

**OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN**

**Ohio Department of Rehabilitation and Correction, London Correctional Institution
-AND-
Ohio Civil Service Employees Association AFSCME Local 11**

Appearing London Correctional Institution

Barbara A. Brown, Assistant Front-end Manager, Kroger
David Burrus, Labor Relations Officer 3
John Dean, Legal Intern, OCB
Martin A. Dillard, Investigator-LOCI
Vickey Justus, Labor Relations Officer-LOCI
Ronald J. Terry, Security Officer, Kroger
Deborah A. Timmerman-Cooper, Warden, LOCI
Michele E. Ward, Labor Relations Specialist-OCB

Appearing for OCSEA

Yvonne M. Gandy, Correction Officer, Correctional Medical Center
Joseph H. Lane, Witness
Stanley E. Lane, Grievant
Harley L. Rayburn, Correction Officer
Robert W. Steele Sr., Staff Representative

CASE-SPECIFIC DATA

Grievance No.

35-07-20050208-0005-01-03

Hearing(s) Held

June 24, 2005; August 16, 2005

Closing Arguments E-mailed

September 2, 2005

Case Decided

October 17, 2005

Subject

Off-duty Misconduct–Threats, Intimidation, Obscene Language

The Award

Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

Table of Contents

I. The Facts	3
II. Stipulated Issue	7
III. Relevant Contractual and Regulatory Provisions	7
A. Contractual Provisions	7
B. Work Rules and Policies	7
IV. Summaries of the Parties' Arguments	8
A. Summary of the Agency's Arguments	8
B. Summary of the Union's Arguments	8
V. Analysis and Discussion	9
A. Evidentiary Preliminaries	9
B. Nature of Grievant's conduct in Kroger Store	9
C. Testimony of Ms. Brown	10
D. Testimony of Officer Terry	10
E. Testimonies of Mr. Thompson and Ms. Goins	11
F. Testimony of Officer Gandy	12
G. Testimony of Mr. Joseph Lane	12
H. Testimony of the Grievant	13
I. Summary of Established Violations	14
VI. Penalty Decision	14
A. Aggravative Factors	15
B. Mitigative Factors	15
C. Propriety of Removal	15
VII. The award	15

I. The Facts

This is a disciplinary dispute involving the London Correctional Institution (“Agency” or “LCI”), and Ohio Civil Service Employees Association AFSCME Local 11 (“Union”),¹ representing Mr. Stanley E. Lane (“Grievant”). The Agency fired the Grievant for violating three work rules:

- (1) Rule No. 18 (Threatening intimidating or coercing a member of the general public
- (2) Rule No. 36 (Actions that could harm or potentially harm a member of the general public
- (3) Rule No. 39 (Any act that would bring discredit to the employer²

The Grievant’s problems began on September 18, 2004 at approximately 7:00 P.M, when he and a friend, Ms. Yvonne Gandy (“Officer Gandy”) entered the Kroger Store (“Kroger”) in Springfield, Ohio to purchase some items. Before entering the store the Grievant had consumed “a few beers.”³ Kroger has an unpublished, selectively enforced “No Grazing” Policy that prohibits customers from eating food in the store. Kroger’s Assistant Front-end Manager, Ms. Barbara A. Brown, illustrated the policy’s range of selectivity when she testified that she would not challenge customers for eating one grape but would challenge them for eating one banana.

The Grievant is diabetic, and, while in Kroger, he experienced a drop in his blood sugar, which caused him to feel sick, cold, and clammy. To alleviate this condition, the Grievant ate a doughnut. A Customer Service Clerk, Ms. Eva M. Goins saw him eating the doughnut and immediately reported it to Ms. Brown.⁴ Neither Ms. Goins nor Ms. Brown knew exactly from where in the store the Grievant obtained the doughnut.

Ms. Brown instructed Kroger’s Security Officer, Mr. Ronald Terry, to make sure the Grievant paid for the doughnut. Officer Terry is a full-time police officer with experience in other Kroger stores as a part-time security agent.

