

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 752

OCB GRIEVANCE NUMBER: 07-00-890612-0041-01-07

GRIEVANT NAME: BURLEY, RANDY

UNION: OCSEA

DEPARTMENT COMMERCE

ARBITRATOR: RIVERA, RHONDA

MANAGEMENT ADVOCATE: SAMPSON, RODNEY

2ND CHAIR: DUCO, MICHAEL

UNION ADVOCATE: STEELE, ROBERT

ARBITRATION DATE: DECEMBER 19, 1991  
JANUARY 14 & FEBRUARY 10, 1992

DECISION DATE: APRIL 22, 1992

DECISION: MODIFIED

CONTRACT SECTION  
AND/OR ISSUES:

GRIEVANT SUSPENDED FOR FIVE DAYS FOR  
NEGLECT OF DUTY, AWOL, & WILFULLY  
FALSIFYING AN OFFICIAL DOCUMENT. MGMT  
CHARGED WITH 8 PROCEDURAL ERRORS, AS  
WELL AS DISCRIMINATION & DISPARATE  
CHARGES.

HOLDING: 1)PROCEDURALLY: STATE WAS FOUND TO HAVE ERRED IN  
4 OUT OF 8 ALLEGED VIOL., IN ADDITION TO BEING GUILTY  
OF THE CHARGE OF DISPARATE TREATMENT. GRIEVANT WAS  
GUILTY OF AWOL, NOT GUILTY OF NEGLECT, AND NOT  
"WILFULLY" GUILTY OF FALSIFICATION. GRIEVANT BEHAVED  
CONTEMPTUOUSLY DURING ARBITRATION HEARING ITSELF.  
VIOLATIONS THAT OCCURRED ON BOTH SIDES REDUCE THIS  
GRIEVANCE FROM 5 DAYS TO A 1 DAY SUSPENSION.

COST: \$1230.00

In the Matter of the  
Arbitration Between

#752

OCSEA, Local 11  
AFSCME, AFL-CIO

Union

and

State of Ohio

Employer.

Grievance No. 07-00-(6-12-89)  
41-01-07

Grievant (R. Burley)

Hearing Dates: December 19, 1991  
January 14, 1992  
February 10, 1992

Closing Date: March 10, 1992

Extended Closing Date:  
March 20, 1992

Award Date: April 22, 1992

Arbitrator: R. Rivera

Advocates for the Union: Robert W. Steele  
John Porter, Esq.

Advocates for the Employer: Rodney Sampson  
Michael Duco

Present at the Hearing in addition to the Grievant and Advocates were Clare N. Long, Attorney, Ohio Department of Commerce, Ruth Spencer, ODMH-LRO, Eugene Brundige, Human Resource Consultant (witness), Rick Brown, Former Chief of Licensing (witness), Cliff Kurt, Toledo Business Bureau (witness), Cy Sedlacko, Deputy Chief of Licensing (witness), Greg McGough, Investigator Supervisor (witness), Robert Allerding (witness), Khalil Bryant (witness), Angela Griffin (witness), Angela Burns (witness), Vivian Beard (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition

that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

### Joint Stipulations

At the hearing on December 19, 1991, the parties jointly stipulated to these facts:

1. The Grievant did not, on Friday, April 14, go to the three offices listed on the contemplated itinerary.
2. The investigation conducted by Mr. Sedlacko did not show that the Grievant was not in Toledo on Friday, April 14, 1989.
3. The Employer states that the neglect of duty charge does not encompass either not picking up a list in Toledo nor reminding the licensee in Toledo on Friday, April 14.
4. The Employer claims that the neglect of duty by the Grievant was the Grievant's absence from those three (3) worksites listed on the contemplated itinerary.
5. OCB stipulated that no prior "like" disciplines existed.

