STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES' ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO STUDENT LOAN COMMISSION
(Columbus, Ohio)

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Larrie Green (Special Evaluation: Contract Interpretation)

CASE NUMBER: G-86-67

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: May 8, 1987

APPEARANCES

For the Employer

Karen A. Steele	Manager of Computer Services
Paul D. Cornell	Program/Analyst Supervisor
Michael P. Duco	Office of Collective Bargaining Observer
Donald E. Elder	Advocate

For the Union

Larrie Green	Grievant
Vickie Anderson	Steward
Linda Fiely	Associate General Counsel

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Student Loan Commission

(Columbus, Ohio), hereinafter referred to as the Employer, and the Ohio Civil Service Employee Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union/Association for July 1, 1986-July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on March 11, 1987 at the Office of Collective Bargaining. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated that they would submit briefs.

ISSUES

Does the employer have the authority, right, or responsibility to conduct a special performance evaluation process?

If so, was the process used in accordance with the terms of the Collective Bargaining Agreement between the parties, Ohio Administrative Code and Ohio Revised Code?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not

limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9." (Joint Exhibit 1, page 7)

ARTICLE 22 - PERFORMANCE EVALUATION

Section 22.01 - Use

"The Employer may use performance evaluations pursuant to the Ohio Administrative Code Chapter 123:1-29, except as modified by this Article. If an Agency chooses to use a performance evaluation instrument different than that utilized by the Department of Administrative Services, it shall notify the Union and consult with it prior to implementing the new instrument.

"Within one hundred twenty (120) days of the effective date of this Agreement, the Employer will enter into a comprehensive study to improve the present performance evaluation system. The Union will have full opportunity for input and consultation prior to and during the study." (Joint Exhibit 1, page 33)

Section 22.02 - Limits

"Measures of employee performance obtained through production and/or numerical quotas shall be a criterion applied in evaluating performance. Numerical quotas or production standards, when used, shall be reasonable and not arbitrary or capricious.

"Performance evaluations shall not be a factor in layoffs.

"Employees shall receive and sign a copy of their evaluation forms after all comments, remarks and changes have been noted. A statement of the employee's objection to an evaluation or comment may be attached and put in the personnel file." (Joint Exhibit 1, page 33)

ARTICLE 24 - DISCIPLINE

* * *

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." (Joint Exhibit 1, page 35)

* * *

Section 24.06 - Prior Disciplinary Actions

"All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

"Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

"This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement. (Joint Exhibit 1, page 37)

ARTICLE 43 - DURATION

Section 43.01 - First Agreement

"The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws."

Section 43.02 - Preservation of Benefits

"To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives."

CASE HISTORY

The Ohio Student Loan Commission is a state agency which administers the Federal Guaranteed Student Loan (GSL) and the Plus loan programs. The single mission of the agency is to provide access to post-secondary education to students through student loans. At the present time, the GSL and Plus programs serve as the loaning mechanisms. It should be noted that the Commission's operating revenues are obtained from a fee charged to borrowers to cover the costs of potential claims.

L. Green, the Grievant, was hired by the Employer on April 15, 1985 as a Programmer Analyst II. Employer witnesses testified that this position was considered an entry level position. They also noted that a two (2) year associates degree with an emphasis in programming and/or equivalent field experience were necessary qualifications for this position. P. Cornell, Program/Analyst Supervisor, testified that the Grievant was selected because he had the appropriate educational qualifications. More specifically, the Grievant attained a two (2) year associates degree from Belmont Technical Institute.

Cornell testified that the programming activities within the Commission are conducted by approximately thirty (30) employees. The manpower pool consists of eighteen (18) programmers and twelve (12) operators and secretaries. The data processing department is composed of the following four (4) programming teams: Columbus Repayment Center, Claims, Claims Accounting System, and Graduate Student Loan. It should be noted that the Grievant performed the

majority of his programming activities for the Graduate Student Loan team.

The chain of command within the Graduate Student Loan team consists of a number of levels. At the top of the hierarchy, K. A. Steele serves as the Manager of Computer Services. She supervises Cornell, who in turn supervises a series of Programmer/Analyst classifications ranging from Programmer/Analyst V to Programmer/Analyst II.

The Grievant testified that his assignments were given to him by more senior Programmer/Analysts. The assignments dealt with the completion of certain aspects of larger projects that were being undertaken by individuals with greater levels of experience and expertise. The Grievant also maintained that his work was jointly reviewed by Cornell and the Programmer/Analyst who gave him the assignment.

The Grievant also testified that as a Programmer/Analyst II he had a number of general duties. First, he was required to perform some maintenance in existing programs. Second, he wrote new programs as assigned by his supervisors, and documented that content of the programs and the files that were used in the development of the programs.

