her conviction. In the early months of her incarceration she received physical therapy for her injuries at the Ohio State University Medical Center, where she was kept in a satellite unit on Dodd Hall under 24 hour guard from May 10 to May 28, 1993. She testified that while she was there, paralyzed from the chest down and shackled to her bed, the Grievant, who had heard about her consensual sexual relationship with another C.O., "felt on her" several times. On the first occasion, he inserted a finger into her vagina and asked if she wanted another one. She could not feel this because of her paralysis, but when he removed it, the finger was covered with her menses. She said he cautioned her not to tell anyone about it and that if she did, no one would believe her. She was disgusted, but, thinking he was right, told no one about it. She said that after he molested her a second time, she told a "white shirt" that

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she wanted to go back to the Ohio Reformatory for Women in Marysville. Orient Correctional Institution shift rosters confirm the Grievant was assigned to the OSU hospital and to Mallette during this period, specifically on May 22 and 23.

Later in 1993, Inmate Mallette was transferred to CMC where she underwent surgery. She testified that not long after she arrived, the Grievant, who had begun working a transportation post at CMC, entered her room on 3 North B several times while her roommate was out and fingered her. The patient next door to Mallette was Inmate Virginia Stowers, whom she learned had solicited sex from another officer but been turned down. Mallette suggested to Stowers that she try the Grievant, thinking that she would be left alone if the Grievant had another relationship. After that, Stowers told her about sexual conduct with the Grievant and came into her room to borrow baby oil which the Grievant had told Stowers to buy. She could not remember what Stowers told her more than that the Grievant's penis was extremely small and that they met in the shower room.

Inmate Stowers testified as well, saying that when the Grievant worked 3 North B, she would sit at his desk and talk to him about personal matters and that this led to them meeting in the recreation room, shower or her room's bathroom in the early morning (around 7 a.m.) where he would masturbate her with his finger and sometimes touch her breast. These encounters lasted about five minutes and occurred "too many [times] to count." He talked about cunnilingus and once she fellated him. His penis was very small, she testified. She wrote him a letter describing what she wanted to do to him sexually and read it to him, but he ripped it up and flushed it down the toilet. She said he told her they were caught once, she thought by another C.O., but they were never caught by medical staff

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who made rounds between 7 and 8 a.m. The relationship ended shortly before the investigation began, she said. Shift rosters show the Grievant worked 3 North B on seven different dates, including three Saturdays, beginning May 18, 1994 and ending July 15, 1995.

C.O. Chris McMillan testified that one Saturday before lunch he walked into 3 North B's recreation room and found the Grievant and Inmate Stowers together, about two feet apart, in the corner of the room that could not be observed from the hall. Stowers' eyes opened wide and McMillan thought both were startled. Stowers had her clothes on and appeared to be fidgeting with them. McMillan said, "What's going on in here?" The Grievant turned Stowers to face the wall. When McMillan then walked out, the Grievant followed and they made small talk for a few minutes. Nothing more was said about the incident and McMillan did not report it because, he said, he had seen no infraction.

C.O. Keith Averette testified he saw Stowers and the Grievant alone together three times in the winter to early spring of 1995, all between 7 and 7:45 a.m. One of these was in the recreation room. Stowers was sitting and the Grievant came to the door. Another time was in the maximum security cell. He thought this was unusual because long term residents were not permitted in this cell. On the third occasion, a weekend morning, both were sitting at the duty desk. Their heads were close together and they leaned back when Averette approached. Stowers was wearing a low cut, homemade top and her breasts were obvious. Averette said he thought the maximum cell and desk incidents were irregular, especially for a veteran officer of caliber. He did not report the incidents, stating this was for "white shirts," and in order to write up Stowers for her appearance, he would also have to write up the Grievant, whose post it was and upon whom he depends for backup.

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These accusations came to the attention of the Employer during an investigation the fall of 1995 into charges against other officers. While Barbara Cotton, Labor Relations Officer and Administrative Assistant to Warden Rodney Francis, was interviewing inmates in the course of this investigation, she heard rumors about the Grievant. Then, when she was interviewing inmate Mallette in an attempt to elicit information from her about other officers, Mallette made the above accusations against the Grievant and told what she knew of the lengthier consensual relationship with Stowers.

