IN THE MATTER OF ARBITRATION
UNDER THE CONTRACT EFFECTIVE JULY 1, 1986

Between:	Sondra Knight Grievance No. 46-86-D8 ND 463
The State of Ohio (Ohio Department of Transportation)	Phillip Grow Grievance No. 47-86-D8 ND 464
THE EMPLOYER	Perry McDaniel Grievance No. 48-86-D8 ND 465
-and-	Richard Heinlein Grievance No. 49-86-D8 ND 466
Ohio Civil Service Employees Association, Local No. 11, AFSCME, AFL-CIO	William Justus Grievance No. 50-86-D8 ND 467
THE UNION	Gregory Steele Grievance No. 51-86-D8 ND 468
	Robert Quinn Grievance No. 52-86-D8 ND 469
	Gary Reveal Grievance No. 53-86-D8 ND 470
	Robert Ringer Grievance No. 54-86-D8 ND 471

Before: NICHOLAS DUDA, JR., ARBITRATOR

OPINION AND AWARD

April 14, 1987

CASE DATA

SUBJECT

Discharges.

APPEARANCES

FOR THE EMPLOYER

N. Eugene Brundige, Deputy Director for Labor Relations, ODOT, Presenting the Case

Rachel Livengood, District 8 Labor Relations Specialist, Co-Counsel

Lloyd A. Wallace, Deputy Director District 8, ODOT

William T. Johnson, Labor Relations Specialist

Barry Braverman, Labor Relations Specialist

Joe Sand, Inspection Supervisor, District 8

Donald B. Thelen, Thelen & Associates, Inc.

Tim Wagner, Labor Relations Specialist

FOR THE UNION

Daniel S. Smith, General Counsel, Presenting the Case

John T. Porter, Attorney, Co-Counsel

Michael Temple, Staff Representative

Phillip Grow, Grievant

Robert Ringer, Grievant

Sondra L. Knight, Grievant

Richard Heinlein, Grievant

Perry L. McDaniel, Grievant

Gregory Steele, Grievant

Wiliam Justus, Grievant

Robert Quinn, Grievant

Gary Reveal, Grievant

BACKGROUND

By agreement of the Parties, this arbitration proceeding was a consolidated hearing covering nine separate grievances, each on behalf of a different Grievant. Every Grievant had been a Bituminous Plant Inspector assigned to work in one or more test or inspection laboratories in District 8 of the Ohio Department of Transportation (ODOT).

On June 25, 1986, each Grievant was notified in writing that he/she was removed from the position of Bituminous Plant Inspector effective with the close of business on July 3, 1986. The reason given in each case was:

> You have been guilty of violation of Ohio Revised Code, Section 124.34 (Neglect of Duty, Inefficiency, Malfeasance, Nonfeasance) in the following particulars to wit: In the course of your employment you are required to perform certain tests of road surface materials (i.e. bituminous concrete which is sold to the state by private contractors for use in highway projects). During the first six months of 1985 it was discovered that you failed to conduct many of the required tests; instead you willfully falsified and/or fabricated test results on official ODOT records.

The removal order for each employee stated the dates on which that employee had allegedly "fabricated and/or falsified" test results.

On July 3, 1986 separate grievances were filed on behalf of each of the nine employees. Each Grievance protested the Grievant's discharge, alleged violation of the Labor Contract, and requested remedy as follows:

> OLD CONTRACT ARTICLES 1.02, 7.01, 7.02, 7.03, 20.01 IN EFFECT AT TIME CHARGES WERE INITIATED. NEW CONTRACT 24.01, 24.02, 24.05 IN EFFECT AT TIME OF DISMISSAL. OR ANY OTHER RELATIVE ARTICLES. REMEDY: THAT I BE REINSTATED AND MADE WHOLE.

Processing through the grievance procedure did not result in settlement of any case. The consolidated hearing was January 26 and 27 and February 12, 1987. Post hearing briefs were also filed.

POSITIONS OF THE PARTIES

FOR THE EMPLOYER

1. ...the agency [gave each] employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct....

2. ...the agency's rule or managerial order [was] reasonably related to the orderly, efficient and safe operation of the business....

3. ...the agency, before administering discipline...[made] an effort to discover whether the employee did in fact violate...a rule or order of management....

4. ...the agency's investigation [was] conducted fairly and objectively....

5. At the investigation...the Appointing Authority's designee obtain[ed] substantial evidence or proof that the employee was guilty as charged....

6. ...the agency [has] applied its rules, orders and penalties evenhandedly and without discrimination to all employeess....

7. ...the degree of discipline administered..related to:

   a. the seriousness of the employee's proven offense
   b. the record of the employee in his or her service with the agency.

THE UNION'S POSITION

In not one case has the Employer shown cause sufficient to justify termination.