Prior to the effective date of the Collective Bargaining Agreement (Joint Exhibit 1), and subsequent to the enactment of this document (See Page 3 of this Award for Article 22: Performance Evaluation, Section 22.01 - Use), the Employer has an obligation to evaluate its employees. The Ohio Administrative Code (OAC) Rule 123:1-29-01 contains the following sections which

specify the Employer's responsibilities regarding performance evaluations:

123:1-29-01 Performance evaluation

"(A) Classified state and county welfare employees serving in a classification established pursuant to division (A) of section 124.14 of the Revised Code and all other county agencies and general health districts shall be rated or evaluated with respect to performance efficiency twice during the employee's probationary period and once during each calendar or anniversary year.

(B) The first performance evaluation shall be completed within thirty days of the conclusion of the first half of the probationary period. The second evaluation shall be completed within thirty days of completion of the probationary period, unless the employee is given a probationary removal, in which case the final evaluation will be made at the time of the removal. The final probationary evaluation shall state whether the employee is to be retained or probationarily (sic) removed. No probationary performance evaluation will be accepted or processed.

(C) All employees specified in paragraph (A) of this rule who have completed their probationary periods shall be evaluated once a year. The annual evaluation shall measure the employee's performance for the year immediately preceding the valuation date or for that portion of the year after the completion of the probationary period. Employees shall be evaluated within the sixty-day period of thirty days prior to and thirty days subsequent to their anniversary date, provided, however, that the director may authorize an appointing athority (sic) to have all annual evaluations for his employees completed on an alternate schedule different than that prescribed by these rules. For purposes of this rule, "anniversary date" shall be calculated from the date of commencement of continuous service." (Joint Exhibit 8)

* * *

In accordance with the above provisions, the Employer evaluated the Grievant two (2) times during his probationary period. The first probationary evaluation took place on July 14, 1985 which was the mid-probationary terms (Union Exhibit 1). The following rater's comments were contained on the form:

"RATER'S COMMENTS

Larrie has been working very hard. He needs to spend more time in problem determination and to build up more programming skills.

Signature W. G. Schreck Date: 7/22/85"

(Union Exhibit 1)

It should be noted that the document indicates that K. Steele agreed with the above comments. D. H. Harmon, the Appointing Authority, also concurred with the Rater's evaluation by noting that he agreed with the evaluation (Union Exhibit 1).

On October 11, 1985 the Employer conducted a final probationary performance evaluation (Union Exhibit 2). The following Rater's comments were contained in the evaluation form: "RATER'S COMMENTS

Larrie is making good improvement. What few problems that still exist should be resolved through experience.

Signature Paul Cornell/Karen Steele Date: 11/8/85"

(Union Exhibit 2)

It should be noted that the Appointing Authority agreed with the Rater's and Reviewer's comments (Union Exhibit 2).

On April 15, 1986 the Employer conducted a performance evaluation which reviewed the Grievant's annual performance (Union Exhibit 3). This evaluation was allegedly conducted in accordance with Ohio "Administrative Code (OAC) Rule 123:1-29-01. The evaluation was not as positive as the evaluations conducted during the Grievant's probationary period (Union Exhibits 1 and 2). More specifically, Cornell made the following assessment of the Grievant's performance:

"RATER'S COMMENTS

During his first year Larrie has been slow to adapt to data processing concepts and programming. At last evaluation, we

recommended Larrie take additional programming courses. Larrie has taken some courses at OSU. I feel at this time in Larrie's data processing career, with a degree from Belmont Tech, and additional courses at OSU, he should have excelled technically much more quickly. The problem areas are VSAM procedures, table handling and JCL. I feel Larrie needs more programming experience before being promoted to the next P/A level.

Signature Paul Cornell Date: 4/27/86"

(Union Exhibit 3)

In the Reviewer's Comments portion of the document, however, Steele agreed with the above comments but also initiated a special evaluation procedure. Steele's comments included the following recommendations:

"REVIEWER'S COMMENTS

I agree with the above comments. Although Larrie has taken recommended courses to help him in deficient areas, there is no recognizable difference in his work. I am recommending special reviews be conducted every 90 days to track consistant (sic) and immediate improvement in his work.

Signature Karen Steele Date: 4/29/86"

(Union Exhibit 3)

The evaluation form also indicates that on May 1, 1986 the Appointing Authority reviewed the above comments and concurred with the rater's and reviewer's comments (Union Exhibit 3).