¹ Hereinafter collectively referred to as the (“Parties”).

² Joint Exhibit 2, at 7; Joint Exhibit 3, at 1.

³ See, Joint Exhibit 3, at 11 & 21. During cross and direct, the Grievant said he drank only 1.5 cans of beer.

⁴ Management Exhibit 4.

However, September 18, 2004 was his first security assignment in this particular Kroger store. Officer Terry was not in uniform and wore a baggy, button-down shirt, beneath which he wore a tight fitting shoulder holster. The baggy shirt hid the weapon in the shoulder holster, at least from the untrained eye. Officer Terry also carried mace and a two-way radio.

Officer Terry approached the Grievant who was then eating a piece of pepper jack cheese. Officer Terry asked the Grievant if he had eaten a doughnut and the Grievant said yes, and he would eat any fucking thing he likes.⁵ Officer Terry said that was okay, so long as the Grievant paid for the doughnut. The Grievant then voluntarily produced a weapons qualification card and his state identification card, which indicated that he was employed at the London Correctional Institution.⁶ The Grievant picked up a box of unopened doughnuts as he and Officer Terry walked up one isle to the checkout counter. Somewhere along the way, Officer Gandy joined them.

Matters further deteriorated at the checkout counter. The Grievant became loud and boisterous, and Officer Gandy realized she lacked sufficient funds to purchase the desired items. She left to get more money. In her absence, Officer Terry apparently reminded the Grievant that he must pay for the doughnut, and the Grievant stated loudly that there was no fucking way he would pay for the doughnut, and Officer Terry could not make him pay for it. The Grievant smelled of alcohol, his eyes were bloodshot, and his gait was slightly unsteady. The Grievant got louder and began to attract employees' and customers' attention. He told Officer Terry that he could take his radio, and if he could get the radio, he could get Officer Terry's weapon and that Officer Terry did not want him to get the weapon. The Grievant loudly stated that he had more credentials than Officer Terry. He called Officer Terry a redneck, displayed his state identification card to Officer Terry and said, "I ain't no punk." While at the checkout counter, the Grievant threatened to take Officer Terry's weapon. Officer Terry signaled to Ms. Brown to call the Springfield Police, which Ms. Brown had decided

⁵ Officer Terry's direct testimony and Management Exhibit 2.

⁶ Management Exhibit 2 and Officer Terry's direct testimony. *See e.g.*, Management Exhibit 3 for an example of the type of card in question.

to do when she heard the Grievant threaten to get the gun. When the Grievant made the weapon's threat, a shopping cart separated them.

One police officer arrived and the Grievant became even louder, accusing Kroger employees of being racist and bigots and stating that his money was not good enough for them. Officer Gandy returned with the money and the Grievant's brother, Mr. Joseph Lane ("Mr. Lane"). Officer Gandy joined the Grievant and they began speaking loudly or shouting to each other, accusing Kroger of racism, singling the Grievant out, and refusing to take their money. A second police officer arrived, and one of them apparently knew the Grievant's brother as they greeted each other with a shoulder bump and/or "high five." After hearing the weapon's threat, and Officer Gandy's outbursts, Ms. Brown instructed Officer Terry to trespass the Grievant and Officer Gandy.[∇] The police officers tried to assist Officer Terry by asking the Grievant for his driver's license, but he insisted on displaying his state identification. The police repeatedly asked for the license; the Grievant repeatedly offered the state identification card. Finally, he surrendered the license.

Then the police asked him to walk to the rear of the store to complete some forms for the trespass, but the Grievant refused. When the officers threatened to handcuff him, he dared them, saying "try it." The officers did not handcuff him. Also, the Grievant refused to allow Officer Terry to properly photograph either him or Officer Gandy so as to complete the trespass file. The Grievant attempted to conceal Officer Gandy from the camera and distorted his face when his photograph was taken, attempting to make himself unrecognizable.[∞] Approximately thirty minutes from the time Officer Terry first approached the Grievant, he and Officer Gandy were trespassed. The police officers escorted the Grievant, Officer Gandy, and Mr. Lane from the store and arrested Officer Gandy pursuant to a warrant for an old traffic violation. Finally, the officers escorted the Grievant and his brother off Kroger's property.