Robert Ringer was accused of falsifying three tests. Mr. Ringer denied this charge...His testimony was so convincing that the Employer's representative admitted that he believed him....At the times Mr. Ringer was accused of falsifying tests, Mr. Ringer was in training....

Lastly, Robert Ringer was a five year employee with no prior discipline. There is no reason present to justify the discipline imposed on Mr. Ringer.

The facts surrounding the grievance of Philip Grow are similar to those of Mr. Ringer's grievance. Mr. Grow was accused of falsifying a small number of tests. During the time period for which Mr. Grow is being accused, he was in training. On most of the occasions involved, Mr. Grow was working with a more senior inspector....

Six grievants admitted that they had falsified tests. These grievants were Sondra Knight, Robert Quinn, Perry McDaniel, Richard Heinlein, Gregory Steele and William Justus. The fact that tests were falsified, however, does not force the conclusion that termination was justified. Evidence was presented at the hearing which mitigated against the "economic death sentence" for these employees.

The District in which these persons worked was the busiest in all of ODOT. During the construction season, these persons worked long and odd hours. There were not enough inspectors to go around. The pace of work is hectic, and there is great pressure from both the plant operators and construction personel to not slow down production.

...supervision of the Inspectors had grown lax over the years. Central office, until the discovery of these false tests, had almost stopped checking on the District....

In spite of this lax supervision, the inspectors had a clear understanding as to when it was appropriate to "fudge" a test. You had to know the operator well enough to know he did not cut corners. You had to be so busy that you could not perform the tests in a timely fashion. Also, you had to know where the asphalt was going. Generally, asphalt going on the highway had to be tested, but asphalt going to berm or side work was less critical. Finally, the inspectors were instructed that certain tests did not have to be performed as frequently as stated in the manual and some tests did not have to be performed if other tests were passing.

All these facts taken together created an atmosphere which encouraged test falsification. It should also be noted that the practice was one which was widely known amongst the inspectors and one which had gone on for some time. Joe Sands, the present supervisor of the inspectors was also for a long time one of this group of inspectors. It is unlikely that he was not aware of the practice and tacitly condoned it....

The grievants who admitted falsifying tests should not be terminated for several other reasons. All the grievants were long time employees with no prior discipline. Richard Heinlein was employed by ODOT for almost 25 years. All the grievants were allowed to continue inspection work for an extremely long period of time after the evidence of the false tests was discovered - for

almost one year. During this time period, they were able to rehabilitate themselves in the eyes of their immediate supervisors....

Finally, all the grievants, I believe, were perceived by the Arbitrator to be normal people - people with friends and family,...These persons are not the outcasts of society and in doing what they did they did not seek to profit or harm anyone. The only reason for their behavior is that their work was hard and stressful and that the supervisors let them get away with it.... The Employer cannot justify automatic termination given all these relevant facts. A lesser penalty would be the just penalty.

Gary Reveal testified that he did not falsify tests....the only evidence against Mr. Reveal is a theory of random possibilities which, while mathematically possible, may not be so in real life. All of the above arguments made for the grievants who admitted to falsification also apply to Mr. Reveal. He, like the others, did not deserve to be terminated....

The test falsification that did occur would not have occurred if the Employer were doing its job....Each [Grievant] understandably feels that they were made the scapegoats when the wrath of the Central Office came raining down on Distict personnel...For all the above reasons, the Arbitrator is respectfully requested to grant the grievances before him..

ISSUE

In each case, the issue is whether the Grievant was discharged for just cause, and if not what is the appropriate remedy?

RELEVANT LABOR CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

Section 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.

Section 24.02 - Progressive Discipline

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

A. Verbal reprimand (with appropriate notation in employee's

file)
B. Written reprimand.
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

Section 24.05 - Imposition of Discipline

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

RELEVANT SECTION OF OHIO REVISED CODE

Section 124.34 Tenure of office, reduction, suspension, removal and demotion.

The tenure of every officer or employee in the classified service of their state...shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for...dishonesty...neglect of duty, violation of such sections or the rules of the director of administrative services or the commisiion, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office....

RELEVANT PROVISIONS OF ODOT'S DIRECTIVE A-301

DISCIPLINARY ACTIONS

VIOLATIONS	OCCURRENCES WITHIN 24 MONTH PERIOD			
	1st	2nd	3rd	4th
2. c. Failure to follow written policies of the Director, Districts, or offices.	Written Reprimand/ Suspension	Suspension	Removal	
21. Willfully falsifying any official document.	Suspension/ Removal	Removal		
34. Violation of Section 124.34 of the Ohio Revised Code. (The severity of the discipline imposed should reflect the severity of the violation).**				
35. Other actions that could harm or potentially harm the employee, a fellow employee(s) or a member or members of the general public.**				

** The appropriate discipline depends on the severity of the incident.

ANALYSIS

FINDINGS OF FACT

Each of the nine grievances concerns the termination of a person who had been employed as Bituminous Plant Inspector, a classification in the Ohio Department of Transportation (ODOT).