On July 15, 1986 the Employer conducted a special evaluation of the Grievant's performance (Joint Exhibit 10) in accordance with the recommendations contained in the Grievant's annual evaluation (Union Exhibit 3). The following Rater's Comments authored by Cornell on October 8, 1986 indicate that he had certain misgivings about the Grievant's performance:

"RATER'S COMMENTS

On 4-29-86 Larrie received his annual evaluation. At that time, I felt he should have excelled technically much quicker and I stated that problem areas. At that time, Karen recommended special reviews be conducted every 90 days to track consistent & immediate improvement. During this 90 days, I have documented Larrie's progress & his work and feel the documentation explains Larrie's progress. As of 4/29/86, I felt Larrie's problem areas were VSAM procedures, table handling, & JCL. I feel Larrie has not excelled or shown significant improvement in these areas, but more important he has had real problems with COBOL logic. The quantity of work was lowered because only two programs have been worked on during this 90 day period. I feel Larrie needs to improve his programming skills and abilities before being promoted to the next Programmer/Analyst level. I also feel continued 90 day evaluations are needed.

Signature Paul Cornell Date: 7/8/86"

(Joint Exhibit 10)

Steele agreed with Cornell's evaluation but made some additional comments which were contained in the Reviewer's Comments section of the evaluation:

"REVIEWER'S COMMENTS

Knowing the extent of the two assigned projects of which the last should have been completed weeks ago and still is not, I cannot help but agree with all of Paul Cornell's comments. Larrie was allowed to set his own time goals and still could not meet them. He has not demonstrably shown improvement in any problem areas. I recommend another special review to be done in 90 days; during this time the log will continue to be kept and the meetings to review assignments and their progress will also continue. However, during this 90 day period, progressive discipline will start.

Signature Karen Steele Date: 7/9/86"

(Joint Exhibit 10)

Upon review of the above comments, the Appointing Authority concurred with the evaluation and provided the following comments:

APPOINTING AUTHORITY ACTION

I concur. The Commission offers a good environment for professional growth, but we must be able to meet the standards of the agency in terms of quality and quantity.

Signature David H. Harmon Date: 7/10/86"

(Joint Exhibit 10)

It appears the Employer never initiated a second special evaluation.

On July 22, 1986 the Grievant filed the following Statement of Grievance and Adjustment Required:

"STATEMENT OF GRIEVANCE

On April 29, 1986, my immediate Supervisor Mr. Paul D. Cornell in consort with the Unit Manager Ms. Karen Steele instituted special job evaluation review every 90 days; to the best of my knowledge, I am the only person within this section of the Student Loan Commission and within the entire Commission that has been singled out for this type of evaluation. This special evaluation is in violation of Ohio Civil Service Laws and Rules 123:1-29-01 part C. It is in violation of the agreement between the State of Ohio and Ohio Civil Service Employees Association Local 11, AFSCME AF/CIO (sic), which took effect on July 1, 1986. This action is in violation, specifically of Article 2, Section 2.01, 2.02 to booth (sic) actions arising out of these evaluation including, the records that are being kept by my Supervisor are in violation of Article 23, Section 23.01 and 23.03. In addition to major violations of Article 24, Section 24.02.

ADJUSTMENT REQUIRED

An immediate end to the special 90 day evaluation: All special records that pertain to me that is currently being help by my supervisor and others except the personnel manager, these records should be returned to me for destruction, and not be refered to by anyone within the Student Loan Commission.

Also to be treated fairly and equally in all aspects of employment including the right to seek training, advice, and assistance from my supervisors without malice and intimidation. And made whole."

(Joint Exhibit 2)

In response to the grievance (Joint Exhibit 2), Cornell wrote the following response on July 29, 1986:

"On April 29, 1986, Larrie Green received his annual evaluation. At that time, I felt Larrie should have excelled technically much more quickly and I stated the problem areas. At that time, Karen Steele recommend special evaluations be conducted every 90 days to track consistent and immediate improvement. During this 90 days, I have documented Larrie's progress and his work. I feel the documentation explains Larrie's progress.

Statement of Grievance: Larrie Green stated to the best of his knowledge, he was the only person within the Commission singled out for this type of evaluation. This type of evaluation (special) has been conducted throughout the Commission and the personnel records will show such. This type of evaluation is not in violation of Ohio Civil Service Laws. Rule 123:1-29-01 Part C., does not address special evaluations.

This evaluation is not in violation of Article 2, section 2:01, 2:02 of the State of Ohio and Ohio Civil Service Employees Association Local 11, AFSCME AFL-CIO. This evaluation is not discriminatory in any way based on other special evaluations done throughout the Commission. This evaluation was used for the purpose of tracking improvement.

Section 2:02 - the Agreement Rights have no bearing on this special evaluation. The purpose of this special evaluation is to track improved performance and is never used as a tool for harassment.