### Joint Exhibits, Arbitrator's Documents, Documents Requested During Hearing

1. Sign in forms for Employer and Union.
2. Subpoenas for Sandy Scott, Clifford B. Kurt, Robert Pyzik, Sgt. Frank H. Arvay, Rick Brown, Vivian Beard, Robert Morris, Khalil Bryant, Robert Allerding, Teresa VanCamp, Joe Barrett, Yalondia Poole, and Angela Griffin.

3.
  - a. Record for the official file for pre-discipline meeting -- supporting evidence dated May 1, 1989, signed by Cyril L. Sedlacko.
  - b. Columbus Division of Police Official Report of Motor Vehicle Theft dated 4/1/89 signed by Officer Bill Hillman for Grievant for 85 Olds/Cut Salon.
  - c. Stolen Vehicle Recovery Report dated 4/2/89.
  - d. Release form for stolen vehicle dated 4/4/89.
  - e. Inter-Office Communication to Cy Sedlacko from Greg McGough dated 4/14/89 re: attempt to contact Grievant regarding Great Lakes Security.
  - f. Typed summary of Investigators' itineraries for week of April 10 - 14, 1989, for Anderson, Grievant, McGough and Wiles.
  - g. Three page Print Private Investigator Quarterly Report for Great Lakes Security and Investigation, Inc. dated 4/14/89.
  - h. Letter dated 4/11/89 to Great Lakes Security and Investigation, Inc. from Fredric M. Brown stating that Great Lakes Security had failed to submit evidence of comprehensive general liability insurance coverage and therefore the Ohio Department of Commerce Division of Licensing would void their license to do business as a Private Investigator and/or Security Guard Provider.
  - i. Travel Expense Report for Grievant for 1/25-1/26/89, 2/1-2/2/89, 2/14-2/16/89, 3/27-3/31/89, 4/10-4/12/89, 4/14/89, all signed 4/17/89.
  - j. Handwritten (unsigned) noted dated 4/18/89 about how to reach Grievant.
  - k. Two page Memo to the file from Rick Brown dated April 20, 1989 re: Grievant's Itinerary for 4/14/89.
  - l. Letter to Fredric Brown from Cliff Kurt, Toledo Better Business Bureau dated April 28, 1989 regarding conversations of 4/20 and 4/27/89 regarding communication with Grievant.
  - m. Letter to Rick Brown from Robert Pyzik, Chief Prosecutor Sylvania dated April 28, 1989 regarding

conversations of 4/19 and 4/25/89 regarding communication with Grievant.

- n. Letter to Division of Licensing Attention Cy Sedlacko dated April 28, 1989 regarding conversations regarding communication with Grievant.
  - o. Handwritten note to Grievant from Bill(?).
  - p. Letter to Cliff Kurt from Jana Skaglin, Manager, public Information, Better Business Bureau dated April 6, 1989 with 3 attached letters of complaint with handwritten note at the bottom: Advise Grievant 4/10 - Grievant tcb.
- 4. Attachment A2 - Materials copied for Grievant/Maxine Hicks after they reviewed itinerary books and travel expense reports in office of Vicki Treckiak on/about February 19, 1991. Expense reports and itineraries for John Wiles and Gregory T. McGough.
  - 5. Handwritten note marked Insert 2nd pg and refers to prior discipline of Grievant (source unknown) (unsigned not dated).
  - 6. One page of Ohio Bell bill for April 28, 1989.
  - 7. Letter to Fredric Brown from Cliff Kurt dated April 28, 1989 confirming conversations of 4/20 and 4/27 regarding communication with Grievant.
  - 8. Award in the matter of the arbitration between OCSEA/AFSCME and Ohio Department of Transportation, OCB Grievance No. G-87-0205 Grievant Bambino.
  - 9. List entitled Materials Received by Union February 19, 1991 (source unstated).
  - 10. Letter dated 11/14/91 to Bob Steele, Staff Representative OCSEA/AFSCME from Rodney Sampson regarding arbitration of the five-day suspension of Grievant.
  - 11. Memo to Rodney Sampson from Robert Allerding, Chief of Records Management re: Commerce, Records Retention Schedules and Destruction dated February 4, 1992 with attached Department of Commerce, Retention Schedule for Employee Disciplinary Records and other information, General Schedule for Travel Expense Reports and Other Information, Division Itinerary Records Information, and Records Destruction Information.

