ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 629

OCB GRIEVANCE NUMBER: 11-03-901129-0118-01-09

GRIEVANT NAME: DIANO, MARLENE

UNION: OCSEA/AFSCME LOCAL 11

DEPARTMENT: EMPLOYMENT SERVICES

ARBITRATOR: DWORKIN, JONATHAN

MANAGEMENT ADVOCATE: LEHMAN, JERRY

2ND CHAIR: BUTLER, VALERIE

UNION ADVOCATE: FALCIONE, DENNIS

ARBITRATION DATE: APRIL 29, 1991

DECISION DATE: JULY 5, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: 30 DAY SUSPENSION FOR VIOLATION OF RULES GOVERNING JOB REFERRALS FOR FAMILY MEMBERS; TIMELINESS OF DISCIPLINE

HOLDING: "TO THIS DAY, SHE (GRIEVANT) BELIEVES SHE WAS ENTITLED TO PARTICIPATE IN THE FORMER MANAGER'S MISCONDUCT AND THAT THE DEFENSE, - 'MY BOSS DID IT SO IT WAS OKAY FOR ME TO DO IT' - EXCUSES HER. DISCIPLINE WAS THOROUGHLY PROGRESSIVE IN THAT IT FOLLOWED SEVERAL OTHER SUSPENSIONS."

COST: $935.07

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
SUMMARY ARBITRATION OPINION AND AWARD

#629

In The Matter of Arbitration Between:

THE STATE OF OHIO
Ohio Bureau of Employment Services
Canton, Ohio Office

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, OSCEA/AFSCME
Local Union 11, State Unit 3

* Case No 11-03(90.11.29)0118-01-09

* Decision Issued:
* July 5, 1991

APPEARANCES

FOR THE STATE

Jerry Lehman	Labor Relations Officer
Valerie Butler	OCB Representative
Charles Edwins	Office Manager
Joe Donato	Witness
Lucy B. Andrews	Witness

FOR THE UNION

Dennis A. Falcione	OCSEA Staff Representative
Joseph Tuscan	Witness
Michelle Diano	Witness
Marlene Diano	Grievant

ISSUE: Article 24: Suspension of Employment Services Interviewer for violating rules governing job referrals for family members; Timeliness of Discipline.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

Grievant, a six-year Employee of the Ohio Bureau of Employment Services (OBES), was suspended thirty days. She was charged with violating specific regulations and procedures, dishonesty, nepotism, and abusing the public trust. The State alleged (and proved): 1) that she referred her own daughter for job placements out of order and ahead of more qualified OBES clients; 2) she filled out and signed an application for her son.

The length of the suspension was premised on both the seriousness of the misconduct and the Employee's past record. She had accumulated four disciplinary actions in a two-year period:

August 8, 1988. A two-day suspension was related to sick leave. It was imposed for "failure to obtain a proper doctor's statement, giving a misleading doctor's statement and concealing relevant medical information." Subsequently, the Office Manager reconsidered and reduced the penalty to a written reprimand.

November 29, 1988. Grievant served a two-day suspension for "failure of good behavior." According to testimony, the cause for discipline related to falsification of records.

January 23, 1989. A five-day suspension for neglect of duty was issued. It was grieved and appealed to expedited arbitration. Arbitrator Jerry A. Fullmer denied the grievance, ruling that the discipline was justified for the Employee's failure to submit medical documentation covering one hundred twenty hours of absence.

October 27, 1989. Grievant received a verbal reprimand for locking OBES files in her desk, contrary to Management directives. She accepted the discipline, but explained in the arbitration hearing that she locked records because her family's applications kept disappearing from office files.

An unusual factor in this case is that the suspension was imposed approximately two years after the misconduct. This circumstance leads to one of the Union's main arguments -- that discipline so far removed from an offense has no corrective influence. It follows, according to the Union, that the sole purpose of Grievant's suspension was to punish. The governing Collective Bargaining Agreement forbids disciplinary action which is punitive rather than corrective. Article 24, §24.03 provides in part:

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

The parties gave serious consideration to timeliness of discipline during bargaining. In Article 24 of the Agreement, they required arbitrators to consider it. The concluding paragraph of Article 24, §24.02 states:

> 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 timeli-

ness of the Employer's decision to begin the disciplinary process.