The special evaluations and documentation are not in violation of Article 23, section 23:01 and 23:03.

23:01 - Personnel files - All special evaluations and documentation have been filed and maintained within O.S.L.C. Personnel Office and the Department of Administrative Services.

23:03 - Employee notification. Larrie Green has received all copies of the special evaluation and documentation.

Article 23, section 24:02. - There has never been disciplinary action; therefore, none could have been included in any performance evaluation.

ADJUSTMENT REQUIRED

Larrie Green is presently within his second 90 day evaluation. These evaluations will continue until Larrie shows consistent improvement. All copies of documentation are being

held by (1) Larrie Green, (2) OSLC Personnel, (3) State Personnel, (4) Department Personnel file.

Larrie has been treated fairly and equally by all Managers, Supervisors, and fellow employees. Larrie was advised at his 6-month evaluation to seek additional training. The Commission paid for a COBOL course at O.S.U. and gave additional time off for a J.C.L. Course at O.S.U. We have given Larrie the opportunity for additional training. Larrie's Supervisor, and his fellow employees have helped and given advice to Larrie on all of his projects without malice or intimidation. We, as a department, are more than willing to help Larrie professionally, for the good of Larrie and the O.S.L.C."

(Joint Exhibit 3)

The parties were unable to resolve the grievance (Joint Exhibit 2) at the various stages of the grievance procedure (Joint Exhibits 4-7).

A number of disciplinary actions, however, were issued by the Employer during the period that the grievance (Joint Exhibit 2) was being processed. On September 22, 1986 the Employer issued the following verbal reprimand to the Grievant:

"TO: LARRIE GREEN, PROGRAMMER/ANALYST

FROM: PAUL CORNELL, PROGRAMMER/ANALYST SUPERVISOR

SUBJECT: VERBAL REPRIMAND

Based on your last 90 day special evaluation, you were informed that if we did not see improvement concerning job related skills (Cobol programming logic) and completing assignments, we would start progressive discipline. This verbal reprimand is for not completing your present assignment by September 17, 1986 as discussed on September 19, 1986."

(Union Exhibit 4)

A notation in the above document indicates that the Grievant had reviewed the action but that he did not agree with it as to form and content.

On October 2, 1986, the Grievant received a written reprimand from Cornell because he allegedly failed to complete an assignment by October 2, 1986. The written reprimand contained the following comments:

"Based on your last 90 day special evaluation, you were informed that if we did not see improvement concerning job related skills (COBOL Programming Logic) and completing assignments, we would start progressive discipline. This written reprimand, the second step of progressive discipline is for not completing your present assignment by October 2, 1986."

(Union Exhibit 5)

The grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Union

It is the position of the Union that the Employer does not have the authority, right, or responsibility to conduct a special evaluation process.

The Union argued that neither the Collective Bargaining Agreement (Joint Exhibit 1) nor Ohio Administrative Code Rule 123:1-29-01 (Joint Exhibit 8) provide for a special evaluation process. As a consequence, the Union argued that the special evaluation process initiated by the Employer was outside the Employer's scope of authority (Union Brief, Page 4). In support of this contention, the Union claimed that the Performance Evaluation Article (See Page 3 of this Award for Article 22 -Performance Evaluation, Section 22.01 - Use) provides for performance evaluations but that they must be conducted in accordance with this Administrative Code Rule 123:1-29-01 (Joint Exhibit 8). The Union maintained that Sections (A) and (C) of

Rule 123:1-29-01 (Joint Exhibit 8) limit the Employer's Authority in terms of the number of performance evaluations it can legitimately administer. The Union noted that Section (A) specifies that an employee will be evaluated with respect to performance efficiency twice during the probationary period, and once during each calendar or anniversary year. The Union maintained that similar restrictions are contained in Section (C). This section contains language which enumerates the time period to be used when conducting performance evaluations. It states that employees that have completed their probationary period shall be evaluated once a year. Language contained in this section also indicates that performance shall be measured for the year immediately preceding the valuation date, or for that portion of the year after the completion of the probationary period.

In further support of the above interpretation, the Union argued that the special evaluation procedure was an extraordinary process. A process which was not customarily initiated by the Employer (Union Brief, Page 4). The Union maintained that during Cornell's tenure at the Commission the Grievant was the sole employee that had been placed on special evaluation status.

For a number of reasons, the Union also claimed that the special evaluations (Employer Exhibit 1) introduced by the Employer in support of its special evaluation policy were also deficient in terms of credibility. First, the special evaluations introduced as exhibits were issued prior to the effective date of the Collective Bargaining Agreement (Joint Exhibit 1). Thus, the propriety of their issuance under the terms and conditions

contained in the Agreement (Joint Exhibit 1) was tenuous. Second, the Employer was only able to produce two (2) examples, and portions of one (1) example dealt with multiple special evaluations for the same employee. Last, Cornell was unable to explain the conditions surrounding the issuance of these evaluations.

