

ARBITRATION
BENCH DECISION AND AWARD

#57964

ARBITRATOR: Louis V. Imundo

State of Ohio

Grievance No. 123-(0910822)-240-0104

Department Department of Mental

Grievant- Shirley Edwards

Union OCSEA/AFSCME

Date Of Hearing March 28, 1991

Issue (s) : Just cause and appropriateness of action

Appearances:


For the Employer: (Advocate) Linda Thernes

For the Union: (Advocate) Tim Miller

AWARD: In the Arbitrator's opinion the Grievant's wrongdoing was an act
of "neglect of duty" and not dishonesty. Management has disciplined
the Grievant under the wrong standard of conduct. The Arbitrator has
no authority to rewrite the disciplinary action. Because Management
applied the wrong rule the action taken under this rule was
inappropriate. The Grievant is to be made whole for the two day
suspension and the matter is to be removed from her record. The
Arbitrator has stressed to the Grievant that his decision is based
on Management's error and not because of her innocence. In the
Arbitrator's opinion even if Management had applied the correct rule
lesser discipline was warranted. The lesser discipline would have
been a written warning.

Issued at: Fairlawn, Ohio

Date: March 28, 1991


Arbitrator's Signature

Before Louis V. Imundo, Jr., Impartial Arbitrator

Expedited Arbitration

In the matter of arbitration between

**DEPARTMENT OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES, YOUNGSTOWN
DEVELOPMENTAL CENTER**

and the

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL NO. 11 AFSCME**

Grievance of **Marie A. Fleming** - No. 24-15-(09-10-90)-113-01-04

ISSUES

The Parties agreed to a joint stipulation of the Issues to be decided by the Arbitrator. The Issues are:

- Was the Grievant, Marie Fleming, issued a 5 day suspension for just cause?
- If not, what shall the remedy be?

OPINION

ISSUE NO. 1

WAS THE GRIEVANT, MARIE FLEMING, ISSUED A 5 DAY SUSPENSION FOR JUST CAUSE?

The Grievant was disciplined under the following offense and standard guidelines for progressive corrective action

Idleness/Malingering

or failure to work or complete assigned duties where safety is not a threat to health and safety of others or property.

The penalty was that set forth under Category B of the ODMR/DD Labor Relations Policy Directive No. 86.2.02, Page 2.

- a) An oral reprimand for the first offense.
- b) A written reprimand for any second offense.
- c) A minor suspension (i.e. one to five days) for any third offense.
- d) A more severe suspension of six to ten days for any fourth offense.
- e) A removal for any fifth offense.

The Grievant, who is a Therapeutic Program Worker (TPW) was disciplined for allegedly being found asleep during scheduled work time by her supervisor, Mr. Michael Irwin. Mr. Irwin originally charged Ms. Fleming with sleeping on the job. After reviewing the case against Ms. Fleming, and prior to imposing any disciplinary action, higher-level Management reduced the charge from sleeping on duty to idleness/malingering. The Grievant was given a five day suspension because of in light of her offense and past record, such was warranted under Category B progressive discipline.

It was the Union's position that Ms. Fleming was on her fifteen minute break and merely resting on the couch. It was the Union's position that the Grievant was completely awake when Mr. Irwin came into the room. It was also the Union's position that Management's case is procedurally defective.

With respect to this Issue, whether or not just cause existed turns on the credibility of the witnesses' testimony. Management's only witness, Mr. Irwin, testified that he observed Ms. Fleming asleep for over two minutes. The Union's witnesses' Ms. Fleming and Mr. Strozier, both testified that she was fully awake.

The record establishes that while employees are entitled to, two fifteen minute work breaks, the Youngstown Developmental Center, because of the nature of its function, does not have formal scheduled work breaks. Mr. Irwin testified that employees have been told that two or more can not be on a break at the same time. Ms. Irwin testified that on July 31st he found three of the four employees on duty taking their break at the same time.