12. Subpoena of Robert Allerding and the following documents:

Handwritten note of Arbitrator Rhonda Rivera's name, phone number and dept. of Licensing request for destruction of records through 12/91 4/89.

Records Retention Schedule.

Memo to Robert Allerding from Diane Hillman, Records Management Officer re: disciplinary records dated 12/12/91.

Records Retention Schedule.

Copy of Article 23 - Personnel Records, Article 24 - Discipline, Article 25 - Grievance Procedure.

Invoice from Ohio Mobile Shredding dated 8/1/90.

Certificate of Records Disposal 2 pages dated 8/1/90.

Investigator Itinerary for Grievant, Wiles and McGough.

Investigator's Itinerary to Grievant along with various travel and expense reports, receipts and state of Ohio Vouchers.

Employer Exhibits

E. Opening Statement - Rodney Sampson, Advocate Office of Collective Bargaining.

E-1. a. Memo to Grievant from Joyce Frazier Clark, Chief of Personnel dated May 3, 1989 notifying Grievant of Pre-Disciplinary meeting scheduled for May 11, 1989, 9:00 a.m. in the West Conference Room, 77 S. High Street, 23rd floor and informing Mr. Burley that Joyce Frazier Clark has been assigned to be the impartial administrator by Linda K. Page, Director of the Department of Commerce.

b. Letter of 5 day suspension commencing June 5 and ending June 9, 1989 to Grievant from Linda K. Page, Director, Ohio Department of Commerce, Division of Administration dated May 24, 1989.

- c. Receipt signed by Fredric M. Brown on July 11, 1989 for document for Grievant in his absence, also signed July 13, 1989 by Fredric M. Brown saying documents were delivered upon Grievant's return on July 13, 1989 and a note at the bottom saying what was received did not include all of the attachments which were referenced and returned the response to Vicki Treciak.
  - d. Memo to Grievant from Vicki Treciak re: Step 3 Response (Grievance #07-00(6-12-89) 41-01-07 dated July 11, 1989 (pages number 1, 2, 3, 5) - management's response to Grievant's grievance filed at step 3 on June 12, 1989.
  - e. Appeal and Preparation Sheet Step 4 Grievance Designee Office of Collective Bargaining dated June 5, 1989.
  - f. Grievance Form State of Ohio - OCSEA, Local 11, AFSCME, AFL-CIO dated June 12, 1989 signed by Grievant.
  - g. Letter to Grievant from Dick Daubenmire, Contract Compliance Chief, Ohio Department of Administrative Services, Office of Collective Bargaining dated August 3, 1989 re: Step 4 Grievance Review, denying grievance.
  - h. Letter to Eugene Brundige, Deputy Director, Office of Collective Bargaining from Bruce A. Wyngaard, Director of Arbitrations OCSEA/AFSCME Local 11 requesting the 07-00-(89-06-12)-0041-07 grievance be taken to arbitration.
- E-2 Inter-Office Communication to Cy Sedlacko from Greg McGough dated April 14, 1989 re: attempt to contact Grievant regarding Treat Lakes Security.
  - E-3 Activity report (incomplete copy) of Investigator Grievant for Week of 4/10 - 14/89 signed by Grievant.
  - E-4 Letter to Division of Licensing Attn. Cy Sedlacko, Deputy Chief from Frank Arvay, Sergeant, Sylvania Township Police stating last communication with Grievant was 4/13/89 by telephone and that no appointment was scheduled for Friday, April 14, 1989.
  - E-5 Two page State of Ohio Travel Expense Report for Grievant for 4/10/89 - 4/14/89 signed 4/17/89 by Grievant.