The Union charged that the special evaluation process was arbitrary, which caused the Grievant's evaluation to be inaccurate (Union Brief, Page 6). The Union claimed that Cornell failed to provide a rationale for the standards used to assign numerical scores to the Grievant's performance dimensions. The Union alleged that Cornell's testimony lacked credibility because the personnel department failed to provide him with guidelines or procedures; even though the department had recommended the special evaluations.

The Union maintained that the Employer's argument dealing with the use of performance evaluations is in conflict with the Agreement (Joint Exhibit 1) (Union Brief, Page 6). More specifically, the Union argued that Ohio Administrative Code Rule 124.325 (Employer Exhibit 2) is not applicable because the use of retention points, for the purpose of layoffs, is in conflict with the limitations contained in the Agreement (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.02 - Limits). The Union strongly emphasized that this contract provision supersedes the Ohio Administrative Code and does not provide for the use of performance evaluation as a factor in layoffs. The Union noted that the parties had negotiated

contract language which recognizes that the Agreement (Joint Exhibit 1) would supersede all matters covered by the Agreement (Joint Exhibit 1) and other State statutes, regulations or directives. The only exception to this preposition allegedly dealt with matters contained in the Ohio Revised Code Chapter 4117 (See Page 4 of this Award for Article 43 - Duration, Section 43.01 - First Agreement). Thus, in the Union's opinion, Cornell's assertion that other individuals summed the separate evaluation scores for retention point purposes seemed unconvincing. The Union maintained that his testimony failed to rebut the arbitrary manner in which the special evaluation process was conducted.

The Union alleged that the special performance evaluation process placed the Grievant in an additional probationary period (Union Brief, Page 5), which conflicted with the Collective Bargaining Agreement (Joint Exhibit 1) negotiated by the parties. The Union also contended that the process was punitive, humiliating, and demeaning. The Union, moreover, alleged that the process engaged in by the Employer led to the Grievant's demise rather than foster the Grievant's skill development. In support of the above argument, the Grievant testified that other employees were aware of his status, and that the special evaluation process reduced his morale and initiative. V. Anderson, a Union Stewart, claimed that the Employer mishandled the situation and that other alternatives should have been considered. She maintained that improved communication between the Grievant and management representatives would have corrected any potential performance deficiency.

The Union also argued that the special evaluation process was defective because it contained statements which referred to disciplinary actions (Union Brief, Page 5). The Union claimed that the special evaluation form contained the phrase "progressive discipline will start" (Joint Exhibit 10) which violated a specific limitation contained in the Agreement (See Page 3 of this Award for Article 24 - Discipline, Section 24.02 -Progressive Discipline). The Union alleged that the inclusion by the Employer of the above phrase circumvented the process of expunging negotiated by the parties (See Page 4 of this Award for Article 24 - Discipline, Section 24.06 - Prior Disciplinary Actions). The Union maintained that the parties never intended to expunge annual performance evaluations, and thus, the Employer should be prevented from including disciplinary statements in performance evaluations (Union Brief, Page 6).

Based on the above arguments, the Union requested that the Arbitrator determine that the special evaluation process was improper, and that all documents and records related to the process should be expunged and destroyed. The Union also proffered that a ruling in the Union's favor should render the special evaluation process as generally improper, as applied to all employees covered by the Collective Bargaining Agreement (Joint Exhibit 1) (Union Brief, Page 6).

The Position of the Employer

It is the position of the Employer that it has the right and authority to conduct special evaluations. The Employer argued,

moreover, that its authority is derived from inherently reserved residual rights, statutorily reserved management rights under the Ohio Revised Code, and expressly reserved management rights specified in several provisions of the Agreement (Joint Exhibit 1) (Employer Brief, Page 7).

The Employer maintained that it is a well established labor relations principle that management retains those rights not specifically negotiated away from management by the union, and that those rights remain unfettered and within the control of management (Employer Brief, Page 7). The Employer argued that this general proposition is further supported in the Management Rights Article contained in the Agreement (See Page 2 of this Award for Article 5 - Management Rights). In the Employer's opinion, this article allows it to engage in special evaluation procedures because the Agreement (Joint Exhibit 1) does not contain any language which expressly abridges this managerial prerogative.

