ARBITRATOR'S AWARD

CASE NUMBER 90

In the Matter of the Arbitration
Between

ArcelorMittal USA,
Indiana Harbor Works, East Chicago, Indiana

and

Nikola Petkovich, an individual Greivant represented by
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers International Union,
and it Local Union # 1011

Grievance # ILVT-17-04

October 8, 2018

David A. Dilts
Arbitrator

APPEARANCES:

For the Company:

Jack Klinker, Associate Labor Relations Representative

For the Union:

Jim Flores, USW Staff Representative

Hearings in the above cited matter were conducted at the Offices of ArcelorMittal's Indiana Harbor operations at 3210 Watling Street, East Chicago, Indiana. The parties stipulated that the present case is properly the Arbitrator pursuant to Article Five, Section I of their 2015 Collective Bargaining Agreement. The record in this case was closed upon the completion of the hearings on Tuesday, September 25, 2018.

ISSUE

Was Nikola Petkovich (herein the Grievant) discharged for just cause? If not, what shall be the remedy?

INTRODUCTION

The Grievant was first employed by ArcelorMittal (herein the Company or Employer) on or about October 27, 2014. The Grievant was a Service Technician assigned to the Indiana Harbor West Cleaning Services group at the time of his separation from the Company. The Grievant received a notice from the Company that he was being suspended for five days, at the end of which he was subject to discharge (Joint exhibit 3). The Union filed a timely grievance protesting the Company's decision to discharge the Grievant.

The October 4, 2017 letter informing the Grievant of the disciplinary action taken against him states, in pertinent part (Joint exhibit 3):

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> This action is being taken as a result of your violation of Personal Conduct Rule 2.V., which states:
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> > 2. The following offenses are among those which may be cause for discipline, up to, and including suspension preliminary to discharge:
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> > V. Engaging in sexual harassment or other forms of harassment of another

employee . . .

Your behavior also violated the Company's Fair & Equal Treatment Policy.

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The Grievant admits that he engaged in the actions of which he stands accused, and which the Company characterizes as sexual harassment. The Grievant only denies that the subject actions were founded in sexual desires for the female coworker. A shift manager for the cleaning service received a report from a female coworker of the Grievant claiming that the Grievant had engaged in inappropriate behavior towards her. The matter was then referred to Mr. Allen in the Human Resources Department who then initiated the Company's investigation on behalf of the Company. The findings of Mr. Allen's investigation were that the victim of the alleged harassment feared for her safety and that the Grievant's conduct including the following (Joint exhibit 3, 3rd and 4th page of the Company's position at the third step):

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- On July 5, 2017, while at work, the Grievant approached the Coworker at her desk, unprovoked, and kissed her on her cheek. At that time, the Coworker told Grievant that his kissing her was not acceptable.
- On July 6, 2017, the Grievant asked the Coworker what she thought of the kiss to which the Coworker again expressed that the kiss was not appropriate.
- In early August 2017, the Grievant sent the Coworker additional inappropriate text messages, including a text that stated that he was "only thinking with [his] dick." It was at this time that the Coworker told the Company about what had taken place.

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- On September 27, 2017, when the Company was finally able to speak with the Grievant, following his extended absence, the Grievant was advised to only speak to the [Coworker] about work-related matters, [and Grievant] reinstructed on Company's Fair and Equal Treatment Policy, and was provided with a copy of that policy.
- On October 3, 2017, the Grievant badgered the Coworker to the point that she reported him to management.

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The investigation also revealed that the Grievant and Coworker had been friends at work, frequently eating lunch together. The investigation also determined that the Coworker had told the Grievant that she was a happily married woman and had no romantic interest in him. The Coworker was not called to testify at hearing.[1]

The record also contains medical records (Union exhibit 1)[2] concerning the Grievant's use of prescription drugs associated with complications from numerous abdominal surgeries he experienced. The record suggests that the Grievant had been taking this medication to increase his appetite and mitigate his loss of weight (Joint exhibit 3, page 4, Section H). Union exhibit 1, page 1 is quoted directly in the Union exhibit 3 and states in relevant part: ". . . *The medication has helped the patient, but showed that it has had negative side effects resulting in abnormal*