The Grievants were hired by ODOT on the following dates:

Name	Continuous Service Date	Name	Continuous Service Date
Gary L. Reveal	05-24-65	Gregory J. Steele	07/21/81
Richard Heinlein	08-17-66	Phillip D. Grow	03/26/84
Robert A. Quinn	05/01/78	Perry L. McDaniel	09/15/84
Sondra L. Knight	06/12/78	William R. Justus	09/17/84
Robert M. Ringer	05/21/79		

ODOT headquarters is located in Columbus but the department has twelve districts set up on a geographical basis throughout the state. The nine terminations in this arbitration all involve employees from District 8 which is headquartered in Lebanon, Ohio. District 8, the largest ODOT district, serves southwestern Ohio including the metropolitan areas of Cincinnati and Dayton.

ODOT has two major responsibilities. First, the unit is responsible for the performance by its own employees of maintenance and repair of State and Interstate roads by actions such as patching, snow plowing, removing brush and litter, etc. Second, ODOT arranges and oversees the construction and replacement of highways by outside Contractors. Although ODOT employees do not perform the actual replacement or construction, they do work on planning, providing technical support and inspecting materials and installation to insure that contractors comply with state specifications.

ODOT, the Employer, provides specifications for the concrete material to be used on roads, highways, including on bridges, but the material is obtained from a number of outside suppliers operating their own plants. Before the concrete material is released for shipment out of the plant to the road site, ODOT requires an inspection by its own employees of the materials used in the concrete to insure compliance with state specifications. In

addition, state employees weigh the material and write the shipping tickets for each load. These functions of checking quality and quantity and issuing letters and reports on the material are entrusted to Bituminois Plant Inspectors who are assigned to work at a testing laboratory maintained in every concrete manufacturing plant.

Sometimes both Inspector functions — checking quality and quantity — are performed at a plant by only one Inspector. If work volume is high, another Inspector is assigned to assist. One of them is assigned to check the quality and the other to work as "Ticket Writer", weighing material and writing the shipping tickets.

The procedure for testing and reporting quality is very specifically determined for and publicized to Inspectors. Detailed instructions are set forth in the "Bituminous Concrete Manual", a copy of which is provided to and available to Inspectors at every Plant Laboratory. According to the express terms in the Manual,

> Methods of Sampling and Testing must be performed exactly as prescribed in the manual. High quality work by the plant inspector...is necessary to provide high quality in the pavements they help to build...
>
> An Inspector is the individual...who is in a position to see and know if the methods and materials used conform to the specification requirements. The Inspector will be held accountable for...doing his work....[according to the manual instructions]...
>
> The plant inspector may not alter either the text or the intent of the specifications. When conditions arise which seem to make the specification impractical, or if the contractor fails to comply with the specifications, telephone the laboratory [supervision] at once.
>
> Each plant inspector should note carefully the exerpt from the United States Code Title 18 Section 1020 concerning falsifications....
>
> whoever, being an...employee of...any state...knowingly makes any false statement, false representation or false report as to the character, quality, quantity...of the material used or to be used...in connection with

> the...construction of any highway or related project....shall be fined not more than $10,000.00 or imprisoned not more than five years or both.
>
> Plant inspectors shall keep the laboratory informed of their work by means of Bituminous Concrete Plant Inspectors reports which are hereinafter described.

In part II, entitled "Field Inspection", the Manual describes in detail how materials are to be sampled and field tested and manufactured into a mixture. For purposes of this decision it is only important to know that the Inspector samples aggregates and bituminous mixtures by first segregating and weighing to determine that every component is proper and has weight within the specified range (described as a percentage of the total sample's weight). For example the specification for No. 16 grade material may permit the material to be 10-35% of the weight of the total sample. The Inspector first determines how much of the sample is No. 16. Then he weighs (in grams) that portion of the sample. Finally he divides that weight by the weight he had determined initially of the entire sample. If the percentage is not within the acceptable range the Inspector is to notify the Plant Inspector and the Inspector Supervisor and not accept the product until proper specifications are attained.

Each Bituminous test takes approximately 45-60 minutes to perform. The Inspector is to record the information just described on form TE-124, a work sheet kept on file in the field laboratory.

Every day the Inspector is supposed to enter on Bituminous Concrete Plant Report Form TE125 the results of all the analyses (tests) he performed that day and submit the report to the laboratory in the Columbus headquarters and to the project engineer.

In the summer of 1985 the Central Office laboratory became suspicious of the validity of some test results that had been submitted by employee B___. During an investigation he was accused of failing to perform and falsifying

reports of test results. Ultimately he made an agreement with ODOT which provided for him to resign.

District 8 employed seventeen other Bituminous Plant Inspectors at that time in 1985.