The Employer also argued that when the parties agreed to incorporate Ohio Revised Code Section 4117.08 (C) into the Management Rights Article (See Page 2 of this Award for Article 5 - Management Rights), its reserved rights hypothesis was further bolstered and elaborated. The relevant portions of Section 4117.08 (C) are as follows:

"* * *

Ohio Rev. Code Sec. 4117.08 (C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

(2) Direct, supervise, evaluate, or hire employees;

(3) Maintain and improve the efficiency and effectiveness of governmental operations;

(4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;

(6) Determine the adequacy of the work force;

(7) Determine the overall mission of the employer as a unit of government;

(8) Effectively manage the workforce (sic);

(9) Take actions to carry out the mission of the public employer as a governmental unit.

* * *"

(Joint Exhibit 9)

The Employer maintained that the specific authority to conduct special evaluations is derived from point number two (2) which preserves the Employer's authority to evaluate employees. The Employer, moreover, emphasized that its right to determine the number and frequency of employee evaluations could be readily inferred from other portions of Ohio Revised Code Section 4117.08 (C). The Employer suggested that the following managerial responsibilities comply with the tenets of its proposition: determine matters of inherent managerial policy, standards of services, personnel, adequacy of the work force, and effectively manage the work force (Employer Brief, Page 8).

The Employer posited that the Agreement (Joint Exhibit 1) does place certain limitations on the Employer's authority to conduct performance evaluations, but that none of these limitations deal with the frequency of conducting evaluations (Employer Brief, Page 9). The limitations discussed by the Employer concern its viability to use performance evaluations for layoff determination purposes (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.02 - Limits), and that disciplinary action taken cannot be referred to in an employee's performance evaluation report (See Page 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). The Employer contended that the inclusion of the above limitations implies that other limitations were not contemplated by the parties when they negotiated the performance evaluation language. As a consequence, the Employer argued that the Agreement (Joint Exhibit 1) does not contain any specific limitation regarding the frequency of performance evaluations.

The Employer contended that the references to the frequency of performance evaluations contained in Ohio Administrative Code Section 123:1-29-01 (A) (Joint Exhibit 8) does not limit the Employer's authority. The Union argued that this statutory provision establishes a minimum requirement. That is, the Employer must evaluate an employee at least once a year, but that this procedural requirement does not preclude additional special performance evaluations, when the conditions warrant such an appraisal (Employer Brief, Page 10).

The Employer attempted to offer further support for the above interpretation by focusing on the alleged objectives of performance evaluations (Employer Brief, Page 10). The Employer emphasized that the following sections of Ohio Administrative Code Rule 123:1-29-01 identify the major objectives of performance evaluations.

"* * *

(F) Performance evaluations shall be used to determine efficiency points in the computation of retention points for layoffs. Computation of retention points is governed by Chapter 123:1-41 of the Administrative Code.

(G) All agencies shall use the performance evaluation as a tool of supervision and training."

(Joint Exhibit 8)

The Employer argued that the Agreement specifically precludes the use of performance evaluations as a factor in layoffs (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.02 - Limits), and that the Agreement supersedes administrative rules (See Page 4 of this Award for Article 43 - Duration, Section 43.01 - First Agreement). As a consequence, the Employer claimed that performance evaluations should be viewed as a tool for supervision and training.

The Employer asserted that the circumstances surrounding the present grievance (Joint Exhibit 2) warranted the proper use of the special evaluation process (Joint Exhibit 10), for supervision and training purposes (Employer Brief, Pages 4-6, 10-12). The Employer alleged that during the Grievant's first year of employment he received ample job counseling and training by a

variety of management personnel. The Employer, moreover, emphasized that the Grievant was given an opportunity to upgrade his skill level via release time from work and tuition reimbursement for additional educational training. Cornell also testified that the Grievant was permitted to establish his own project deadline, which allegedly allowed the Grievant additional time for skill development. All of these support mechanisms, in the Employer's opinion, failed to upgrade the Grievant's existing skill level, as evidenced by his annual performance evaluation (Union Exhibit 3). The Employer alleged that the special evaluation process was used as a supervisory tool to salvage, counsel, and motivate the Grievant, rather than demean and humiliate him.

In addition to the supervision and training objectives of the special evaluation process, the Employer maintained that it represents sound personnel management practices. More specifically, the process allegedly provided the Grievant with clear notice concerning the Employer's performance standard requirements. The Employer also emphasized that it could not reasonably expect the Grievant to improve his performance without a clear understanding of his performance deficiencies (Employer Brief, Page 11).

The Employer claimed that the Union's interpretation of the performance evaluation process was too narrow and would lead to harsh and absurd results (Employer Brief, Page 12). The Employer alleged that if it were limited to annual performance evaluations, it would be immediately forced to initiate the disciplinary

process as a corrective measure, after counseling and training efforts had failed to engender the desired results. The Employer emphasized that the Union's approach would prevent the Employer from utilizing the disciplinary process as a last resort. The Union's approach, in the opinion of the Employer, should not be used in cases involving employee incompetency (Employer Brief, Page 12).