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[1] The parties Collective Bargaining Agreement contains Article Five, Section I, paragraph 9 which states: *"The Company agrees that it shall not, in an arbitration proceeding subpoena or call as a witness any bargaining unit Employee or retiree. The Union agrees not to subpoena or call as a witness in such proceedings any non-bargaining unit employee or retiree.*

[2]Company objects to these records, contending they were not argued in the grievance process. The Company has alleged that the Grievant claimed abuse of a controlled substance, which is not supported by drug testing results (Union exhibit 8, and physician's testimony). The Grievant claimed that he was taking Dronabinol and was under the care of a physican and that is included in the Union's position at Step 2 of the grievance procedure (Joint exhibit 3, page 4). Therefore this Arbitrator cannot exclude these medical records.

thinking, confusion, anxiety, nervousness, and panic attacks. . . . "

At the time of his discharge, the Grievant was working under the Justice and Dignity provision of the Basic Labor Agreement' Article Five, Section I, paragraph b. (Joint exhibit 1, p. 59). The discharge for which the Grievant had been previously discharged is unrelated to the matter currently before this Arbitrator.

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COMPANY'S POSITION

The Company discharged the Grievant for inappropriate behavior directed at one of his female coworkers. The behavior reported by the female coworker rises to the level of sexual harassment in violation of Company rules and policies (Joint exhibit 2, Section 2 V.). This behavior included the Grievant sending her sexually suggestive text messages (Company exhibit 2 and Union exhibit 3), leaving her disturbing voice mails (Company exhibits 3 and 4) and even going so far as to kiss her on the cheek while she sat at her desk at work. The Grievant engaged in this conduct despite the Employer's Fair and Equal Treatment Policy (Company exhibit 5), with which he was familiar and had been recently trained) which contains an entire section prohibiting the conduct in which the Grievant engaged (Company exhibits 1 sign-in sheet for

meeting in which the policy was the subject). Sexual harassment is clearly barred by Section 2, Paragraph V of the Company's Personal Conduct Rules, (Joint exhibit 2) to wit: *"V. Engaging in sexual harassment or other forms of harassment of another employee or found displaying material of a sexual nature or of a harassing and demeaning nature."* The language of this paragaph begins with: *The following offense are among those which may be cause for discipline, up to, and including suspension preliminary to discharge.*

Mr. Allen's testimony shows that the Company conducted an impartial and thorough investigation which confirmed that the Grievant's victim had requested that he stop harassing her. When interviewed, the Grievant admitted to his actions and said it was a "wrong move." He was instructed, at that time, to only interact with the female employee regarding work-related matters, yet, shortly thereafter, he approached her in an isolated setting to ask her about overtime and proceed to badger her to the point that she became uncomfortable, thereafter she reported the incident to the Employer.

These facts are not in substantial dispute, and inconsistent with the Grievant's obligations under the Employer's Fair and Equal Treatment Policy . Therefore, the Employer has shown, with the clear preponderance of evidence, that there was just cause for the discharge of this Grievant.

The Union has raised a couple of defenses for this Grievant. The Union contends that the Grievant was experiencing an adverse reaction to a prescription drug and that the Grievant and the subject female coworker had a close personal relationship therefore the Grievant's actions were not unwarranted or unwelcome. Neither of these defenses have merit. These issues are a matter of credibility and the Union has failed to call the victim to testify on behalf of the Grievant

– something the Company cannot contractually do. Further, the Company's Medical Director (Dr. Ted Niemiec) was called as a witness and he refuted the Union's claims concerning that the prescription drug accounted for the Grievant's misconduct.

The Grievant engaged in a pattern of severe and pervasive sexual misconduct which clearly amounts to a violation of the Company's rules and policies. The Union failed to establish a defense for his conduct or that mitigating circumstances exist.

Therefore, the Company respectfully requests that the Arbitrator deny this grievance in its entirety as being without merit.

UNION'S POSITION

The burden of proof in discipline and discharge cases rests with the Company. In this case, the Company has failed to prove that there was just cause for this discharge. It is the Union's position that this grievance must be sustained and the Grievant reinstated to his position and made whole.