Mr. Hughes, Mr. Strozier, and the Grievant were all on break at the same time. Mr. Hughes was found asleep in another room and he was disciplined. Mr. Strozier was getting cigarettes from his car. He was not disciplined. The Grievant was allegedly asleep. The Union's witnesses claimed ignorance of the policy regarding how many employees in a unit can be on a break at the same time. The record shows that the referenced policy apparently is an unwritten one since none was submitted into the record.

In the Arbitrator's opinion, given the nature of the Grievant's responsibilities and the special needs of their clients, the need for such a policy is readily apparent. The Arbitrator believes the referenced policy/procedure exists and such has been communicated to employees. In the Arbitrator's view the Union's witnesses' claim of ignorance was entirely self serving and served to diminish their credibility.

The record is devoid of anything to show that Mr. Irwin is a less than competent supervisor, or that he had any motive whatsoever to create an incident so he could discipline Ms. Fleming. The record establishes that Ms. Fleming is somewhat less than a model employee.

Ms. Strozier testified that the unit was clean and orderly, whereas Mr. Irwin said it was not. Mr. Strozier testified that he did not close the front door of the unit when Mr. Irwin asked him to be witness to Ms. Fleming sleeping on the sofa. Mr. Irwin testified that Mr. Strozier, after coming from the parking lot to the unit, closed the front door loudly enough to awaken Ms. Fleming. In Mr. Irwin's view, Mr. Strozier intentionally closed the door loudly so Ms. Fleming would wake up before he saw her in Mr. Irwin's presence. In the Arbitrator's opinion Mr. Strozier's testimony was self serving and perjured. The Arbitrator has decided to discredit his entire testimony.

Ms. Fleming testified that she was on her break at the time Mr. Irwin found her. The Grievant testified that her schedule is usually "packed" from 4:00 p.m. to 10:00 p.m. and she has no time during that period to take a break. The Arbitrator asked Ms. Fleming when she normally takes her breaks. The Grievant said that it varies. The Arbitrator notes that Ms. Fleming never said she was busy after 10:00 p.m. In fact, the record indicates that the people under her care were asleep. The Arbitrator finds it rather strange that Ms. Fleming was taking a break at 11:45 p.m. when her shift ends at 12:30 a.m. given the fact she apparently was not busy after 10:00 p.m.

Mr. Irwin gave uncontroverted testimony that there have been problems

with employees on night duty sleeping on the job. The Arbitrator believes Mr. Irwin had good and sufficient cause to be on the premises the evening of July 31st. Ms. Fleming testified that she had her legs on the couch because one was hurting. However, the record is devoid of anything to indicate that at the time she was having any medical problem with her leg.

Mr. Fleming testified that Mr. Irwin could not have entered the unit through the front door. Ms. Fleming further testified that she was not asleep. In the Arbitrator's opinion Mr. Irwin was a fully credible witness, whereas Ms. Fleming was not. In the Arbitrator's opinion Mr. Irwin did indeed enter the unit through the front door and saw Ms. Fleming in a less than fully conscious state on the sofa. The Arbitrator believes Ms. Fleming was "cat napping" and not in a deep sleep. The Arbitrator believes that until Mr. Strozier loudly closed the door, Ms. Fleming was unaware of Mr. Irwin's presence.

In Management's closing statement Ms. Butler pointed out that Ms. Fleming did not claim she was on a break at the time Mr. Irwin found her. Rather, she waited until later in the disciplinary process. In the Arbitrator's opinion, if Ms. Fleming truly believed she was on a break at the time, she had every reason to state so to Mr. Irwin at the time he confronted her. Her failure to provide such an explanation at that time leads the Arbitrator to believe she did not truly believe she was on a break. This was something she thought of later to defend the charge lodged against her.