The Employer argued that evidence and testimony introduced at the hearing firmly evidenced that the special performance evaluation process was an established past practice (Employer Brief, Page 12). The Employer also noted that this practice was not abrogated by any provision contained in the Agreement (Joint Exhibit 1). Cornell testified that the special performance evaluation process had been utilized by the Employer for a considerable period of time. In support of this testimony, Cornell provided several examples of previous special evaluations conducted by the Employer (Employer Exhibit 1). The Employer also alleged that the performance evaluation instrument bolstered its past practice argument. Specifically, the instrument or form identifies probationary, annual and special evaluations as permissible alternative evaluation modes. The Employer stated that the use of this particular instrument is in accordance with the Agreement (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.01 - Use). The Employer, moreover, claimed that the instrument is issued to all State agencies, and that the Agreement provides for this procedure by

incorporating Ohio Administrative Code Rule 123:1-29-01 (E) (Joint Exhibit 8).

The Employer disagreed with the Union's assertion that the Grievant's special performance evaluation was engaged in by the Employer with discriminatory or wrongful intent (Employer Brief, Pages 6, 13). The Employer emphasized that the testimony provided by the Grievant and Anderson was uncorroborated by any evidence introduced at the hearing. As a consequence, the Employer maintained that the Union failed to establish that the special performance evaluation process was discriminatory or engendered a disparate treatment outcome.

With respect to the second issue proposed by the parties, the Employer asserted that the special performance evaluation was conducted in accordance with the Agreement (Joint Exhibit 1). The Employer, more specifically, alleged that the inclusion of the phrase, "[h]owever, during this 90 day period, progressive discipline will start", in the Grievant's special evaluation (Joint Exhibit 10) did not vitiate the special evaluation process (Employer Brief, 13). In other words, the Employer stressed that the Agreement prohibits the referencing of a disciplinary action taken by the Employer, rather than an action that is being contemplated as a last resort to correct performance deficiencies. (See Page 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). The Employer maintained that at the time of the special evaluation (Joint Exhibit 10) the Employer had not initiated any formal disciplinary action against the Grievant. The Employer, moreover, contended that its special

evaluation process was not defective because the Agreement allows the Employer to refer to events or actions giving rise to disciplinary actions in a performance evaluation report. (See Page 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline).

In the opinion of the Employer, the above arguments strongly support its argument that the Employer has the authority to conduct special performance evaluations. As a consequence, the Employer argued that this Arbitrator should deny the grievance.

THE OPINION AND AWARD

It is the opinion of this Arbitrator that the Employer has the right to conduct special performance evaluations. In making this determination, this Arbitrator has concluded that the performance evaluation language contained in the Agreement (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.01 - Use, Section 22.02 - Limits), and the language contained in the Ohio Administrative Code Chapter 123:1-29 (Joint Exhibit 8) that has been incorporated into the Agreement (Joint Exhibit 1), are sufficiently ambiguous to require interpretation.

This Arbitrator does not agree with the Union's contention that the performance evaluation Article (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.01 - Use, Section 22.02 - Limits) is clear and unambiguous. In this Arbitrator's opinion, the language is laden with latent ambiguity because the language becomes unclear when an effort is made to apply it to a given situation (Midwest Rubber Reclaiming Co., 69

LA 198, 199, Bernstein). The situation under consideration deals with the Employer's authority to provide an employee with purposeful feedback concerning performance deficiencies, prior to an annual evaluation. It also concerns the ability of the Employer to provide and document feedback in a non-disciplinary manner.

It is a well established contract interpretation standard that when a party includes certain exceptions in an agreement it indicates that there are no other exceptions (A.S. Abell Co., 46 LA 327, Horvitz, 1966; Great Atlantic and Pacific Tea Co., 46 LA 372, Scheiber, 1966). The present Agreement contains two sections which specifically limit the Employer's use of performance evaluations. The first section limits the manner in which performance measures may be employed, restricts the use of performance evaluations as a factor in layoff decisions, and requires that an employee receives a copy of the performance form (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.02 - Limits). The second section precludes the Employer from referring to a disciplinary action in a performance evaluation report (See Pages 3 and 4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). Thus, the inclusion of these exceptions by the parties indicates to this Arbitrator that the parties intended that the once a year requirement should be viewed as a minimum standard. In other words, the Employer does have the right to initiate special performance evaluations when the situation suggests that such an intervention is appropriate.