The Company would have the Arbitrator believe that the Grievant was discharged for a culmination of events that occurred between the Grievant and a female coworker. The Employer alleges that the Grievant sent harassing texts, left harassing voice mails, engaged in harassing conversation, and kissed the woman against her will. The Company has failed to prove anything of the kind.

There are texts which were entered into the record. Company exhibit 2 shows that the Grievant said *"I was only thinking with my dick. I didn't realize people had emotions until I felt*

mine." The Grievant admits texting this, but as was shown in a video presented by the Union (South Fork) millennials use this language (even on a television cartoon) as pejorative. To assume that this has only a sexual connotation fails to account for how the younger generation understands and uses this pejorative term.

The Company correctly claims that the Grievant kissed the subject female coworker. The Grievant readily admits that he kissed the woman on her cheek. The Company, without proof, goes on to claim that this was, again, an act with a sexual connotation. The Grievant testified without rebuttal that in the cultural in which he was raised such a kiss is a greeting and often practiced without any sexual connotation. Further, when the woman objected, the Grievant refrained from any future "pecks on the cheek" – as this record of evidence clearly shows.

The Company also claims that after the Grievant was told by Mr. Allen he was to have no conversation with this female coworker, outside of what was necessary for the business of their respective jobs, that the Grievant again approached her and initiated a discussion outside of business issues. Company exhibit 2 was offered as corroboration of Mr. Allen's testimony. In this exhibit the first two pages involve the Grievant apologizing for being "an asshole" and the female accepting the apology. Clearly from the response the coworker sent this Grievant his communication was NOT unwelcome. The remainder of the conversation concerned overtime. The second and third pages involve the Grievant reaching out because of personal problems. The Company claims this violates orders allegedly given the Grievant, but there is no record of a complaint or other problems. The Grievant and the female coworker had a mother-son relationship that was well-known in the plant and this is not harassment.

In sum, the preponderance of evidence does not support the Company's position in this

case. Further, the Company failed in its contractual obligation to provide the Grievant with the benefits of the Dignity and Justice provisions of Article Five, Section I, in violation of the Basic Labor Agreement. The Union asks that this Employer failure be corrected.

The Union respectfully requests the Arbitrator to sustain this grievance in its entirety and order that the Grievant be reinstated to his job, that the discharge be rescinded and that the Grievant be made whole in all respects, or whatever remedy the Arbitrator deems fit.

ARBITRATOR'S OPINION

In the case before this Arbitrator there are two sets of issues. The first matter to be resolved is whether just cause exists for the disciplining of this Grievant, and if so, whether discharge is reasonable; which includes the Union's argument of mitigating circumstances. The second matter to be resolved is whether the Justice and Dignity language of Article Five, Section I applies to this specific discharge. Each of these matters will be addressed, in turn, in the following paragraphs of this opinion.

Just Cause

The facts concerning the relevant events are not in substantial dispute in this case. The Grievant readily admits to having asked his female coworker for a date outside of work, kissing her on the cheek, telling her he was "thinking with his dick" and numerous text messages of a personal nature. The Grievant even admits that he contracted this female coworker after Mr.

Allen instructed him to limit communications to business only.

Mr. Allen testified that he instructed the Grievant to communicate with this female coworker only about work related issues on September 27, 2017. It was reported to the Employer by the female coworker that the Grievant approached her on October 2, 2017 and initiated a conversation. The female coworker is alleged to have complained that she felt uncomfortable by the Grievant at that time. Some of Mr. Allen's testimony is corroborated by Casey Kolosh who was present during portions of the investigation, in particular, with the interview of the female coworker and at least one of the interviews with the Grievant. What this Arbitrator has before him are conclusions drawn by the Company's investigators, and no testimony whatsoever from the female coworker who was allegedly sexually harassed. Albeit, it is an official investigation, almost no paper-trail was introduced, and it is only the testimony of two Company witnesses that is found in this record.

What this Arbitrator has before him are several behaviors, mostly admitted by the Grievant, and the question of whether these behaviors constitute sexual harassment within the meaning of Company Rule 2. V of the Employer's Personal Conduct Rules (Joint exhibit 2). The Company promulgated a Fair and Equal Treatment Policy (Company exhibit 5) in which it defined sexual harassment (page 2):

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> **Sexual Harassment:** Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (b) submission to or rejection of such conduct is used as a basis for an employment decision affecting that individual; or (c) the purpose or

> the effect of such conduct is to interfere substantially with the affected individual's work performance or to create an intimidating, hostile or offensive work environment. Some examples of unwelcome behavior that can be construed as sexual harassment include; but are not limited to: sexual advances, propositions, off-color jokes, touching, physical assault, sexually explicit or suggestive objects or pictures, references to a person's body parts, request for sexual activity, and/or sexually explicit conversation. . . .