In the Arbitrator's opinion the Grievant's cat napping while on duty and not on a break was clearly cause for disciplinary action. At the Hearing, the Union contended the disciplinary action at issue is procedurally flawed because Management changed the original charge of sleeping on duty to idleness/malingering. In the Arbitrator's opinion, in this case the charge of idleness/malingering is closely related to sleeping on duty. Management's changing the charge prior to imposing disciplinary action was not a case of attempting to discipline the Grievant for something different than what she was originally accused of doing. The matter here is one of degrees of the same misconduct, and not one involving different forms of misconduct. Management modified the original charge only because of the short time span Mr. Irwin saw the Grievant asleep. The Arbitrator believes Management's modifying the original charge to a lesser degree of the same offense was a prudent judgment call, and not a violation of Article 24.04 of the Agreement. The basic issue of the Grievant's being asleep while she should have been on duty did not change. Had Management's modification of the charge against the Grievant involved a different type of misconduct

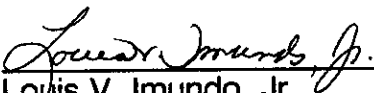
the Arbitrator would be inclined to sustain the Union's position.

In conclusion, it is the Arbitrator's opinion that Management had just cause to discipline Ms. Fleming. In view of the Grievant's record of six incidents of misconduct in 1989, the relatively short time span between this occurrence and the last in December 1989, and the range of discipline outlined in Category B's progressive steps the Arbitrator believes the five day suspension was appropriate.

AWARD

The instant grievance is denied.

March 29, 1991
Date



Louis V. Imundo, Jr.
Arbitrator

Before Louis V. Imundo, Jr., Impartial Arbitrator

In the matter of arbitration between

STATE OF OHIO DEPARTMENT OF HEALTH

and the

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL NO. 11 AFSCME**

Grievance of **William Hayward**
No. 14-00-900804-065-01-13

This matter was heard before Louis V. Imundo, Jr., Impartial Arbitrator, in Fairlawn, Ohio on March 28, 1991

INTRODUCTION

1.1 Appearing For Management

- Valerie Butler, Labor Relations Specialist, OCB
- David A. White, Labor Relations Officer, Department of Health
- Jim Shaheen, N. Regional Supervisor

1.2 Appearing For The Union

- Tim Miller, Staff Representative
- Lara Becker, Senior Sanitarian
- Donald Miles, District Sanitarian
- William E. Hayward, Sanitarian III and Grievant

2.0 NATURE OF THE CASE

This case pertains to the Grievant's being given a three day suspension for the following reasons: "Your supervisors have presented considerable evidence that you have grossly neglected your duties, especially your untimely performance of field survey reports. You have also been insubordinate and uncooperative to your division chief, Mr. Laco, in refusing to answer work related questions. In addition, you are again formally admonished to cease in use of agency staff and/or equipment to perform non-agency tasks at state expense." (*Joint No. 2*)

It was Management's position Mr. Hayward repeatedly failed to comply with his supervisor's requests to file timely mileage logs to account for his time in the field. It was Management's position that Mr. Hayward also repeatedly failed to comply with Mr. Shaheen's request to write-up the Ashtabula County Private Water System survey. According to Management the Grievant failed to do the assigned work after he received a formal verbal reprimand, and subsequent to this a written reprimand.

It was Management's position that Mr. Hayward was insubordinate to Mr. Laco when, in an investigatory meeting about his alleged misconduct, he refused to answer questions posed by Mr. Laco. Last, it was Management's position that Mr. Hayward used a State fax machine for Union business.

It was the Union's position that the survey Mr. Hayward failed to complete in a timely manner was a low priority item, and other more important work took precedence. The Grievant was in the process of doing other far more important work and he simply did not have the time to complete the low priority survey. It was the Union's position that other Sanitarians are often behind schedule in completing their surveys and the Grievant has been singled out for disciplinary action.