After the charges came to light, the Grievant was placed on administrative leave while the investigation proceeded. Cotton, assisted by other DR&C staff, and Trooper Velez of the Ohio Highway Patrol interviewed inmates and corrections officers, including the Grievant (who had his union representative with him), collected a number of statements and examined DR&C documents. Inmate Mallette was returned to Marysville to protect the integrity of the investigation, according, to Cotton, because friends of another officer under investigation were talking to her. Mallette also said she was placed in isolation because she was not cooperating in that investigation. Ms. Cotton's investigative report, which was issued April 15, 1996, concluded the Grievant had violated numerous Standards of Employee Conduct and recommended discipline. A pre disciplinary conference was held on April 23, 1996, with the report following on May 2. Warden Francis reviewed the case, recommending removal on May 28. The removal order was signed by the Director on June 4, 1996, citing

Rule #25 Giving preferential treatment to an inmate; the offering, receiving or giving of a favor or anything of value to an inmate; dealing with an inmate, furlougee, parolee, or probationer without the express authorization of DR&C.

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Rule #46 e Engaging in any other unauthorized personal or business", relationships(s) with inmates, ex inmates, furlougees, parolees, probationers or family or friends of same.

Rule #46 d Committing any sexual act with an inmate, furlougee, parolee, or probationer. (Joint Ex. 4)

For his part, the Grievant denies the accusations of sexual contact with the inmates. He admits Stowers sat at the duty desk and talked with him, but says this is not against post orders. He is an officer who follows the rules. This may explain why the inmates falsely accused him. For example, Mallette complained about her restraint when he was her guard at the Ohio State hospital, but he would not release her. He also admits he read one letter addressed to Stowers, but this was while working in the mail room and he passed it on as he did mail to other inmates. He said he did guard Mallette two consecutive days at CMC, but did not know she had a relationship with C.O. Kinder, the door was left open per post orders at the time, and he never asked to work overtime at a special post. At CMC, he worked seven dates on 3 North B, only three of which were on the weekend and he never requested this post. He has no explanation for why other corrections officers would testify against him, but when McMillan saw him and Stowers together he was fixing the television. He also testified that when Cotton interviewed him, she took notes and tried to persuade him to confess, saying DR&C had little evidence against him.

Several witnesses were called to testify in behalf of the Grievant. C.O. Joan Jones, Capt. Charity Stover

and R.N. Sandra Leasure agreed that he was a professional, by the book officer. Jones said talking with inmates was common practice. C.O. Norbert Leasure (steward and former Chapter president) pointed out there was value in this, and Capt. Stover said it was not a violation at the time for inmates to sit at the desk unless it was

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malingering or habitual, but she, herself, did not permit it. Sandra Leasure testified that the first shift was very busy, with much traffic coming and going, except on weekends. Stover said the same thing about Dodd Hall at OSU and that the Grievant never asked her to assign him to 3 North B, but she learned he had asked others to do so. Jones testified that Mallette told her Smitty, a former officer, was the one who did "the bad stuff," not the Grievant, and Norbert Leasure testified that the Warden told him they might have gone "a little too far" in the Grievant's case, something the Warden did not recall. Leasure also said he was not permitted to interview the inmates.

A grievance was filed on June 10, charging removal without just cause in violation of Article 24 (Discipline) of the Collective Bargaining Agreement and requesting reinstatement with the Grievant made whole. After the Step 3 meeting, the parties agreed to hold the case in abeyance pending resolution of criminal charges against the Grievant. The Grievant was found not guilty, whereupon the grievance was appealed to Step 4. Remaining unresolved, the case came to arbitration where it presently resides for final and binding decision.

Arguments of the Parties

Argument of the Employer

The Employer argues that credible witness testimony and documentary evidence proves clearly and convincingly that the Grievant engaged in acts of sexual misconduct with the two inmates. Cotton is a well trained, experienced investigator. Her investigation into the Grievant's activities was an outgrowth of a larger investigation. She interviewed the inmates a number of times, neither withheld medical treatment from them, nor put them

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in the hole, nor promised favorable treatment to elicit their accusations. Her report on which the removal was based, teems with proof. Mallette's story has been candid and consistent; Stowers first tried to protect the Grievant, then revealed their relationship. Their testimony was consistent with their statements and is corroborated by the testimony of two corrections officers. It should not be discounted simply because they are inmates, but evaluated like this arbitrator did the testimony of the inmate witness in the parties' Speer decision (Parties' Case No. 27 15 901218 0136 01 03).