[∇] Kroger "trespasses" undesirable customers by photographing them, having them complete forms, and posting the photographs in every Kroger store. Trespassed customers are not permitted on Kroger's property. If they go onto the property, Kroger can detain them and have them arrested.

[∞] Management Exhibit 8, at 3.

The event was over, but it had shaken some Kroger employees and customers. For example, Ms. Brown was literally afraid for her life when the Grievant threatened to get Officer Terry's weapon. Because her hands were shaking so badly, the cashier in the Grievant's lane (lane No. 2) required assistance from the cashier in Lane No. 1, Mr. Christopher Thompson, to help her to complete the Grievant's transaction.

There were from 50-75 customers moving through the store during the entire event. Some customers used another route to exit the store. Other customers entered the store, heard the commotion, and immediately left. Still others entered and shopped but avoided lane No. 2. An elderly woman and regular Kroger customer was frightened to tears and requested an escort to her vehicle; Mr. Thompson accommodated her.

In a letter dated October 13, 2004, the Agency charged the Grievant with violating three Work Rules and scheduled a pre-disciplinary conference for October 18, 2004.⁹ The Parties actually held that conference on November 2, 2004, and the Hearing Officer found just cause for discipline.¹⁰ The Agency terminated the Grievant on December 22, 2004. At that time the Grievant had approximately twenty years of state service and a two-day fine.¹¹ On December 24, 2004, the Union challenged the removal by filing Grievance No. 27-13-04-12-12-2618-01-03 ("Grievance").¹² The Agency denied the Grievance at the Step-3 meeting on March 2, 2005.¹³ That same day the Union notified the Agency of its intent to arbitrate the Grievance.¹⁴

The Parties appointed the Undersigned to hear the dispute and scheduled an arbitral hearing for June 24, 2005. The Undersigned heard the matter on the date scheduled at the London Correctional Institution. At the beginning of the hearing, the Parties offered several factual stipulations, joint exhibits, and a submission

⁹ Joint Exhibit 3-4, at 14. The Rules in question were: Rule 18, Threatening, intimidating or coercing another employee or a member of the general public; and Rule 36, Actions that could harm or potentially harm the employee, fellow employee(s) or a member of the general public; and Rule 39, Any act that would bring discredit to the employer.

¹⁰ Joint Exhibit 3, at 7-13.

¹¹ Joint Exhibit 5; Joint Exhibit 3, at 6..

¹² Joint Exhibit 2, at 4.

¹³ Joint Exhibit 2, at 7.

¹⁴ Joint Exhibit 2.

agreement. There were no procedural challenges or objections to the Undersigned's jurisdiction. The Agency and the Union were represented by their respective advocates, each of whom had a full and fair opportunity to produce testimonial and documentary evidence in support of their cases. All witnesses were duly sworn and fully available for direct and cross-examination. All documents introduced into the arbitral record were available for relevant objections. Because the parties could not complete their presentations on the first hearing day, they scheduled a second for August 16, 2005.

A second-day hearing commenced on that date at the London Correctional Institution. At the end of the second-day hearing, the Parties opted to submit post-hearing briefs in lieu of closing arguments and e-mailed the last brief to the Undersigned on September 2, 2005, and the arbitral record was officially closed.

II. Stipulated Issue

Was the Grievant removed from his position as a correction officer with the London Correctional Institution for just cause? If not, what shall the remedy be?¹⁵

III. Relevant Contractual and Regulatory Provisions

A. Contractual Provisions

24.01-Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. . . .

24.02- Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. . . .