It was also the Union's position that Mr. Hayward is being targeted for disciplinary action because he is a Union activist. In the Union's view, Mr. Hayward was disciplined for sending a fax when Management could have simply charged the Union for the fax. It was the Union's position that a fax involves use of a telephone, and the Union has the right to use such as long as they reimburse the State for the cost of the calls. With respect to Mr. Hayward's alleged insubordination, it was the Union's position that Mr. Laco never clearly stated the meeting's purpose. In addition, Mr. Laco refused to allow either Mr. Miles or the Grievant permission to call the

Union's regional office for counsel. In light of Mr. Laco's behavior the Grievant thought it best that he not answer any questions.

3.0 APPLICABLE ARTICLES AND SECTIONS OF THE AGREEMENT

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Article 24 - Discipline, Section 24.02 (in part)

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

- A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- D. Termination.

Article 24 - Discipline, Section 24.04 (in part)

Pre-Discipline - An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

Article 25 - Grievance Procedure, Section 25.06 (in part)

Time Off, Meeting Space and Telephone Use - Upon request, the grievant and Union shall be allowed to use of an available, appropriate room, and copier, where available, for the purpose of copying the grievant trail while processing a grievance. The Union shall be permitted the reasonable use of telephone facilities for investigating or processing grievances. Any telephone tolls shall be paid by the Union.

4.0 ISSUES

The Parties agreed to a joint stipulation of the Issues to be decided by the Arbitrator. They are as follows:

- Was Mr. Hayward suspended for just cause?
- If not, what shall the remedy be?

5.0 RELEVANT AND PERTINENT TESTIMONY

The following has been taken from the Arbitrator's notes, evidence and testimony put forth by the parties.

Mr. Shaheen was Management's first and only witness. Mr. Shaheen gave uncontroverted testimony that survey reports are supposed to be submitted within thirty days after the survey work is completed, but not later than the end of the quarter in which it was conducted. Mr. Shaheen gave uncontroverted testimony that he repeatedly asked Mr. Hayward for the Ashtabula County report. Mr. Shaheen also gave uncontroverted testimony that he repeatedly directed the Grievant to file departure/arrival/mileage logs. As the record establishes, despite Mr. Shaheen's repeated requests the Grievant failed to comply.

On March 30, 1990 Mr. Shaheen sent an inter-office communication to Mr. Hayward assigning him to the District Office for the purpose of completing the Ashtabula report for the survey he did in December 1989, and completing other reports in process. In his communique Mr. Shaheen directed the Grievant to have the Ashtabula report submitted for typing by April 6th. (*Management No. 3*)

On March 30, 1990 Mr. Shaheen formally, in writing, told Mr. Hayward that he expected to see fully completed and signed mileage logs. (*Management No. 1*) On April 13, 1990 Mr. Shaheen issued a formal written verbal reprimand to the Grievant for his failure to submit a mileage log that was due on April 11th. (*Management No. 1*) On May 11th the Grievant was given a written reprimand for failing to submit the previously requested mileage logs and the Ashtabula County Private Water System Survey write-up. In his written reprimand Mr. Shaheen charged the Grievant with gross neglect and insubordination. (*Management No. 2*) The Grievant was again directed to submit what had been previously requested. The record shows

that Mr. Shaheen's actions against Mr. Hayward were not formally grieved.

On June 29, 1990 Mr. Shaheen sent another inter-office communication to Mr. Hayward assigning him to the District Office for the weeks of July 2nd and 9th in order to complete all second quarter surveys. According to what Mr. Shaheen wrote the Grievant had not completed any surveys for the period April - June 1990. Mr. Shaheen imposed a deadline of July 10th. (*Management No. 3*) The record establishes that Mr. Hayward failed to meet the deadline.

Mr. Shaheen testified that at no time did Mr. Hayward offer any acceptable reason for failing to comply with his requests. The only reason Mr. Hayward ever offered for failing to complete the survey report was that he was too busy with other work which he considered to be of higher priority.