The Union maintains that the suspension violated other contractual mandates as well. Article 24, §§24.01 and 24.02 strictly confine the State's disciplinary authority, requiring that no employee may be disciplined without just cause and committing the Employer to the principles of progressive penalties. They provide in relevant part:

ARTICLE 24 - DISCIPLINE

§24.01 - Standard

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

§24.02 - Progressive Discipline

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

The grievance protesting the suspension was initiated on November 29, 1990. In its "Statement of Facts," it declared that just cause was lacking because Grievant did not knowingly commit misconduct. According to the Union, "she followed procedures of past Management." The statement set the stage for Grievant's substantive defense -- if the Employee acted unethically or contrary to regulations, she did so innocently, simply following the example of a previous Office Manager.

The grievance was appealed to arbitration and heard in Canton, Ohio on April 29, 1991. At the outset, the parties agreed that the dispute was procedurally arbitrable and the Arbitrator was authorized to issue a conclusive award on its merits. Arbitral discretion is more specifically defined and limited by the following paragraph in 25, [redacted] of the Agreement:

> Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

BACKGROUND, FACTS, AND ARGUMENTS

Grievant is an Employment Services Interviewer in the Canton, Ohio OBES office. She was hired into the Classification in 1984

and continued to serve in that capacity under a succession of four Office Managers.

Among its many purposes, OBES acts as an employment agency for out-of-work Ohioans. It classifies job applicants according to skills and other factors and attempts to match them to vacancy listings in its job bank. One of Grievant's functions is to make those matches and send eligible candidates for job interviews. While judgment is a factor in her work, she actually has very limited discretion. Before she selects individuals for outside interviews, they are already categorized by skills and assigned priorities. As stated in the OBES Security Manual:

> Purpose and Scope of the Program: The Wagner-Peyser Act mandates that the employment service match qualified workers with jobs and bona fide jobs with qualified workers. Subsequent legislation has mandated that priority and preference in services be given to veterans and handicapped persons. Further legislation and federal regulations have specified and expanded program areas for which services are to be rendered.

The Agency's method for fulfilling the criteria is to assign individuals code numbers to identify qualifications, handicap priority, and veteran's preference. Candidates' profiles are categorized on a designated form and filed. If two or more have similar skills and priorities, social security numbers are used as tie-breakers. Secondary codes, indicative of work experience outside principal skills or occupations, are also assigned on Form 512

and filed in the data bank. Employer job orders are similarly categorized and filed. Special orders -- those which require unique skills or experience and/or the potential employer's unwillingness to interview marginal candidates -- are accepted by the Agency and recorded on a separate form to assure compliance with the employer's specifications.

Jobs are extremely scarce commodities in Canton. The Community has suffered more than its share of unemployment. The OBES office services approximately 25,000 unemployed individuals per year, but receives only 800 to 1,000 job orders. An Employment Services Interviewer such as Grievant has little opportunity to choose friends or relatives for jobs if s/he follows the coded procedure. An Interviewer can, however, deviate from procedures and bestow an unfair, illicit benefit. The Agency has promulgated a comprehensive Administrative Procedure Handbook to advise employees that a self-serving act or conflict of interest is strictly forbidden. Section III, Chapter IX of the Handbook proscribes certain types of conduct and outside activities. Certain portions merit special recognition:

Employee Conduct and Business Activities

900 Introduction: The bureau's effectiveness in serving the public interest is directly proportional to the confidence in which its employees are held by the people of Ohio. To maintain this trust, all employees of the bureau not only must obey the literal requirements of all laws, regulations, and orders governing official conduct, but also must show by

personal action that no substantial conflict (or appearance thereof) exists between private interests and official duties.

. . .

902 Policy Regarding Employee Conduct and Business Activities

B. Standards. An Employee of the bureau should not:

. . .