ODOT's suspicions about B___ were communicated to the other Inspectors on or about the beginning of July 1985. Supervision indicated that the investigation was continuing.

District 8 began to investigate its other seventeen Bituminous Inspectors. Early in the fall of 1985 ODOT hired a professional civil engineer, Donald B. Thelen, experienced in Materials analysis to assist in the investigation. His study considered information on the TE-124's and on corresponding TE-125's submitted by Inspectors during the 1985 construction period which had begun in late March.

Mr. Thelen used information recorded by every Inspector on the TE-124's which that Inspector had used to prepare a TE-125. He duplicated the mathematical division of each material component's weight by the weight of the entire sample (Both weights were stated in grams).

There are sixteen different sieve sizes on the TE124 form but normally only about five to nine are used in the testing. Under the Manual the Inspectors calculate percents for each sieve "to the nearest whole percent...except for the fraction passing the No. 200 sieve, which is to be calculated to the nearest 0.1%."

Mr. Thelen calculated <u>all</u> percentages to the nearest 0. That is, for each aggregate or mix blend sample reported on a TE-124, he calculated and recorded the "percentage remainder" for every "sieve" size, which I called "component" above, but he did so to the nearest .1%.

Typically the first sieve size in a sample, e.g. 2", allows all material to "pass through" so that the percentage is 100% and there is no percentage

remainder for that component. However for every sieve size which does not involve a 100% pass through, there are ten possible percentage remainders calculated to the nearest .1%. Those ten possible percentage remainders are 0.0 to 0.9. Thus the occurrence of any specific percentage remainder has a probability of one in ten, that is the odds against the occurrence are ten to one.

Below is one of the pages developed by Mr. Thelen.

EXHIBIT A

INSPECTOR GARY REVEAL

DATE 3-22-85

PROJECT # 688-84

TE-125..# 1

Producer & Loc. Valley Asph Plt 4 South Broadway

Tons Prod: 720.00 TON

Date

mple of 301 No. a

	Grams	Bit. %
x	1825	
3/8		
	87	4.5
		4.6

Aggregate Only

ve	Grams	Total Pass. Grams	%
	0	1738	100
	0	1738	100
	421	1317	76
4	614	703	40
6			
8	151	552	32
6	119	433	25
0			
0			
0	301	132	8
0			
	0	12	.7
	10	2	.9

	Percentage Remainder										
	.5	.6	.7	.8	.9	.0	.1	.2	.3	.4	.5
100.0	1738					X					
100.0	1738					X					
75.8	1320			X							
40.4	695									X	
31.8	556			X							
24.9	434				X						
7.6	139	X									
.7	12		X								

The left side of the page has a "Xerox" copy of information from a TE-124 prepared by Grievant Reveal and used by him to prepare a TE-125 March 22, 1985.

The Percentage Remainders for March 22, 1985 reflect a random distribution of the Percentage Remainders to the nearest one tenth.

The state pointed out that the odds against the same percentage remainder repeating consecutively for every sieve used is a function of the number of sieve sizes. That is, if quantities less than 100% passed through six consecutive sieves, the chances of having all six with the same one-tenth percentage remainder would be 1 in 1 million, a product of all the probabilities (10 times 10, times 10, times 10, times 10, times 10). The chances of the identical one-tenth percentage remainder with four sieves would be 10 times 10, times 10, times 10, or 1 in 10,000. For five sieves it would be 1 in 100,000. And so on.

After an extensive analysis, Mr. Thelen reported that some of the tests reported by each of ten of the seventeen Inspectors until about July 1, 1985 had an "unrandom" pattern, one that was highly unlikely from a mathamatical or probability standpoint. The "unrandom" pattern was characterized by a .0 percentage remainder for every sieve on the test. For example, on March 22, 1985 Mr. Reveal had reported that he tested three aggregate samples and three mixed blend samples. The data he reported for four of those tests produced a .0 percentage remainder for 15 consecutive items where the odds against any single .0 remainder was 10 to 1. The analysis for one of those four tests is shown on the following page.

Project No. 688-84

INSPECTOR Reveal

DATE 3-22-85

PROJECT # 688-84

TE-125.# 1

Producer & Loc. VALLEY ASPH. #4 DAYTON, O.