Mr. Shaheen testified that he attended the July 23rd meeting held at Mr. Laco's request. The Grievant was represented by Mr. Miles. At the meeting the Grievant was ordered to cooperate in completing assigned work. He was also advised that failure to answer any questions would be construed as insubordination. According to the witness, the Grievant refused to discuss the status of survey reports, or answer other work related questions.

Mr. Hayward was called as the Union's first witness. Mr. Hayward testified at great length about the scope of his job activities and the work in progress during the period in question. The Grievant testified that Management has changed priorities back and forth, and he simply could not abandon one important project he was in the midst of doing and do other work which he considered to be less important. Mr. Hayward testified that he did not have the time to do the Ashtabula County report.

The Arbitrator questioned Mr. Hayward about why he stopped filing the required mileage logs? The Grievant offered three reasons for his behavior. The Grievant said he was told by Management to stop doing Union related work or that his mileage reports would be held up. In response to this threat the Grievant said he elected to not file any more reports. The Grievant's next reason was that he was simply too busy with more important work to file the mileage logs. The Grievant's third explanation was that after having been used to driving a State car it was difficult to get back into the routine of filing mileage logs.

The Grievant testified he did not understand the nature of the July 23rd

meeting with Mr. Laco and Mr. Shaheen. This, in conjunction with Mr. Laco's refusal to allow him to call the Union's regional office led him to conclude that the best course of action was "no action." (*Arbitrator's notes*) When the Arbitrator questioned Mr. Hayward and referred him to step 3 Grievant Decision wherein it states in part: "although he had been notified prior to the meeting that it was to be an investigatory interview,," Mr. Hayward changed his testimony and said that during the meeting he was told it was investigatory.

The Grievant testified that he believed he was within his rights as a Union officer to use the State's fax machine to send information to the Union's headquarters. According to the record Mr. Hayward used the State's equipment on or about July 12th and 18th. (*Joint No. 2*) It was the Union's and Mr. Hayward's position that the fax transmittal was via telephone and the Union has the right under Article 25.06 to use the telephone for Union business so long as the State is reimbursed for the costs of such usage. Mr. Hayward testified that his actions were entirely out in the open and there was not attempt to defraud the State.

Mr. Miller called Ms. Lara Becker as the Union's second witness. Ms. Becker testified that it is not uncommon for Sanitarians to be late in filing their surveys. However, under crossexamination the witness said that she usually offers an explanation for any reports that will be untimely, and when directed to meet a specific deadline she complies.

Mr. Miller called Don Miles as the Union's third witness. Mr. Miles testimony did not add to, or subtract from what was already in the record.

In his closing statement Mr. White made the following points to support Management's position:

- Management has clearly proven that Mr. Hayward is guilty of all the charged misconduct and just cause for taking disciplinary action existed.
- Management clearly communicated to Mr. Hayward that they were serious about his doing assigned work on time. However, the Grievant did not take Management seriously.
- Management went out of their way to have Union representation provided for the Grievant at the July 23rd meeting and as a Union officer

for four years and the current Chapter President, he clearly understood its purpose.

In his closing statement Mr. Miller made the following points to support the Union's position:

- The Grievant is a good employee with twelve years of service.
- The Grievant has a complex and demanding job and he was simply overworked. As a result, he was unable to complete the mileage logs and report at issue in a timely manner. No just cause existed to discipline Mr. Hayward.
- Even if just cause is found to exist the three day suspension is too severe given the seriousness of the alleged misconduct, the circumstances involved, and the Grievant's service record.
- Management has other motives than to rehabilitate the Grievant.

6.0 OPINION

The record shows the charges against the Grievant are multiple in nature and broad in scope. In determining whether just cause existed each of the charges needs to be separately assessed.