5. Use or attempt to use any means that deviates from standard placement procedures for the purpose of securing employment through the Job Service System for himself/herself or a relative, friend, or acquaintance; except that the referral of a bureau employee or an applicant known to be the relative of a bureau employee must be reviewed and approved by the supervisor of the person making the referral.

The Ohio Employment Security Manual, Part II, Chapter 0027, Section E also addresses referrals of relatives:

The Placement Policy of the Employment Services is as Follows:

. . .

To allow no unfair advantage in the placement process to be given to relatives . . . of bureau employees. Although persons related . . . to bureau employees are entitled to use the Job Service, they may not receive preferential treatment. Under no circumstances, may suppressed job information be revealed to such individuals prior to their registration and selection for referral. Further, unless outreach or recruitment is indicated for a particular job order, it would be contrary to the policy of the employment service for a bureau employee to encourage a relative . . . to register in order to gain referral to a specific job.

In most instances, a bureau employee may not refer his/her relative to a job opening. If, however, due to the

> division of responsibilities, office size or other factors, it is impractical for another employee to make the referral, a bureau employee may refer his/her own relative. The referral of any applicant known to be the relative of a bureau employee must be reviewed and approved by the supervisor of the person making the referral.

The State contends that Grievant deliberately violated these conduct standards to achieve advantages for members of her family. The Agency first learned that something might be amiss in July or August, 1990. Ashland Oil Company had a special-interest file in the Canton Office with a choice job opening. Grievant telephoned her son to tell him about the opportunity and to inform him that she could not find his registration card. At her son's request, she filled out a new form for him and signed his name. The form came up in a random review by the (current) Office Manager. Grievant was questioned and admitted everything. She stressed, however, that she filled out and signed the form with her son's permission.

The admission prompted a more intensive investigation. Office files extending back years were searched by Grievant's surname. Two files containing referrals of Grievant's daughter for job interviews turned up. One bore Grievant's initials as the Employment Services Representative making the referral. The other, for a job opening at Ewing Chevrolet, disclosed that three referrals were made. Grievant's initials were beside two of them as the referring Interviewer. Next to her daughter's name the original Interviewer designation was whited out and replaced with, "LA" (the

initials of one of Grievant's co-workers). Similarly, the first file carried Grievant's initials on the original order as the referrer, but "LA" is on the reconciliation. This too seems to have been an irregularity. Moreover, Grievant's daughter's qualifications did not match the job requirements; her code number was significantly lower than called for by the vacancy.

Grievant had no satisfactory explanation for her conduct and, on October 4, 1990, she was issued the following notice:

> The Operations Division has recommended that you be removed for dishonesty and conflict of interest for violation of Bureau policy regarding referral of relatives . . . and falsification of documents regarding the application and referral of your children . . . . The allegations made against you will constitute just cause under Article 24 of the AFSCME/OCSEA contract.
>
> You have previously received a 5-Day Suspension in January, 1989 and a 2-Day Suspension in November, 1988.
>
> I will conduct a conference on this matter on Friday, October 19, 1990 at 11:30 a.m. in the Canton local office of the Ohio Bureau of Employment Services . . . .

The conference mentioned in the notice was the pre-disciplinary meeting required by Article 24, §24.04 of the Agreement. It was conducted as scheduled, and the Hearing Officer's decision on whether or not just cause for discipline existed was issued on October 31. It stated in part:

> I find just cause exists for discipline. The conflict of interest rules are well known and necessary for the ES [Employment Services] referral process to function fairly. The infraction is blatant and deprived other applicants of a referral for which they had priority. I also find that [Grievant] failed to follow proper practices and falsified the 512 for her son. The fact that she had her son's permission does not completely excuse this because she violated Bureau policy, ignored specific instruction and did not indicate on the form that [her son's] signature was not actually his own.

In the arbitration hearing, the Agency did not explain why the original removal proposal was modified to a thirty-day suspension. In any event, the modification was made and Grievant served the suspension from November 26, 1990 to January 4, 1991.