The Grievant's testimony, by contrast, was self serving, inconsistent with facts independently established and lacking in reliable corroboration (Speer). Moreover, other Union witnesses did nothing to rebut the Employer's case. Jones never worked on 3 North B, S. Leasure never worked with the Grievant and spent only half of her time in 3 North B, and Winfield did not work at DR&C during the period. Mallette's comment reported by Frye did not explain what she was being uncooperative about. Warden Francis did not recall having said he might have gone too far with the Grievant. Finally, Stover's testimony largely supported the Employer's case, inasmuch as she said the Grievant asked other captains to give him work on 3 North B, that it is improper for inmates to linger at the duty desk, that sex related correspondence between inmates

and officers should be reported, and that there are periods of inactivity on Dodd Hall at the OSU hospital.

The Employer points out that the Grievant was informed on its Standards of Employee Conduct and well aware of the consequences of improper relations between inmates and staff. Becoming physically involved or establishing a pattern of fraternization, showing favoritism or giving preferential treatment are serious breaches of security, for

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which progressive discipline is not appropriate. The removal should be upheld and the grievance denied in its entirety.

Argument of the Union

The Union takes the position that there was not enough evidence to charge the Grievant, let alone remove him. In its view, the evidence shows him to be a by the book officer with a clean record against whom a case was built by a biased investigator. This case, it asserts, is based on statements coerced from inmates, correction officer statements lacking in substance, and a desperate interpretation of the rules.

As to the first two charges, that the Grievant gave preferential treatment to or engaged in an unauthorized personal relationship with Stowers, the Union says:

1. Even Stowers denied on cross that she gave the Grievant a pornographic letter to read; if he did read one, he had no duty to report it; and the only mail of hers he read was in the mailroom;
2. Witnesses established that the practice is to throw away confiscated food, not ticket the inmate;
3. The Grievant should not be punished for talking with Stowers as many others did; this is something C.O.'s are trained to do, and was not a violation at the time.

As to the alleged sexual conduct, the Union says no physical evidence was produced, there were no eyewitnesses and no pinpointing of dates except by deduction from work schedules. Activities in both places made the possibility of detection too great to risk a career.

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The Union challenges the credibility of both inmates, saying Mallette's memory is suspect and she contradicted herself. The Union contends she was put in the hole as an instrument of persuasion, not to protect the integrity of the investigation. The Union's theory is that she did not want to give up her boyfriend, so she named an officer who followed the rules to her detriment. She even told Jones that it was another officer, not the Grievant, who was the real culprit. Stowers was clearly intimidated by Cotton, even as she testified in arbitration and her testimony about the Grievant's anatomy is undermined by the doctor's statement.

The Employer left holes, not calling officers whom Mallette allegedly told about her ordeal or those whom the Grievant allegedly asked for the 3 North B post. There were no polygraphs of the inmates, Cotton denied there were case notes though witness after witness said notes were taken, and the Employer relied on a

deceased witness who did not believe Stowers and Mallette despite what she told Cotton under coercion.

As to the other Employer witnesses, neither Averette nor McMillan knew dates or filed incident reports. Averette's interpretation of what he saw was mere speculation and his "reports" do not hold water. McMillan did not even see any violations. Finally, Francis did not deny that he admitted to N. Leasure that they went too far.

The Union concludes that Cotton began with the assumption of guilt and did what she had to in order to support that foregone conclusion. She is not a novice investigator, so it must have been a calculated plan and not merely the actions of inexperience. The coercion she used to get what she wanted undermines the integrity of the investigation she testified she wanted to protect.

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The Union reiterates that the Employer has not shown any violation of DR&C rules and that any scintilla of credible testimony from the inmates is obscured by the coercion used. It asks that the grievance be sustained and that the Grievant be reinstated with full back pay, including roll call pay, seniority and compensation for all missed overtime opportunities.