24.05- Imposition of Discipline

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

B. Work Rules and Policies

EFFECTIVE OCTOBER 1, 2001

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION **STANDARDS OF EMPLOYEE CONDUCT**

PERSONAL CONDUCT

It is essential to the orderly operation of a correctional system that employees conduct themselves in a professional manner. Employees shall recognize the limitations of their authority and at no time use the power of their position for personal gain or advantage. Below are some illustrative examples of behaviors that the Department will not tolerate in a correctional environment. These are examples and are not intended

¹⁵

(Joint Exhibit 5.

to be inclusive.¹⁶

* * * *

6. The Department will not tolerate the use of obscene or verbally abusive language by any employee toward inmates, releasees, offenders under supervision of the APA, or families of same. Employees will conduct themselves in a manner, which will not be demeaning to any individual under the custody and control of the Department, other staff members, visitors and members of the general public.

* * * *

ILLEGAL ACTIVITIES

An employee's visibility to the public as well as to those entrusted to the Department's supervision requires the display of exemplary conduct at all times.

GOVERNMENT PROPERTY

Department of Rehabilitation and Correction credentials, identification cards or badges, shall not be used to coerce, intimidate or deceive others either to obtain or attempt to obtain any privilege, article or service not otherwise authorized in the performance of official duties.

- Rule 18 Threatening, intimidating or coercing another employee or a member of the general public;
Rule 36 Actions that could harm or potentially harm the employee, fellow employee(s) or a member of the general public; and
Rule 39 Any act that would bring discredit to the employer.

IV. Summaries of the Parties' Arguments

A. Summary of Agency's Arguments

1. The Grievant was removed for just cause.
2. The testimonies of Ms. Brown and Officer Terry were internally and externally consistent. Furthermore, their testimonies were supported by their written statements as well as the written statements of other employees.
3. Kroger management and employees had no motive to conspire against the Grievant.
4. Warden Timmerman-Cooper testified that, given the Agency's mission and its role in law enforcement, the Grievant's behavior was wholly intolerable and invited removal.
5. Each of the rules that the Grievant violated permits removal for a first offense.
6. The Grievant's tenure is an aggravating factor in this case because an employee with almost twenty years of service should have known better than to behave in such a matter.

B. Summary of Union's Arguments

1. The Grievant was not terminated for just cause.
2. The entire episode leading to his removal was grossly exaggerated.
3. The Union could not cross-examine two of the Agency's witnesses, who submitted written statements but did not appear to testify at the arbitral hearing.
4. The testimonies of Ms. Brown and Officer Terry suffer from internal and external inconsistencies. Investigator Dillard used leading questions to elicit some statements from Officer Terry.

¹⁶ Joint Exhibit 4, at 1.

5. Warden Timmerman-Cooper did not thoroughly consider the facts and circumstances in the case, including the conflicting statements and mitigating factors.

V. Discussion and Analysis
A. Evidentiary Preliminaries

Because this dispute involves discipline, the Agency has the burden of proof or persuasion regarding its charges against the Grievant. To establish those charges, the Agency must adduce *preponderant* evidence in the arbitral record as a whole, showing *more likely than not* that the Grievant engaged in the alleged misconduct. Doubts regarding the existence of any alleged misconduct shall be resolved against the Agency. Unless the Agency sufficiently establishes the purported misconduct, it cannot prevail, *irrespective* of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant evidence) as to its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Nature of Grievant's Conduct in Kroger Store

Resolution of this dispute turns entirely on credibility, with the Parties taking positions that are dipole opposites. The Agency claims the Grievant all but terrorized Kroger employees and customers with his threats and intimidation. The Union, in stark contrast, claims the Grievant only slightly raised his voice to Officer Terry at the checkout counter. While neither of the Party supports all of its assertions, the Agency's version of the event is more persuasive. One question captures a major reason for this conclusion: Why would Kroger summon police officers and trespass the Grievant and Officer Gandy if the Grievant merely raised his voice at the checkout counter? But for the Agency's explanation, Kroger's actions would be wholly nonsensical. With these notions in mind, the Arbitrator turns now to an examination of the testimonies and written statements in this case.