THE DEPARTURE/ARRIVAL/MILEAGE LOGS

The record is devoid of anything to indicate that Management's requiring such logs is improper or unreasonable. The Grievant was properly requested to maintain such logs as part of his job duties. In the Arbitrator's opinion Mr. Hayward's reasons for not filing the logs are ludicrous. If the Grievant felt that Management was in some way harassing him or restricting him from doing legitimate Union business he could, and should have filed a grievance. The record is devoid of anything to indicate that such action was taken. If the Grievant had any evidence to show that Management was delaying in seeing that he was repaid for mileage expenses he could have lodged a formal complaint. Again, the record is devoid of anything to show that such action was taken. Considering Mr. Hayward's reasoning his decision to simply not file said logs is illogical at best. His failure to file the logs resulted in his not being paid for legitimate work related travel

expenses. In the Arbitrator's opinion the Grievant's actions more logically suggest that he did not want Management reviewing where and how he spends his time while out of the office.

In the Arbitrator's opinion Mr. Hayward's explanation that he was simply too busy to take a few minutes to complete a mileage log is unbelievable. The Grievant's explanation that he had difficulty getting back into the routine of filing mileage logs is even more unbelievable.

Mr. Shaheen gave uncontroverted testimony that survey reports are typically one to two typewritten pages in length, and it takes about one to two days to write up a report. The Grievant testified that in light of the amount of work he had to do, and the low priority of such reports he did not have the time for nearly seven months. The record is devoid of anything to show that Mr. Hayward ever complained about being overworked. The only explanation Mr. Hayward offered for his failure to complete the report at issue was that he was too busy with other work. He was too busy even after Mr. Shaheen repeatedly directed him to do the report. He was still too busy when Mr. Shaheen ordered him to remain on the office and complete all reports. In the Arbitrator's opinion Mr. Hayward's actions show a clear pattern of passive resistance to authority. In the Arbitrator's opinion, Mr. Hayward willfully decided to test Mr. Shaheen's authority and patience by simply ignoring the legitimate requests made of him. The Grievant continued to disregard Mr. Shaheen's requests and directives even after being verbally warned in writing, and then given a formal written warning.

When questioned by the Arbitrator about his failure to complete the required time logs and the survey at issue, the Grievant testified at length about his perceptions of priorities. The Arbitrator pointed out to Mr. Hayward that Management told him to change his priorities and do the reports. The Grievant said he believed his ranking of priorities superseded Mr. Shaheen's rankings. In the Arbitrator's opinion Mr. Hayward's actions show a disregard for managerial authority. Mr. Hayward demonstrated a serious misunderstanding of his role. He is a Sanitarian and not a manager. In the Arbitrator's opinion when Management changes priorities, employees may, within reason question such, but if so directed are expected to follow orders. With few exceptions, the common law of the workplace is obey now and grieve later.

In the Arbitrator's opinion Mr. Hayward's actions show a clear pattern of uncooperative behavior, i.e. passive resistance to authority, and a gross

neglect of duty. In the Arbitrator's opinion Management had just cause to discipline the Grievant.

INSUBORDINATION AND UNCOOPERATIVENESS AT THE JULY 23RD MEETING

The record clearly establishes that despite verbal and written warnings Mr. Hayward failed to do assigned work. Even after being ordered to remain in the office for a couple of weeks to do the work at issue Mr. Hayward still failed to do the assigned work. Considering the aforementioned the Grievant's testimony that he did not understand the purpose of the July 23rd meeting is incomprehensible and unbelievable. The incredibility of the Grievant's testimony is further supported by the fact that he is an experienced Union official. Even if he has limited experience in dealing with disciplinary action matters, common sense dictates that a reasonably intelligent person would understand he/she was subject to further disciplinary action. In the Arbitrator's opinion Mr. Hayward projected the image of a reasonably intelligent person. In addition, under direct examination by the Arbitrator Mr. Hayward said that during the course of the meeting he was told of its purpose.