Tons Prod: 720.00

ple of 2-01 No. 2

Grams		Bit. %
	1721	
1610		
	81	4.2
		4.5

Aggregate Only *

Grams	Total Pass. Grams	%
0	1610	100
0	1610	100
443	1197	73
623	574	35
132	442	27
98	344	21
276	98	6
82	16	1.0
13	(3)	1.2

	Percentage Remainder										
	.5	.6	.7	.8	.9	.0	.1	.2	.3	.4	.5
100.0	1640.0					X					
100.0	1640.0					X					
73.0	1197.2					X					
35.0	574.0					X					
27.0	442.8					X					
21.0	344.4					X					
6.0	98.4					X					
1.0	16.4					X					

The 2" sieve is ignored for analysis purposes because there cannot be a percentage other than .0 on a 100% pass through. The same is true in this case for the 1" sieve. However, as a result of the data Mr. Reveal submitted there would then be five consecutive .0 percentage remainders, which has a probability of 1 in 100,000. His reports for another sample on the same day produce the same .0 remainder for all five possibilities, another 1 in 100,000 outcome. The third report produced a .0 remainder on four consecutive possibilities, a 1 in 10,000 likelihood. For just these fourteen consecutive .0 percentage remainders the probability of occurrence was 1 in 100,000,000,000,000.

Data submitted by Mr. Reveal for April 26, 1985, produce the same type results. For that day he reported tests on three aggregate samples and one mix sample, a total of four tests for the day. For those four tests he reported data which produced 15 consecutive .0 percentage remainders (excluding the No. 200 and the sieve having 100% pass through.) The chances of that happening are 1 in one quadrillion. Considering results on the three aggregate tests separately, the probability is 1 in 100,000 on two of the tests and 1 in 10,000 on the third aggregate test.

Mr. Thelen speculated on the source of the data which would produce the extremely improbable "unrandom" results. His conclusion was that the results had not been derived from the required tests, that someone had multiplied a percentage within the acceptable range times an arbitrarily determined total grams in the sample and then rounded the product to the nearest whole gram. In other words, the test results were "backed into" with a calculator, rather than developed as specified in the Manual and instructions. In this way the "results" for a test could be determined mathematically in just a few minutes rather than in the one hour required if the test was performed.

After examining the concerned data and Mr. Thelen's analysis and explanation the Employer concluded that the "unrandom" percentage remainder resulted from false data reported without prior performance of the appropriate tests. Mr. Thelen ascertained the "unrandom" pattern for some tests which each of ten Inspectors reported he/she had performed. One person, killed in an accident before the state proceeded with disciplinary action, is not involved in these grievances and will not be considered herein.

Mr. Thelen concluded that the nine grievants had falsified test results at least as follows:

Name	Period	AGG Tests		Mix Tests	
		Reported	Falsified	Reported	Falsified
Reveal	3/22-6/28/85	101	92	54	32
Grow	6/11-6/25/85	12	11	19	9
Steele	5/8-6/27/85	37	31	33	9
McDaniel	5/16-5/31/85	22	21	13	10
Justus	5/6-6/21/85	33	24	19	10
Ringer	6/11-6/27/85	9	8	4	3
Knight	4/18-6/14/85	32	20	18	9
Heinlein	4/12-6/27/85	45	31	23	11
Quinn	4/12-6/25/85	44	33	31	14

After reviewing, ODOT determined that each Inspector had submitted the falsified results and had done so willfully. The situations of the nine Grievants may be considered in three different categories.

1. Grievant Reveal denies that he submitted any falsified tests.
2. Grievants Ringer and Grow deny falsifying test results and each claims he was not responsible for the results submitted.
3. Each of the other six Grievants admits she/he falsified tests.

GRIEVANT REVEAL

Mr. Reveal has been a Bituminous Inspector for many years.

ODOT claims that he falsified 92 of 101 aggregate tests and 32 of 54 mix tests in the period 3-22-85 through 6-28-85 on a total of 42 different days. It is extremely unlikely, that the "unrandom" patterns described above could have occurred on even one day, much less two days. However, in addition the Arbitrator reviewed all the information from the concerned-124 and-125's reports and the "unrandom" pattern analyses of .0 percentage remainders for the cited days. It is absolutely unbelievable that Grievant Reveal achieved the results he reported by performing the tests in the proper manner.

By analogy a person may win the lottery once or perhaps even twice but not 5 or 10 times much less than over 100 in a period of three months. The arbitrator finds far beyond any reasonable doubt that the test results submitted by Reveal on the questioned days were false.

On 30 of the 42 days Grievant was the only Inspector assigned to the concerned plant; on those days he performed both testing and ticket writing functions. Thus, no one else was present who could have entered any false results. On four of the other days, the Ticket Writers were other Grievants who admitted falsifying on some of the days they tested. On five days Grievant Ringer, discussed below, was the Ticket Writer. Based on these findings, the Arbitrator finds overwhelming evidence to support the conclusion that Grievant Reveal willfully falsified test results on official ODOT records.

GRIEVANT RINGER

Grievant Ringer is accused of willfully falsifying on three days, June 11, 26 and 27, 1985.

On June 11, 1985 he signed a report allegedly showing results from four tests that had been performed. On all four tests the percentage remainders to the nearest .1 was .Ø on all of the sieves. On the first of the four tests the possibility of consecutive .Ø percentage remainders was 1 in 1,ØØØ. The same was true on the second test. On the third test the probability was 1 in 1ØØ,ØØØ. On the fourth and last test the probability was also 1 in 1ØØ,ØØØ. Individually considered those results are very highly unlikely. When considered collectively, the data produces sixteen consecutive percentage remainders. The probability of that event is 1 in 1Ø quadrillion—absolutely unbelievable!