- E-6 Position Description Ohio Department of Administrative Services, Personnel Division for Investigation Specialist signed by Kenneth R. Cox October 14, 1986.
- E-10 Inter-Office Communication from Fredric M. Brown, Chief of Licensing to Gregory McGough, Investigator Supervisor dated September 23, 1988 re: Extension of the Normal Eight Hour Work Day outlining the procedure and attached form to be filled out.
- E-11 Four page Memo no. 601a dated 6/20/86 Ohio Department of Commerce Progressive Disciplinary Policy Violations of Departmental Work Rules and Corresponding Disciplinary Measures.
- E-12 Inter Office Memo to Grievant from Patrick Keys, Chief re: Verbal Warning dated August 24, 1987 signed by Patrick Keys and Grievant acknowledging receipt of a copy of this verbal warning with Grievant adding that he did not agree with the content and would submit an attachment.
- E-13 Memo to Grievant from Cyril Sedlacko, Deputy Chief, Licensing dated January 9, 1989 re: verbal reprimand confirming conversation of January 3, 1989, signed by Grievant acknowledging receipt of the verbal reprimand.
- E-14 Two page State of Ohio Travel Expense Report for Grievant for 4/10/89 - 4/14/89 signed 6/20/89 by Grievant.
- E-15 Original and Amendment of materials sent/received by the Grievant/Union as compiled by the Employer.

#### Union Exhibits

- U a. Union's Opening Statement.
- b. Handwritten list of Union Issues (2 pages).
- c. Handwritten objections (1 page).
- U-1 The Issue and Case Summary (source unclear).
- U-2 One page activity report submitted by Greg A. Anderson.
- U-3 a. Typed summary of Investigators' Itinerary for week of April 10-14, 1989 for Anderson, Grievant,



McGough and Wiles with attached sheets submitted and signed by each respectively.

- b. Typed summary of Investigators' Itinerary for week of April 10-14, 1989 for Anderson, Grievant, McGough and Wiles with attached sheets submitted and signed by each respectively.

U-4 Analysis of Potential Discipline Cases form completed by Fredric M. Brown, Chief of Licensing for Grievant (5 pages).

U-4 a. Memo from D. Matthew Davidson, Superintendent Ohio Department of Commerce to William D. McDowell, Examiner notifying Mr. McDowell of Written Reprimand, dated February 12, 1988, and signed by William E. McDowell, acknowledging receipt of the memo.

- b. Letter to Mr. Ken Roberts, Division of Credit Unions from Cynthia Ann Luecke, President/Treasurer Enquirer Credit Union, Inc. dated December 16, 1987 tracking hours of Ann and Bill and attached handwritten note used in tracking.

- c. Page 3 of correspondence to Mr. D. Matthew Davidson dated October 10, 1987 re: credit union exam process and Mr. McDowell's conduct.

- d. State of Ohio Travel Expense Report signed by William E. McDowell dated August 1, 1987 and approved by signature D. Matthew Davidson August 6, 1987.

- e. State of Ohio Travel Expense Report signed by William E. McDowell dated July 24, 1987.

- f. State of Ohio Division of Credit Unions Examination Time report for Enquirer signed by Cynthia Ann Luecke and William E. McDowell for July 20, 21, 22, 23, 24 and 28, 1987.

- g. Comments Concerning Meeting in Office on February 17, 1988, signed by William E. McDowell.

U-5 Memo from Vicki Treckiak to Grievant re: Step 3 Grievance (07-00)6-12-89)41-01-07) Meeting dated June 19, 1989 granting and scheduling for June 26, 1989 at 8:00 a.m. a step 3 meeting re: 5 day suspension.

U-6 Seven page draft of Management Concerns dated August 8, 1989.