The Employer's position is that Grievant knew the rules and willfully violated them. According to testimony, she and other Canton employees were trained and re-trained, with specific emphasis on the regulations concerning family referrals. It is inconceivable, according to the Employer, that she did not know she was violating a fundamental policy when she committed the misconduct. The fact that she blanked her own initials on one of the referrals and substituted another employee's confirms that she acted intentionally, with appreciation of her wrongdoing; and then tried to cover it up. In the Employer's judgment, the claim that Grievant did not understand the prohibitions attending her job is patently false. Grievant's training records prove it is a lie.

* * *

Grievant vigorously denied the allegation. She testified forcefully that she had not been adequately trained, did not have access to Bureau manuals and handbooks, and had never been told by those who supervised her that there was anything wrong with referring her children for job interviews. She claimed she was not even trained until 1990 when the current Manager "re-trained" her. She stated that the Manager in charge of the Canton Office from late 1987 to early 1990 expressly allowed her to refer her daughter to an opening for which she was unqualified. In fact, it was a small part of an ongoing practice in Canton which mainly benefitted the Manager himself. According to Grievant, he routinely sent his friends to her with instructions to give them referrals.

As stated, the Union argues that the discipline was too far removed from the alleged misconduct to comport with just cause. The act of filling out a card for her son in 1990 may have been regarded as cause for discipline, but it was not nearly as serious as the referrals of Grievant's daughter. They took place in October, 1988, and there is no indication of similar activities since then. The Union points out that the events of October, 1988 preceded the suspension by fully two years.

The Union invokes the saying, "justice delayed is justice denied," and urges the Arbitrator to observe the contractual emphasis on timeliness of discipline. The Pre-Disciplinary Hearing Officer listened to the same defense and responded to them in her decision:

> The union argued that the charges regarding the referrals are too old. They were placed and filled approximately two years ago. The union argues that this action is untimely under the AFSCME Contract, Article 24.02.
>
> Article 24.02 states that disciplinary action shall be initiated as soon as reasonably possible. It is impossible for OBES management to monitor every referral and job order to ensure employees are following the conflict of interest rules. [The current Manager] initiated this discipline promptly after discovering this infraction. [Grievant's] behavior cannot be overlooked simply because she was able to conceal it. [Emphasis added.]

The Union challenges Management's reasoning and conclusion. It notes that, according to the Employer's own testimony, OBES placement records are reviewed internally and by both the State Monitoring Office and the U.S. Department of Labor. With only 800 to 1,000 jobs filed in the Canton office annually, the Union observes that the Agency certainly can do more than random reviews. The Ohio Employment Security Manual requires weekly reviews, and the Union contends that Grievant's alleged violations would have been uncovered much sooner if Supervision had done its job. The problem was that Canton Supervision did not do its job.

A supervisory witness called by the Union supported the charge. Currently Manager of the OBES Alliance, Ohio Office, he was Interim Manager in Canton for a few months beginning July, 1987. He stated that his practice is to review daily to check coding, time cards, statistical data, and intercept potential problems. That, however, was not the practice in Canton when he

arrived. He found the office in shambles. There was not a manual or handbook anywhere; he had to bring his own into the office to make them available to employees. He left them there when he transferred to Alliance.

The witness ended his testimony with a strong endorsement of Grievant as one of the best employees he worked with in his eleven years as a Supervisor.

With regard to the charge that she falsified records, Grievant admits putting the co-worker's initials on her daughter's referral. Although she insists that the Manager permitted her to directly send family members for job interviews, she apparently knew about the regulation -- or at least some of it. She claims not to have been told that all family job referrals were to be reviewed and approved by Management, but she understood that the better practice was to have another Interviewer refer her children. Grievant testified that she and the co-worker with the initials "LA" were friends who frequently did favors for one another. The referral at issue, according to Grievant, was not unusual.

The Union concludes that the discipline was a shameful repudiation of common precepts of just cause. Grievant did not create a scheme to violate rules; she merely followed her Manager's counsel and example. If it was wrong, it was not her fault. It was the result of Management's indifference to its own policies. The Union asks rhetorically, "How can an employee be held to such unforgiving adherence to rules which Supervision itself ignores?"

The Union demands that the grievance be sustained, the discipline expunged, and Grievant restored lost wages and benefits.