C. Testimony of Ms. Brown

Ms. Brown credibly testified as follows:

1. The Grievant was clearly upset when he arrived at the checkout center.
2. The Grievant verbally identified himself as an employee of the London Correctional Institution.

3. The Grievant said “No fucking way will I pay for a doughnut. You can’t make me because you can’t prove I ate it.”
4. Referring to Officer Terry, the Grievant said, “I have more credentials than that redneck.”
5. The Grievant said. “ If I can get your radio, I can get your gun, and you don’t want me to get your gun.”
6. The Grievant waved his hands around as he shouted at the checkout counter.
7. The Grievant became even louder once the first police officers arrived.
8. Although the police officers asked the Grievant for his driver’s license, he continually offered his state identification card.
9. The Grievant displayed his state identification card to Officer Terry and said, “This is me. This is who you’re dealing with. I’m no punk.”
10. When the police officers threatened to handcuff the Grievant for resisting their orders, he invited them to “try it.”

Nevertheless, Miss Brown’s testimony is not perfect. As the Union correctly pointed out her description of the level of fear that gripped customers and employees is not corroborated in the testimonies of the other three Agency witnesses. Neither Ms. Goins nor Mr. Thompson’s written statements nor Officer Terry’s statements and testimony depict a high level of fear among Kroger employees or the customers. This is a minor discrepancy, however, because Ms. Brown’s descriptions of customers and employees were specific, detailed, and persuasive. Also, the Union correctly notes that although Ms. Brown’s written statement does not mention alcohol on the Grievant’s breath, her testimony does. As a general proposition, one’s credibility usually suffers to some extent when a written statement drafted much closer in time to the event in question is less specific or detailed than subsequent testimony months later. This discrepancy slightly weakens Ms. Brown’s credibility but hardly undermines it, since the remainder of her testimony is forthright, consistent, and, hence, compelling. Furthermore, during both the pre-disciplinary hearing and the administrative interview with Mr. Dillard, the Grievant admitted that he drank “a few beers” before entering Kroger. It is therefore small wonder that his breath smelled of alcohol.

D. Testimony of Officer Terry

Officer Terry’s testimony tracks and essentially corroborates Ms. Brown’s on all of the foregoing major points, save two. First, Officer Terry observed the Grievant pick up an unopened box of doughnuts as he walked back toward the checkout counter. This observation is significant to the issue of whether the Grievant ate a doughnut from a box of doughnuts, as he and Officer Gandy claimed, or whether he ate a

doughnut from the only other conceivable place in the store: the display case. Based upon Officer Terry's testimony the Arbitrator finds that more likely than not the Grievant took a doughnut from the display case rather than from a box of doughnuts. Second, unlike Ms. Brown's testimony, Officer Terry's does not describe Kroger's employees and customers as being terribly fearful of the Grievant. Finally, the testimonies of Ms. Brown and Officer Terry are virtually free of internal inconsistencies.

E. Testimonies of Mr. Thompson and Ms. Goins

Mr. Thompson gave only a brief written statement and did not testify before the Undersigned at the arbitral hearings in this case. Consequently, his testimony is hearsay and carries little weight unless corroborated by independent, credible evidence in the record. Mr. Thompson's written statement is corroborated by the testimonies and written statements of Ms. Brown and Officer Terry, insofar as the Grievant: (1) refused to pay for the doughnut; (2) repeatedly displayed his state identification card; (3) announced that he was a correction Officer for the Agency; (4) spoke very loudly; (5) became even more boisterous when the police officers arrived; (6) told police officers he would not be handcuffed; and (7) made accusations about racism. (Management Exhibit 1) Clearly, Mr. Thompson's statement is not as detailed as either Ms. Brown's or Officer Terry's. However, statements of two witnesses who observed the same event need not be perfectly coextensive. Instead, it is enough if they corroborate the major aspects of the event in question, and so it is in this case. Mr. Thompson's written statement said the Grievant threatened to take Officer Terry's gun and "cuffs" rather than his gun and *radio*. Although this discrepancy is notable and could raise an eyebrow of suspicion about Mr. Thompson's credibility, it does not totally debilitate his credibility.