In the Arbitrator's opinion even though Mr. Laco would not allow him to call the Union's regional office during the July 23rd meeting, Mr. Hayward was still obligated to cooperate and answer work related questions. Mr. Hayward again forgot the well established tenet of obey now and grieve later. In the Arbitrator's opinion Mr. Hayward did not have a legitimate reason to refuse to cooperate with Management. His behavior was a continuance of passive resistance to authority, and clearly, both uncooperative and insubordinate.

In the Arbitrator's opinion Management had just cause to discipline the Grievant for being uncooperative and insubordinate at the July 23rd meeting.

USING AGENCY STAFF AND/OR EQUIPMENT TO PERFORM NON-AGENCY TASKS AT STATE EXPENSE.

In the Arbitrator's opinion Management failed to prove that Mr. Hayward improperly used agency staff to do Union business. At the Hearing the Union did not challenge Management's position that Mr. Hayward had been previously forewarned about using State equipment and agency letterhead for Union business. *(Joint No. 2, August 14, 1990 inter-office*

communication, paragraph No. 5) Management contended that Mr. Hayward improperly used a fax machine. The Arbitrator notes that the record is devoid of anything to show the referenced twelve page communique to the Union's headquarters was sent on Agency letterhead. The Union contended that under Article 25.06 Mr. Hayward properly exercised his rights.

The Arbitrator notes the following in Article 25.06: "Upon request, the Grievant and Union shall be allowed the use of an available, appropriate room, and copier where available, for the purpose of copying the grievance trail while processing a grievance. The Union shall be permitted the reasonable use of telephone facilities for investigating or processing grievances. Any telephone tolls shall be paid by the Union." (*Joint No. 1*) In the Arbitrator's opinion a fax transmittal involves simultaneous use of a copying device, i.e. a copier, and a telephone. The Agreement provides for use of a copier solely for processing a grievance. The Agreement states that telephone facilities can be used for investigating or processing grievances. Since a fax involves the use of a copying device and a telephone it appears to the Arbitrator that a fax can be legitimately used for processing a grievance, but not investigating one.

Based on what is in the record it appears to the Arbitrator that Mr. Hayward was in the process of investigating a grievance. In the Arbitrator's opinion Mr. Hayward improperly used the fax machine.

In the Arbitrator's opinion Mr. Hayward's using the fax machine after being told such was improper was a clear act of insubordination. Mr. Hayward should have followed instructions and filed a timely grievance if he believed Management was violating Article 25.06 of the Agreement. Again, Mr. Hayward failed to adhere to the well established tenet of labor-management relations of obeying now and grieving later.

In conclusion, it is the Arbitrator's opinion that Management had just cause to discipline the Grievant for unauthorized use of State equipment.

The Union has alleged that Management has singled out the Grievant for disciplinary action because of Union activities. In the Arbitrator's opinion the record indicates that Management is somewhat frustrated with Mr. Hayward. The Arbitrator does not believe that in the matters at issue Mr. Hayward was singled out for disciplinary action. If Management was looking to target him, he made a very large target of himself. As concluded, Management had many bona fide reasons to discipline the

Grievant for serious misconduct.

APPROPRIATENESS OF THE 3 DAY SUSPENSION

The record shows that Management does not use a disciplinary action grid for determining what discipline is appropriate for specific types of misconduct. In the Arbitrator's opinion the Union failed to support its claim of disparate discipline. It is also the Arbitrator's opinion that given the seriousness of the Grievant's willful misconduct severe disciplinary action was warranted. The three day suspension was appropriate.

7.0 AWARD

Management had just cause to discipline the Grievant for gross neglect of duties, untimely performance of field survey reports, insubordination, uncooperativeness, and using State equipment to perform non-agency tasks. Management failed to prove just cause for the Grievant's improperly using agency staff. This charge is to be deleted from the disciplinary suspension notice. The instant grievance is denied and the three day suspension is sustained.

March 31, 1991
Date

Louis V. Imundo, Jr.
Louis V. Imundo, Jr.
Arbitrator