OPINION

In its opening statement, the Union remarked that an "element of just cause is whether the penalty was reasonably related to the seriousness of the offense." The obvious purpose of the comment was to introduce the concept that Grievant's alleged misconduct was not so consequential as to justify a thirty-day suspension, not withstanding her less than exemplary discipline record. The Arbitrator disagrees. It would be an error of significant proportion to underestimate the importance of the charges against the Employee. As an Employment Services Interviewer, she was entrusted with a most valuable asset -- job openings. Her function was to distribute the asset to and on behalf of the citizens of Ohio. She is literally accused of theft-in-office -- of using her access to jobs to appropriate them for family. Her misconduct (if she knowingly committed misconduct) provided illicit advantages for her children at the expense of more deserving unemployed persons. As the decision of the Pre-disciplinary Hearing Officer pointed out, Grievant's daughter bypassed two hundred ninety-four qualified individuals for one of the jobs and seventy for the other. The Arbitrator sees little conceptual difference between stealing publicly-held job rights and stealing public funds. In either

situation, the Employer is entitled (and perhaps obligated) to respond with discipline reflecting the gravity of the offense.

In view of these findings, a pivotal issue is whether Grievant knowingly violated the public trust or acted in ignorance of her obligations -- ignorance fostered by supervisory indifference and, perhaps supervisory participation. A great deal of conflicting testimony was presented on the question. The principal witnesses were all positive in their assertions; Grievant and her defenders were as unequivocal as the accusers. It is apparent that some were untruthful. Normally, in cases such as this, an arbitrator's task is to observe witnesses, compare what they say to established facts, analyze motives, and reach conclusions as to who was credible and who was not. This case was an exception; after evaluating the testimony, the Arbitrator concluded that all of the fact witnesses told some truths, but none of them was wholly truthful. In short, the Arbitrator disbelieved Grievant, her allies, and her detractors.

The witness most damaging to Grievant's interests was the individual who headed the Canton Office from November, 1987 to January, 1990. He was Manager when the Employee allegedly violated rules by referring her daughter for vacancies. He stated that he <u>never</u> established a policy or even informally consented to family referrals without reviews. He stressed that Grievant acted on her own, without permission, and contrary to training, re-training, and specific instructions he repeatedly gave her and other members of her Classification.

The testimony did not hold up. Grievant and one of her witnesses established to a high degree of probability that the rules were cavalierly ignored during the former Manager's tenure; that he himself violated them when it fit his purposes. The Union introduced striking evidence of this contention in the form of a written statement from an OBES client. The statement was:

> When [the former Manager] was Manager of OBES I was instructed by [him] to see [Grievant]. She had referred me to several job interviews when I was unemployed.

Asked about this on cross-examination, the prior Manager said only that he did not recognize the name.

Arbitrators are not omniscient. They can never know with absolute certainty who is lying and who is telling the truth. The best they can do is use their intellect and experience to develop probabilities. Disputes such as this are decided on probabilities, not truths. The Arbitrator finds it more probable than not that the Canton Office was not run in a wholly ethical manner in 1988 -- that a system of patronage was indulged for favored job-seekers. Grievant became the Manager's instrument to carry out his objectives in this regard, and it is likely that there was a payback. The Employee's referrals of her daughter were overlooked and, on at least one occasion, approved. Grievant's daughter testified credibly that she visited her mother at work one day and asked, in the presence of several supervisors, if she could be referred for a

particular job. Although her qualifications and code number did not come close to the job requirements, the answer was, "Sure; go ask [one of the Employment Services Interviewers]." She asked and the referral was made. There was no supervisory review.

The woman whose initials, "LA," were on two referrals for Grievant's daughter was also an important witness on behalf of the Employer. She was questioned about the Ewing Chevrolet and Barnhardt Builders job orders. It is to be recalled that the daughter bypassed a total of three hundred sixty-four more eligible candidates on those referrals. The documents concerning both contained irregularities. On one, Grievant's initials were on the referral but the witness' were on the reconciliation. On the other, the original document was altered -- the Interviewer's initials were covered with white correction fluid and "LA" was substituted. As to the "white-out" incident, the witness stated that she neither made the referral nor approved the substitution of her initials.