The same can be said of Ms. Goins' written statement, which corroborates the testimonies of Ms. Brown and Officer Terry in some respects and conflicts with them in others. Ms. Goins' statement corroborates the other testimonies in that she said the Grievant refused to pay for the "single doughnut." Her statement also correctly points out that after police officers arrived, "a huge scuffle/argument between the man, his wife, and another guy. . . ." Although there is no evidence in the record about a huge "scuffle" after the police

officers arrived, Ms. Brown and Officer Terry state that the Grievant and Officer Gandy were very loud and boisterous after the police officers arrived. Perhaps the most troublesome part of Ms. Goins' statement is that she claims to have directly informed Officer Terry that the Grievant ate a doughnut even though Ms. Brown and Officer Terry agree that Ms. Goins notified Ms. Brown who then alerted Officer Terry. Ms. Goines' statement is clearly the weakest of the Agency's four witnesses. Even so, it retains some slight degree credibility because it mirrors some parts of Ms. Brown's and Officer Terry's wholly credible testimonies. In any event, the Agency does not need Ms. Goins' statement to prove its charges against the Grievant.¹⁷

F. Testimony of Officer Gandy

Officer Gandy's testimony does not ultimately help the Union. A major problem with Officer Gandy's testimony is that she basically testified that the Grievant engaged in absolutely no misconduct. That is, Kroger summoned police officers and trespassed the Grievant and Officer Gandy for absolutely no reason whatsoever. That statement is nothing if not astonishing and largely discredits Officer Gandy as a witness in this dispute. The Grievant himself concedes that he slightly raised his voice at the checkout counter. Furthermore, Officer Gandy testified that Ms. Brown was not present in Kroger when the event that triggered this dispute occurred. And, according to Officer Gandy, less than five customers were in the store, a statement that stands in stark contrast with Ms. Brown's testimony that 50-75 customers were in the store during the thirty-minute ordeal. Finally, Officer Gandy could not explain how her personal information was obtained and placed on a Kroger Trespass form with a signature box that indicated she declined to sign. Ultimately, then, in this particular dispute, Officer Gandy's testimony is simply incredible.

G. Testimony of Mr. Joseph Lane

Mr. Lane all but eviscerated his credibility when he initially stated that Officer Gandy came to get him

¹⁷ The remaining witness for the Agency is Mr. Dillard. However, given the number of eyewitnesses in this dispute and Mr. Dillard's lack of observation regarding any event(s) in this dispute, an in-depth analysis of Mr. Dillard's investigative results is not indicated.

and told him that police officers were holding his brother, the Grievant, in a dispute about a doughnut. The record, including Officer Gandy's statement (Union Exhibit 1), clearly shows that the police officers had not arrived when Officer Gandy left Kroger to get more money. When she left Kroger, she was wholly unaware that police officers had been even summoned. How could she possibly have made that statement to Mr. Lane? Also, Mr. Lane denied that he acted friendly with one of the police officers. Yet, Ms. Brown and Officer Terry testified that Mr. Lane greeted one of the officers with a friendly shoulder bump. Indeed, this fact further distressed Ms. Brown who had hoped that police officers would quickly quell the debacle unfolding in her store. Finally, Mr. Lane denied that the Grievant drank beer either en route to his cousin's house or at his cousin's house. Yet, Officer Gandy and the Grievant testified that the Grievant drank beer before going into Kroger. The question is when and where did the Grievant drink the beer? This last point may not be an external inconsistency but it raises yet another question about Mr. Lane's already debilitated credibility.