The above analysis is bolstered by a number of other considerations. The Management Rights Article (See Page 2 of this Award for Article 5 - Management Rights), and the incorporated portions of the Ohio Revised Code Section 4117.08 (C) (Joint Exhibit 9), contain specific references regarding the Employer's authority to evaluate its employees. These negotiated contractual provisions also specify certain managerial prerogatives dealing with the Employer's right to engage in activities which are necessary to the operation of the organization. It would, therefore, seem unreasonable to this Arbitrator to fetter the Employer's ability to evaluate its employees in light of the exceptions that were previously discussed.

It is also axiomatic in contract construction that an interpretation of ambiguous contract language, leading to harsh or nonsensical results, should be avoided when an alternative interpretation, leading to just and reasonable results, is available (Evening News Association, 50 LA 239, Platt, 1968; Rockwell Spring and Axel Co.,23 LA 481, Dworkin, 1954). In this Arbitrator's opinion, the Union's interpretation could prematurely place an employee in a disciplinary status, even though the Employer desired to provide constructive feedback in a non-disciplinary manner. Such a condition would not encourage a harmonious collective bargaining climate and could heighten the possibility of avoidable grievances and disciplinary actions.

An employee's due process rights might also be impacted if the Arbitrator agreed with the Union's interpretation. The Union's interpretation, more specifically, would limit the

Employer's ability to provide an employee with notice concerning the existence of deficiencies, and its expectations regarding performance standards. It seems unreasonable that the parties had intended to restrict this feedback to yearly evaluations and to situations arising under the disciplinary procedure contained in the Agreement (See Pages 3 and 4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). It also seems unreasonable to expect the Employer to provide non-disciplinary notice without an opportunity to document its comments and reservations. The parties have negotiated language in the Agreement which prevents the Employer from referring to any disciplinary action taken in an employee's performance evaluation (See Pages 3 and 4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). This same limitation should protect an employee's rights in annual evaluation and special evaluation situations.

The Union's position, moreover, runs counter to the generally held strategic purposes associated with performance evaluations. Performance evaluations have been defined as formal, structured systems of measuring, evaluating, and influencing an employee's job-related behaviors and outcomes [R. S. Schuler, Personnel and Human Resource Management, 2d ed. (New York: West Publishing Co., 1984)].

Evaluations have two major purposes dealing with employee evaluation and development. The evaluation purpose has traditionally concerned layoff, promotion, and transfer decisions. The developmental purpose, however, has dealt with critical

on-going managerial activities such as providing feedback, supervision, and training.

The parties have specifically limited the Employer's right to use performance evaluations as a factor in layoffs (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.02 - Limits). As a consequence, Section F of Ohio Administrative Code Rule 123:1-29-01 (Joint Exhibit 8) has been rendered moot by the parties. It should be noted, however, that the parties did not tamper with Section G, which deals with the Employer's right to use the performance evaluations as a tool of supervision and training (Joint Exhibit 8). In this Arbitrator's opinion, the above analysis indicates that the parties intended that performance evaluations should be conducted on a yearly basis for evaluation purposes; and on an as-needed basis to perpetuate the developmental aspects of performance evaluations.

The Employer's argument regarding the propriety of the special performance evaluation process is also supported by the very document used by the parties when conducting performance evaluations. By incorporating Ohio Administrative Code Chapter 123:1-29 (Joint Exhibit 8) into the Agreement (See Page 3 of this Award for Article 22 - Performance Evaluation, Section 22.01 - Use), the parties also agreed which form was to be used, and the manner of its issuance. The performance evaluation form contains a number of rating types, one of which is special. Both Union and Employer witnesses testified that this particular form has been used by the Employer for an extended period of time. The Union, moreover, failed to provide any evidence or testimony that the

form has been modified since the effective date of the Agreement (Joint Exhibit 1). In addition, the Union did not provide this Arbitrator with any documentation that the matter was discussed during contract negotiations or challenged by the Union. It is, therefore, this Arbitrator's opinion that the Union's acceptance of the evaluation form and its contents, implicitly evidences the parties acceptance of the special performance evaluation procedure.

This Arbitrator also disagrees with the Union's arguments regarding the second issue under consideration. The Agreement does restrict the Employer's authority with respect to the contents of a performance evaluation report. (See Pages 3 and 4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). The statements contained in the special performance evaluation (Joint Exhibit 10) make no reference to a disciplinary action taken by the Employer. The document merely contains statements discussing certain alleged activities engaged in by the Grievant which could give rise to future disciplinary action.

Finally, the Union's claim that the Grievant was demeaned, harassed, and discriminated against, is unsupported by the evidence and testimony provided at the hearing. The Union failed to provide any evidence which would support either disparate treatment or disparate impact theories of discrimination.

AWARD

The grievance is denied and dismissed.

May 8, 1987

Dr. David M. Pincus
Arbitrator