That testimony was credible and consistent with Grievant's admissions. The witness' account of the other incident was a different story. She conceded making numerous referrals of Grievant's relatives in the past. She never checked code numbers because she "trusted that [Grievant] was giving me a card which matched the job and that the relative was next in line" (according to the numerical coding of job candidates). The testimony put the witness in an unfavorable light. It was inconceivably naive. It appeared more a cover-up of the witness' own rule violations than an accurate description of her state of mind. Moreover, it con-

tained an implicit admission that she too was less than careful about observing regulations. Presumably, she had been trained in the requirements of her position and knew that it was not enough for her to refer Grievant's daughter on "trust." The standards require more; that such referrals be subjected to review no matter who makes them. They state, "The referral of any applicant known to be the relative of a bureau employee must be reviewed and approved by the supervisor of the person making the referral."

The Arbitrator's skepticism regarding the testimony of some Employer witnesses was not one-sided. It affected Grievant's statements as well -- statements which stood out as self-serving and untruthful. Most noteworthy was Grievant's claim of ignorance. She asserted that she never thought she was doing anything improperly; she had not received adequate training, was unaware of the rigid (and necessary) regulations governing family referrals.

If Grievant's testimony is reliable, she worked six years, received good performance reviews and a glowing endorsement from a former Manager, without an inkling of what her job required. The Arbitrator does not believe it. The contentions are refuted by one of the few clear facts in the case: the Employee concealed one of the improper referrals by disguising the record. She blotted out her initials and supplanted them with someone else's.

The Arbitrator finds that Grievant was culpable. Her documented training record established that she understood or should have understood what was expected of her. She knew that illicit referrals were being made, and she willingly participated. She

cannot excuse her own corrupt practice by establishing that her superior engaged in similar misconduct.

The sole remaining question is whether or not the suspension came too late to satisfy just-cause principles. There is a good reason for holding that discipline must be reasonably concurrent with misconduct. A broadly recognized requirement of just cause is that an employer's disciplinary powers are to be used to correct (where correction is feasible), not punish. The precept is underscored by the Agreement between the parties in the progressive-discipline language of Article 24, §24.02 and, more concretely, the provision of §24.04 which states: "Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

It is reasonable to presume that a penalty issued years after the occurrence of a violation will not correct; its sole or predominant effect will be retribution. Retribution without correction is strictly prohibited by the Agreement. The presumption, however, is a rebuttable one. If an employee truly believes that his/her impermissible activity was justified and did not constitute misconduct, discipline may have its legitimate corrective purpose no matter how distant its imposition from the activity. Grievant's testimony -- her response to the suspension -- revealed that her violation was never corrected. To this day, she believes she was entitled to participate in the former Manager's misconduct and that the defense, "My boss did it so it was okay for me to do it," excuses her.

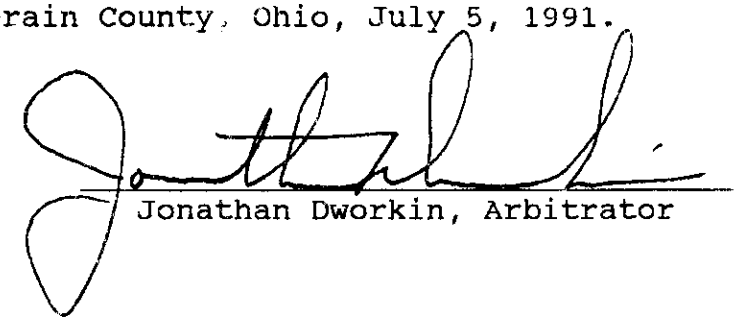
The Arbitrator disagrees with Grievant's rationale. Having considered the timeliness of the discipline as required by the Agreement, he finds that it continued to have corrective impact; the severity of the suspension, therefore, was contractually authorized. It was thoroughly progressive in that it followed several other suspensions.

The grievance will be denied.

AWARD

The grievance is denied.

Decision Issued at Lorain County, Ohio, July 5, 1991.



Jonathan Dworkin, Arbitrator