On June 26, 1985, Grievant Ringer signed a report giving the results for five tests. When the information he reported is calculated for percentage remainder to the nearest one tenth, there are nineteen consecutive zero tenth percentage remainders! The possibility of such results on all five tests are in the quintillions. The probability of that happening on each of the first three tests considered alone was 1 in 1,ØØØ. On each of the last two tests the probability was 1 in 1ØØ,ØØØ.

The same kind of anticipated results apply to the test result data which was reported for June 27 when Ringer was the assigned Inspector. In other words of the total of 13 tests reported on those three days 11 must have been falsified.

Mr. Ringer was hired in May of 1979. For most of his employment he was a material controller. In 1984 he asked to be promoted to a higher position. After going through the personnel audit procedure he was offered and persuaded to become a Bituminous Inspector, only a lateral move, which he did not really want and may not have been equipped to handle.

After he became an Inspector he usually worked as a Ticket Writer and not directly involved with tests. Supervision knew Ringer was not able to

perform tests. His deficiency on that aspect of the job contributed to Supervision's giving him a relatively poor job performance evaluation.

In May 1985 Ringer was off work for several weeks due to an injury. When he returned supervision asked him to learn to perform testing and reporting. Supervision told him that he would work with another Inspector who would perform the tests as well as write tickets until Grievant Ringer learned to do the testing work. He began to be assigned officially to test on or about June 4, 1985.

The Arbitrator accepts as credible Mr. Ringer's testimony that in June he signed TE-124's and 125's for some of the false test results for which one of the other Grievants gave him information. Even in July 1985 Supervision had not checked out Ringer as having learned to perform the tests; he still had difficulty with the tests and was getting the test results from others assigned to be Ticket Writer. The Arbitrator is not convinced by the evidence presented that in June 1985 Grievant knew how to perform the tests and willfully falsified to avoid performing the assignment.

GRIEVANT PHILIP GROW

Mister Grow is accused of willfully falsifying 20 of 31 tests on five days: June 11, 17, 19, 21 and 25, 1985.

He was assigned to perform the tests and signed the subject reports listing the data which was questioned. He insisted in arbitration that he performed the tests and reported the results truthfully. Frankly the Arbitrator does not find Mr. Grow's testimony to be credible.

Grievant Grow was first employed by ODOT on March 26, 1984. He bid and was promoted to Bituminous Inspector on May 26, 1985. At that time the test procedure was explained to him. His first assignment to the job was on May

28, 1985. Within the first few days he demonstrated that he was a very fast learner. In fact, he claimed to supervision within the first week of June that he knew all of the testing procedures already and could handle any number of tests that might be required. Before June 11, 1985 that claim was verified by Grievant's co-workers and the traveling inspector who checked Grievant's work. Supervision accepted his claim that he knew how to perform the tests.

For June 11 Mr. Grow reported that he performed two tests. On one of those tests he reported data which when applied would produce five consecutive Ø remainders, a probability of 1 in 100,000. That result that is possible, although somewhat unlikely.

On June 17 he performed six tests. The data he reported on four of those tests produce consecutive zero tenth percentage remainders. The probability of such results occurring was 1 in 100,000 on each of three tests and 1 in 1,000 on the fourth test. The probability of having the 18 consecutive .Ø percentage remainders was 1 in 1 quintillion.

On June 25, 1985, Mr. Grow reported that he made five tests. On one of those tests he recorded data that would have resulted in eight consecutive .Ø percentage remainders. The probability of that occurring is 1 in 100 million. Other tests reported the same day had a probability of 1 in 100,000, 1 in 10,000, and 1 in 1,000.

The results he reported for June 21, 1985 were even more incredible. He reported a total of nine tests. Results of one test produced eight consecutive .Ø percentage remainders, a 1 in 100 million chance. The same statement applies to a second test. Results he reported for a third test product ten consecutive .Ø percentage remainders! The probability against that occurring is 10 billion to 1! The results he reported for three other tests on June 21 also are highly improbable.

Although the State claimed that Grievant had falsified results for five tests on June 19, it submitted analysis sheets for only four tests. Although the Arbitrator applied the "Thelen" calculations to the -124's and -125's submitted for June 19, 1985, he did not find a fifth "unrandom" set of test results for that day. Therefore the Arbitrator reduced from 20 to 19 the "unrandom" sets of test results reported by Mr. Grow on the five dates specified by the State.