What this Grievant is charged with is sexual harassment, in violation Personal Conduct Rule 2 V: *"V. Engaging in sexual harassment or other forms of harassment of another employee or found displaying material of a sexual nature or of a harassing and demeaning nature."* As the Elkouris observe:[3]

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> It is now established that under certain conditions sexual harassment constitutes a type of sex discrimination . . . Hostile-environment sexual harassment occurs when an employee is subjected to a pattern of unwelcome sexually related conduct in the workplace that interferes with an individual's work performance or creates a hostile, intimidating, or offensive work environment [footnote not reported here].
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> What constitutes "sexual harassment" is context dependent.
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The Arbitrator is informed of the victim's complaints, and the views of the investigators concerning her demeanor, but the Arbitrator was afforded the opportunity to gauge these matters himself. The victim of this alleged harassment was not called to testify and therefore the

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[3] Frank and Edna Asper Elkouri, edited by K. May, *How Arbitrator Works, eighth edition.* Arlington, VA: Bloomberg BNA, 2016, p. 17-101-102.

Arbitrator has only the results of the Company's investigation.[4] The Company claims that the female coworker was uncomfortable with the Grievant's last contact with her. The Grievant was instructed not to discuss anything with this female save work. It is clear from this record that the coworker was uncomfortable with this last communication, and the Grievant had been warned against such communications.

It is clear from the Grievant's own testimony that he had a friendly relationship with this female coworker, which he characterized as having arrived at a point where it was wrong. In essence, the Company's best witness is the Grievant himself. In close scrutiny of the Grievant's conduct it is clear he kissed this coworker, and did suggest a date outside of working hours. Within this context it is not clear that the Grievant intended a sexual relationship. From the testimony of those on both sides, it is clear that the female coworker is several years the Grievant's senior. Further, it is clear that Grievant claims to have viewed this coworker as a motherly figure, and not necessarily an object of sexual desire. The witnesses called by the Union, indicated that the Grievant and the female coworker were on friendly terms and that the alleged victim frequently texted and telephone the Grievant (Witnesses Sherer and Garcia). Witness Ramstetter corroborated the Grievant's claim that the female coworker was seen as a motherly figure. These issues were not raised in the Company's evaluation of the evidence and are contextual in nature.

Finally, is it reasonable to conclude that the Grievant's conduct was sexual harassment?

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[4] Again, Article Five, Section I, paragraph 9 bars the Company from calling this bargaining unit member to testify. This however, deprives the record from direct evidence, subject to cross examination, her state of mind, how she took the Grievant's actions, and the impact on her work environment such that this Arbitrator has before him critical aspects of the charges brought against the Grievant.

Within this context and with the evidence in this record, there is a lack of a sexual dimension to the Grievant's conduct toward this coworker. He admits to kissing her, but rather than a mouth to mouth romantically charged kiss, it was a kiss on the cheek. His asking her on a date outside of work is inappropriate as she is a married woman and did not well-receive the suggestion. Whether either of these transgressions rise to the level of sexual harassment creating a hostile work environment is doubtful.

The Arbitrator is persuaded that the female coworker wished to stop receiving so much attention from the Grievant. Attention that the Company's investigators claimed she said made her uncomfortable. This rings true, she was a married woman and apparently considerably older than the Grievant. The Grievant should have honored her desire to limit their contact to only business communications and he did not. This is conduct proscribed by "other harassment" in the Personal Conduct Rule 2.V – but it is not proven to be sexual harassment. The Arbitrator is persuaded that the Company is within its rights to take corrective action, but the Arbitrator is not persuaded that discharge is a reasonable penalty for this offense, particular lacking strong evidence of a sexual foundation.