Opinion of the Arbitrator

If true, the actions with which the Grievant has been charged, in particular the sexual involvement, constitute a serious enough breach of institutional security to justify removal. The evidence, however, does not clearly indicate the Grievant's guilt. I have previously been convinced by credible inmate testimony and substantial circumstantial evidence, but am not convinced here.

The Warden relied on the investigative report prepared by the Labor Relations Officer. I have thoroughly read that report and carefully compared it to evidence presented in arbitration and considered the circumstances under which the case against the Grievant was developed. The report itself is, at least on its face, persuasive. However, a closer reading and comparative analysis betrays what I think must be an investigator too zealous to be impartial. To begin with, there are no backup contemporaneous notes of many of the interviews which would document the information the investigator allegedly collected. What happened to them? And how am I to test her reporting of alleged facts and interpretation thereof? I am particularly disturbed by this because, for one, Cotton had difficulty remembering during her testimony and repeatedly referred to her report as if it were primary evidence of the facts alleged. For another, there is at least one instance in which

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I find the report differs materially from other evidence and testimony, namely in regard to the Grievant's genitals. On page six of Joint Exhibit 5d, Cotton reports Stowers as saying his penis was "only about four inches long." Nowhere in Stowers' interview with Velez does she say this (Joint Exhibit 5p), while Mallette's interview transcript (Joint Exhibit 5n, p. 8) focusses on 2 3 inches, and testimony had it as "very" or "extremely small." Where did Cotton get the estimate of four inches, which is the only accurate report apart from the physician's statement (which I take to be definitive since no better evidence was offered), and well within the normal range.

The physician's contradiction of Stowers' testimony is only one of several problems I have with Stowers' story. Another is her estimate of how many times she and the Grievant engaged in sex play. Six or seven times is most often mentioned, and certainly jibes with the number of times he worked 3 North B, but then she changes her story and says on direct "too many to count." I conclude this is a woman exaggerating at best, or even making the whole thing up as a fantasy. Even if she is exaggerating and there are elements of truth in the tale, how am I to know which parts are true without solid corroborating evidence? There is also the problem of her obvious fear of what she believes to be Cotton's control over her fate. There was a marked change in the tenor of her testimony, from what I would characterize as pride to passive compliance and recanting of much of what she said on direct. Standing alone, I find her testimony to be unreliable. Taking her fear of Cotton into consideration does not help the Employer's case, nor does the testimony of other witnesses who observed the Grievant and Stowers together. In point of fact, no one saw any more than that they talked at the desk and were occasionally alone

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together, but not in violation of post orders at the time. It is true that the Grievant was therefore in a position where charges of fraternization could be made, but those charges are based on very weak circumstantial evidence. The evidence for a sexual relationship with Stowers is even weaker, being based on her own unreliable testimony and statements she made to other inmates and to an investigator she feared. The charge of a sexual relationship with Stowers is unproven.

As for Mallette, I am more inclined to believe her, but still not enough to be convinced. While her story with respect to the Grievant has, so far as I can tell, remained consistent, she acknowledges lying to protect her boyfriend. She had many reasons to lie about the Grievant, too: to deflect attention away from her lovers, to please an investigator whose husband was believed to have influence with the parole board, to be let out of isolation and returned to CMC, etc. Yes, the Grievant's work schedules show him to have been assigned to her at OSU and at CMC during her treatment there, but there is no physical evidence and no one was called to corroborate her story. Notes of early interviews with her are also mysteriously nonexistent and the investigator displayed in the hearing obvious disgust with the sexual practice alleged. These, as well as the coercive elements of the investigation, taint its conclusion. The Employer had insufficient evidence to remove an officer of clean record acknowledged to be meticulous in following regulations, as do I.

Award

This grievance is sustained. The Grievant will be restored to his former position forthwith with full back pay (including overtime), benefits and seniority less normal deductions and any earnings from employment he may have had in the interim. The

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Grievant will supply such evidence of earnings as the Employer may require. All reference to his unjust removal will be expunged from his record. The Arbitrator retains jurisdiction for thirty (30) days to resolve any disputes that may arise in the implementation of this award.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
August 25, 1997

Anna DuVal Smith, Ph.D. Arbitrator

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