When the percentage remainder analysis is made, one of the nineteen tests has results having a probability of only 1 in 10 billion, three had results which had a probability of only 1 in 100 million, seven had results with a probabiity of 1 in 100,000, three had results with a probability of 1 in 10,000, three had a probability of 1 in 1,000 and two had results which had a possibility of 1 in 100. This is overwhelming evidence that at least the vast majority of the 19 were falsified.

At arbitration Mr. Grow ultimately conceded that eighteen of the questioned tests may have been falsified but denied responsibility. First he said he did not know how to perform the tests until after June 19, 1985. He contended that the information had been written on the reports or provided to him by others, so that the should not be held accountable. In effect, he made claims similar to those made by Mr. Ringer and given credence by the Arbitrator.

It is true that Mr. Grow did not become an Inspector until May 28, 1985. However there are great differences between his situation and that of Ringer.

In a year on the Inspector job, Ringer had learned and performed only the Ticket Writer function. Supervision knew Ringer had not yet learned the testing procedures and had reservations about his trainability. However supervision was dissatisfied with having a person perform only part of the Inspector job, so they decided on extra ordinary efforts to train him.

He was told to watch other Inspectors, learn whatever they did and record whatever results they provided. Such instructions had not been given to Grow and did not apply to his situation. Grow had claimed and demonstrated and ODOT believed that he was capable of testing and entering accurate, truthful information on the reports as specified in the Manual.

For the reasons stated above, the Arbitrator finds that there is clear and convincing evidence that Grievant Grow willfully fabricated and/or falsified test results for nineteen samples on the five days specified.

EVALUATION

The Bituminous Inspector has two basic duties in connection with testing a sample. First he must perform the test to determine whether the materials satisfy specifications and therefore are acceptable for use on the road. Second he must record the true results of the test he performed.

Grow would not be absolved even if it were true as he claimed that his Ticket Writer had recorded some of the false results. Grow did not perform the required tests. Because he knew he had not performed the tests he should not have entered falsified results, nor should he have allowed anyone else to do so. By signing the TE-125 reports Grow adopted any falsification/fabrication even if it had been provided by or placed on the paper by someone else.

The omission to perform the tests monitoring concrete was nonfeasance in office. The submission of falsified results was malfeasance. These are clearly proscribed by section 125.34 of The Ohio Revised Code. The actions are also violations of ODOT's directive No. A-301. That directive points out in item 34 that a violation of Section 124.34 of the Ohio Revised Code is basis for disciplinary action. The directive also prohibits "willfully

falsifying any official document" (item 21) for which ODOT will consider removal, and "failure to follow written policies of the Director." (item 2.c)

Except for Grievant Ringer, the Arbitrator found, based on admission and/or analysis, that each of eight Grievants had willfully falsified reports. Accordingly those grievants violated the specified items in the ODOT Directors Directive A-301, constituting just cause for discipline.

The Union argued passionately and extensively both at the hearing and in its post-hearing statement that the willful falsifications do "not force the conclusion that termination was justified. Evidence was presented at the hearing which mitigated against the 'economic death sentence' for the employee".

Among the points cited by the Union is that

> the district in which these persons worked was the busiest in all of ODOT. There were not even enough inspectors to go around. The pace of work is hectic, and there is great pressure from the the plant operators and construction personnel to not slow down production.

Inspectors are assigned during the construction season to check quality and quantity of concrete mix being delivered to the state. If the tests are not performed for any reason, the purpose of the job is undermined and destroyed. Material should not be accepted without testing. If testing capability could not match production, the matter should have been reported. There was no such report. In no way could an Inspector decide to abandon testing and falsify tests.

In any event there is no factual showing that any of the Grievants was overloaded with work. On some of the days only three, four or five tests were required, a matter of three to four hours work, but the Grievants still falsified a majority of the tests.

The Union cited as another reason to mitigate that "supervision of the Inspectors had grown lax over the years. Central office, until the discovery

of these false reports, had almost stopped checking on the district." There is no requirement that ODOT assume that its employees will behave fraudently. One might argue that an employee is entitled to be regarded as an honorable employee at least until his conduct is cause for suspicion. It was a check of B___'s reports which had obvious mathematical arrors that led to the investigation of his conduct and then to all the other Inspectors.

The Union says "the Inspectors had a clear understanding as to when it was appropriate to "fudge" on a test. You had to know to know the operator well enough to know he did not cut corners." The Inspectors are assigned to a plant to insure that the specifications are met and that specified quantity is being delivered. They have no right to "understand" or change specifications without express supervisory approval. No Inspector has a right to assume that products at a given plant need not be inspected because he believes the concerned operator is honest. The test is made to insure that product complies with specifications, and to bar off spec product whether caused by dishonesty or any other reason. There is no reason for an Inspector to "fudge". Furthermore the Manual makes clear that no Inspector has the authority to revise the rules.

The Union says

> all these facts taken together created an atmosphere which encouraged falsification. It should also be noted that the practice [of test falsificaton] was one which was widely known among the inspectors and one which had gone on for some time. Joe Sands, the present supervisor of the inspectors was also for a long time one of this group of inspectors. It was unlikely that he was not aware of the practice and tacitly condoned it.