Finally, there is the matter of the Grievant's text lamenting that he was "only thinking with [his] dick." The Union attempted to defend this with the position that this is how millennials communicate, and even presented a video clip of a popular television cartoon "South Park" in which the characters were using the word "dick" as a pejorative as attempt to persuade the Arbitrator that this was not sexual. In fact, the use of such vulgar slang ought not be a model for any person, millennial or otherwise. People outside of that narrow group of the population may well find that offensive. However, the *Concise Oxford English Dictionary, revised tenth*

edition offers the following definitions of *dick* (at page 397):

> **dick** • **n. 1.** vulgar slang a man's penis. **2.** Brit. vulgar slang a stupid or contemptible person. **3.** [with neg] N. Amer. informal anything at all, *you don't know dick about it!*

From the *Oxford English Dictionary* it appears that the Union's contention has merit concerning the use of the word "dick" in this context. While still likely offensive to many, this Arbitrator is not persuaded that this usage rises to the level of sexual harassment.

Mitigating Circumstances

There are two mitigation arguments offered by the Union. The Union claims that the friendship between the female coworker and the Grievant suffices to mitigate any misunderstanding that arose between them. Further the Union contends that the Grievant's behavior was influenced by the side-effects of a prescription drug he was taking. Each of these will be examined in the follwoing paragraphs of this section.

Friendly Relations

The Union contends that the Grievant and the female coworker had a cordial personal relationship while at work – even described as a mother-son relationship. The fact that the female coworker was not called to testify for herself concerning that relationship diminishes the

claimed cordiality as a mitigating factor. Albeit, several Union witnesses were called to corroborate the Grievant's claims, that testimony pales in comparison to the alleged victim testifying to the same matters.

From this record of evidence the Arbitrator is not persuaded to find this relation between the Grievant and his coworker constitutes a mitigating circumstance.

Drug Side-effects

The Union argues that the prescription drugs used to treat the Grievant's loss of appetite and weight loss had side-effects that had an impact on the Grievant's behavior. Union exhibit 4 describes the side-effects of the drug the Grievant was taking. The side-effects described by Andreea Selcean, the Grievant treating psychiatrist in her Progress Note, date December 27, 2017 is:*Dronabinol caused abnormal thinking and confusion. Panic attacks. Anxiety. Patient is no longer taking and does not want to be on that again.* (Union exhibit 1, p. 4). This is the essentially the same information contained in Union exhibit 4 for the same class of drug.[5]

The Grievant testified the dosage of dronabinol he was taking had been increased in the summer of 2016 from 2.5 mg to 5 mg and that he continued taking the medication until August of 2017. This testimony is consistent with the pharmacy records contained in Union exhibit 1 pp.

[5] The Company objected to this exhibit being accepted into the record. The letter is dated December 27, 2017 - well after the decision to discharge the Grievant was made. However, this is exactly the same information provided by the Union in a letter from Dr. Milenko Lazarevic and contained in the record of the Step 2 grievance hearing. Therefore, this information is not new to the Company, having been provided on a different letterhead in the grievance procedure and therefore this Arbitrator is persuaded that it is admissible without prejudicing the Company's ability to respond to the evidence.

2-3.

The Company's Medical Director was called on rebuttal and testified that the effects of the dronabinol could produce the side-effects complained of by the Grievant, but that these side-effects should not persist for more than a couple weeks, at most, after the drug was out of his system. This expert testimony was credible, and was consistent with the evidence already in the record concerning the side-effects.

This Arbitrator is persuaded that the prescription's side-effects could well have diminished the Grievant's self-control and made him anxious and confused. It is clear that the Grievant had stopped taking the drug by the end of August, and any effects should have diminished significantly if not disappeared by mid-September. For the period the Grievant was on this medication it may have impacted his ability to control himself – but that should have been brought to the attention of the Employer and there is no record that the Company was informed of the prescription.

This Arbitrator is persuaded that the side-effects were a contributory factor in this case. The behaviors exhibited in this record are consistent with the side-effects identified for this drug. Further, it is also clear that the female coworker and the Grievant were friendly, at times, and his behavior was within that context – not excused, but not predatory.