H. Testimony of the Grievant

Similar to Officer Gandy, the Grievant insists that he merely raised his voice at the checkout counter, nothing more. Again, the Arbitrator finds this assertion to be facially incredible. It is inconceivable that Kroger would have gone to the lengths it did merely because a customer raised his voice. The Grievant also stressed that Officer Terry followed him around the store and to the checkout counter, badgering and embarrassing him about paying for the doughnut. In contrast, Officer Terry testified that he merely followed the Grievant up one aisle to the checkout counter. Although the Arbitrator finds Officer Terry's position more credible in this dispute for the reasons set forth above, it would be entirely understandable (though for other reasons unacceptable) had Officer Terry actually followed the Grievant around the entire store. That would have been one way to account for any other food items the Grievant might consume en route to the checkout counter. It was Officer Terry's duty to enforce the No-Grazing Policy and to assure that the Grievant paid for the food he consumed in the store. The Grievant had clearly demonstrated his capacity and willingness

to consume food while shopping.

I. Summary of Established Violations

Based on the foregoing analysis, the Arbitrator finds that the Grievant violated Rule 18 by “Threatening, intimidating or coercing . . . a member of the general public,” and Rule 39 engaging in conduct or acts “that would bring discredit to the employer.” However, the record does not demonstrate that the Grievant violated Rule 36. That is, he took no, “[a]ctions that could *harm or potentially harm* a member of the general public.”¹⁸

In addition to the foregoing rules, the Grievant violated the Agency’s Standards of Employee Conduct by using “obscene or verbally abusive language,” under circumstances where such language was “demeaning to . . . members of the general public.” The Grievant failed to “display . . . exemplary conduct . . . at all times,” in light of his conduct in Kroger on September 18, 2004. Finally, the Grievant violated the Agency’s Standards of Employee Conduct by attempting to use his “identification cards . . . to coerce, intimidate . . . others either to obtain or attempt to obtain . . . [a] privilege . . . not otherwise authorized in the performance of official duties. To understand the latter violation, one needs only to ask why the Grievant repeatedly flashed his weapons card and state identification card? He did it either to coerce or to intimidate Officer Terry into overlooking or excusing the fact that the Grievant ate the doughnut and cheese.¹⁹ Had Officer Terry done so, he would have afforded the Grievant an undue and unwarranted privilege. In this respect, the Union stresses that the Grievant did not affirmatively ask Officer Terry for a favor or privilege. That the Grievant did not *explicitly requests* favor or privilege hardly establishes that he did not *implicitly or indirectly* attempt to extract them from Officer Terry. Clearly he did.

VI. Penalty Decision

Because the Agency established two of the three serious charges leveled against the Grievant, some

¹⁸ (emphasis added).

¹⁹ It is also likely that the Grievant sought somehow to use his position as an employee for the Agency to accentuate or rehabilitate or burnish his public status in an otherwise embarrassing situation.

measure of discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation of the mitigative and aggravative factors as well as an ultimate determination of whether the penalty of removal is unreasonable, arbitrary, capricious, or an abuse of discretion under the circumstances of this case.

A. Aggravative Factors

The aggravative factors are the Grievant's use of obscene language, threats, and intimidation against members of the general public, security, and law enforcement. His position as a Correction Officer magnifies his transgressions. As a Correction Officer, the Grievant is charged with a responsibility to serve as a model for inmates and to conduct himself in that manner *at all times*. A second aggravative factor is that the Grievant *deliberately* implicated the Agency and its reputation. This is perhaps the most egregious component of his conduct. Finally, when he was terminated, the Grievant had an active discipline in the form of a two-day fine.¹²⁰

B. Mitigative Factors

The mitigative factors include the Grievant's almost twenty years of service with job performance ranging from satisfactory and beyond.¹²¹

C. Propriety of Removal

This balance of mitigative and aggravative factors leaves the Arbitrator with no choice but to make the following wholly regrettable holding against a twenty-year employee: Removal in this case is for just cause and is not unreasonable, arbitrary, capricious, or an abuse of discretion.

VII. The Award

For all the foregoing reasons, the Grievance is hereby **Denied in its entirety**.

¹²⁰ Joint Exhibit 3, at 6.

¹²¹ Joint Exhibit 6.

Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.