If the Arbitrator had been presented with persuasive evidence that Supervision had known that test falsification was being practiced but ignored or tolerated it, the Arbitrator would find that the Employer had not given fair warning to the employees of possible or probable disciplinary consequences to falsification. The test in question is basically a simply

one. Anyone familiar with the testing procedure would know that it could be falsified very simply by multiplying an acceptable percentage times an acceptable sample amount. Knowledge that it could occur is not the same as knowledge that it was occurring. The Arbitrator accepts that Joe Sand knew that the tests could be falsified but Mr. Sand straight-forwardly denied in arbitration having knowledge that even one Inspector was falsifying. He was subjected to examination by the Union and Arbitrator. No basis was established to find that Supervisor Sand knew but ignored falsifications. Contrary to the Union's opinion, his testimony on this point was not vague and evasive, it was clear and firm. Therefore, there is no basis for not believing him.

The Director's Directive No. A-301 had been posted in every laboratory used by the Grievants. And every lab had the Bituminous Concrete Manual. All the Grievants knew that testing wa the primary purpose of the job. For that reason alone and without considering Directive 301 and section 124.34 every grievant knew or should have known that if he did not perform the testing but simply submitted false reports he would be subject to discipline and discharge.

The Union states that "all the Grievants...were...'normal people--people with friends and family'...in doing what they did they did not seek to profit or harm anyone." The Grievants were profiting. They were receiving money for performing an important job which they just did not do and did not regard seriously. That failure and their acts to cover up are magnified because the testing function they did not perform is critical to the safe construction of highway projects on roads and bridges for which society pays substantial money. Their repeated serious misconduct ignored the obvious possibility that the product might be unsafe for use or might deteriorate prematurely, causing

substantial additional expense, inconvenience and danger to the public.

ODOT concluded that this is not a situation where progressive discipline is appropriate and that all Grievants should be discharged.

The Union urges that the extensive service of some of the Grievants should be considered to reduce the discipline from discharge. Frankly the fact of extensive seniority by some of the Grievants presents a matter of great concern to the Arbitrator. He has considered ODOT's determination to discharge all Grievants. After review the arbitrator has concluded that ODOT's determination to terminate all of the violators cannot be found to be excessive and arbitrary or unreasonable for several reasons. First, the violations were serious, calculated and premeditated, and were stopped only by ODOT's intervention after accidental discovery of B___'s acts. Second, the majority of the Inspector force was engaged in falsifications involving much of the product used in highway construction. Most of the Inspectors who falsified tests worked on some days writing tickets with other Grievants who falsified tests on the same product. In effect, if not actually, the majority of the Inspectors were fellow conspirators at different plants who did not check the product with the risk falling on the public they purported to serve. As a result, the state paid a great deal of money for concrete products that may have been of questionable quality or even dangerous. If the product is merely inferior it will deteriorate prematurely, needing replacement thereby increasing costs. When the replacement occurs the public will again be inconvenienced and subjected to road hazards.

The reputation of ODOT and it's Inspectors has certainly been dishonored and seriously blemished. As evidenced by the pertinent provision of the U. S. Code quoted in the Manual, false representations and reports of the nature involved in this case are extremely serious.

CONCLUSION

Grievance No. 54-86-D8, ND 471; Grievant Ringer

The Employer has not shown clear and convincing evidence that Grievant Ringer willfully falsified the reports as charged. Accordingly, there is no just cause for his discharge and he should be reinstated and made whole.

The Arbitrator notes that Mr. Ringer did not desire to perform the testing function and even the Employer questioned his aptitude and/or interest for that duty. While recognizing the Employer's right to make assignments, the Arbitrator recommends that on Mr. Ringer's return to work, the parties consider him for assignment to a different function or job which is acceptable to him.

Grievance Nos. 46 through 53-86-D8; ND 463-470; Grievants Reveal, Grow, Knight, Heinlein, McDaniel, Steele, Justus and Quinn

The Arbitrator analyzed the evidence of falsification against each of these Grievants, even those who admitted the charge. There is very clear and convincing evidence that each of them willfully falsified the reports as charged in violation of the Ohio Revised Code and ODOT regulations, thereby giving just cause for discipline. Under the circumstances there is no basis for finding that ODOT's determination to remove every one of these grievants was unreasonable, arbitrary, capricious or unfair.

AWARD

Grievance No. 54-86-D8, ND 471 is sustained. The Employer is directed to reinstate Grievant Ringer and make him whole for lost wages and benefits with no break in continuous service. The amount of any monies he received as a result of his discharge may be offset.

Grievances Nos. 46 through 53-86-D8; ND 463-470 are denied.

Nicholas Duda, Jr., Arbitrator