Justice and Dignity

The Union complains that the Grievant should have been retained at work under the Justice and Dignity provisions of Article Five, Section I, paragraph 9 b. The relevant portions of

this contract language are found in paragraphs (1) and (4):

> (1) In the event the Company imposes a suspension or discharge, and the Union files a grievance within five (5) days after the notice of the discharge or suspension, the affected Employee shall remain on the job in which his/her seniority entitles him/her until there is a final determination on the merits of the case.
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> (4) When a discharged Employee is retained at work pursuant to this provision and is discharged again for a second dischargeable offense, the Employee will no longer be eligible to be retained at work under these provisions.

The Company argued that since it had discharged this Grievant prior to October 4, 2017 for another, unrelated offense, he was not entitled to be retained at work under the Justice and Dignity language of the Contract. The Union offered only the argument that since the Grievant committed none of the offenses listed paragraph 2 then the Justice and Dignity benefit should apply. The language is clear and unambiguous. The Company asserts that the Grievant was not eligible for the benefits of the Justice and Dignity language of the contract because has been previously discharged for an unrelated matter. A position not challenged by the Union in this matter.

The clear language cited above shows that when discharged while working under the Justice and Dignity provision of Article 6, Section I, a second dischargeable offense makes the employee ineligible for these benefits to continue. The Arbitrator therefore must apply the clear and unambiguous language and find the Grievant not eligible for the benefits of the Justice and Dignity language.

CONCLUSION

The facts in evidence in this case show that a female coworker was by October of 2017 uncomfortable with her discussions, texts, and interaction with the Grievant. In July, however, Mr. Allen testified that the female coworker told him she could handle the Grievant. It is clear that in October, the Grievant made contact with the female coworker after he had been instructed to have only business communications with her.

The evidence in this record is not persuasive that the Grievant sexually harassed the female coworker. A kiss on the cheek, the use of the word "dick" in context, and his repeated communications with her do not contain a overt sexual foundations that support a find of sexual harassment. What it does, however, is to persuade this Arbitrator that the Grievant used poor judgment, was a significant annoyance, and failed to follow Mr. Allen's instructions about contact with the woman. Clearly the kiss, and use of the word "dick" are offensive, and combined with the Grievant "badgering" and failure to follow instructions his conduct is clearly creating a work environment which is intolerable for his coworker. Harassment, of a nonsexual nature, is also proscribed by Personal Rule 2 V and it is clear that such harassment is just cause for discipline. However, this Arbitrator is not persuaded that discharge is a reasonable penalty under these facts and circumstances.

The Justice and Dignity provisions of the Basic Labor Agreement do not apply in this case because the Grievant was working under those provisions because had been previously discharged and granted the Justice and Dignity benefit for the previous disciplinary action taken against him. The Union's contention that the paragraph 2 listing of offense applies here, is

without merit.

Appropriate Penalty

The Arbitrator is persuaded that the Grievant's misconduct falls into two serious categories. His badgering, use of offense words, and kiss are a sound basis for just cause for discipline. Because the Grievant is culpable under Personal Conduct Rule 2 V. for harassment, other than sexual, a significant suspension is reasonable, but discharge is draconian.

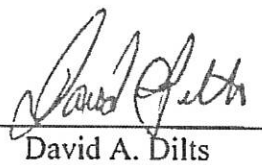
Aggravating the Grievant's misconduct is the fact he failed to follow Mr. Allen's instructions to only communicate with the female coworker about business matters. It is clear that the coworker was uncomfortable with and complained about further communication by the Grievant on October 2. This Arbitrator is persuaded that the Grievant's misconduct is mitigated by the side-effects of the prescription the Grievant took before September of 2016. Therefore, this Arbitrator is persuaded that the aggravation and mitigation demonstrated in this record are of sufficient magnitude to serve to offset one another in the determination of what is an appropriate penalty.

The Arbitrator is persuaded that a long suspension is appropriate for the conduct proven in this case. The Grievant is to be reinstated to his position with the Company without back pay or benefits, but without loss of seniority.

AWARD

The penalty of discharge is not reasonable under the facts and circumstances of this case. Therefore, without a finding of a sexual foundation for the harassment, the discharge is ordered reduced to a long suspension. The Grievant is to be reinstated to his position with the Company without back pay or benefits, but without loss of seniority

At Fort Wayne, Indiana
October 8, 2018:



David A. Dilts
Arbitrator