- U-7 a. Memo (dated 12-12-91) to Robert N. Allarding, Chief of Records Management from Diane Hillman, Records Management Officer re: Disciplinary Records regarding obtaining information on employee disciplinary records from the year 1987 to present.
- b. Information Management Records Retention Schedule signed by Robert Allarding 4/19/89.
- c. Copy of Article 23 - Personnel Records, Article 24 - Discipline, and Article 25 - Grievance Procedure
- U-8 Memo to Joyce Frazier Clark, Personnel Chief from Teresa A. Van Camp, Programming/Analysis Supervisor re: Khalil Bryant, Recommendation for Suspension dated January 16, 1990.
- U-9 Memo No. 6.01 Department of Commerce Policy and Procedures Manual pages 1-4.
- U-10 a. Investigator's Itinerary for week of April 10-14, 1989 for Anderson, Grievant, McGough and Wiles with attached sheets submitted and signed by each respectively (complete copies - tops of individual itineraries are not cut off).
- b. Phone message for 4/10, 10:21 Cliff Kurt (419-241-4911) called and asked Grievant to call back signed by DB and phone log.
- U-11 Day 2 Monitoring Schedule Thursday, April 13, 1989, Grievant's appointment listed as 3:00 - 3:30 p.m.
- U-11(a) Memo to Division Chiefs from Joyce Frazier Clark re: EEO Monitoring Visit dated May 15, 1989.
- U-12 Inter-Office Communication to Rick Brown, Chief of Licensing from Grievant re: travel (expense claim from 12/28 -12/30/89 dated January 2, 1990 with attached travel expense report signed 1/2/89 and 2 Red Roof Inns receipts for Grievant arrival 12/29/89, check out 12/30/89.
- U-13 a. Trip Ticket.
- b. Five Requests for Authorization for Compensatory Time by Grievant signed 12/6/89.
- c. Handwritten log Tuesday Nov. 8 through Nov. 22, 1988.

- d. Four Requests for Authorization for Compensatory Time by Grievant signed 12/6/89.
- U-14 Inter Office Communication to Linda K. Page, Director from Grievant re: May 3, 1989 Pre-discipline meeting notice dated May 10, 1989.
- U-15 Inter Office Communication to Linda K. Page, Director from Grievant objecting to re: Your Appointment of Joyce Frazier Clark as the Administrator responsible for conducting my May 11, 1989 Pre-discipline Meeting, dated May 10, 1989.
- U-16 Inter-Office Communication to Fredric M. Brown, Chief of Licensing from Cy Sedlacko, Deputy Chief of Licensing dated May 2, 1989 re: Background information relative to the submission of travel expense reports by Grievant.
- U-17 Four page Interoffice Memorandum to Division of Licensing Staff Members from Cy Sedlacko, Deputy Chief re: Staff Call dated August 29, 1988.
- U-18 Inter-Office Communication to Linda K. Page from Grievant re: Your May 24, 1989 letter to me dated June 14, 1989.
- U-19 Handwritten diagram of step 1, step 2 and step 3.
- U-20 Inter-Office Communication to Director Page from Grievant re: our designation of Vicki Treciak to hear my grievance at Step 3, dated June 20, 1989.
- U-21 Memorandum to Linda K. Page from Joyce Frazier Clark re: recommended Discipline for Grievant dated May 18, 1989.
- U-22 Memorandum to Linda K. Page from Joyce Frazier Clark re: confidential notes to file on Grievant dated May 18, 1989.
- U-23 Witness Interview Regarding Grievant's Step Three Grievance Hearing dated June 29, 1989.
- U-24 Witness Statement in Response to Request By Grievant, date of meeting June 29, 1989, time of meeting about 5:00 p.m., persons present Grievant, Cy Sedlacko, Rick Brown signed by Fredric M. Brown July 5, 1989.
- U-25 a. OCSEA Memo to Rhonda Rivera from Robert W. Steele re: Grievance #07-00-(89-06-12)-0041-07 dated

January 31, 1992 with attached documents or information requested by the Union from the State.

- b. Letter dated May 10, 1989 regarding pre-discipline notice.
- c. Letter dated May 10, 1989 regarding pre-discipline hearing officer and request for documents.
- d. Letter dated June 14, 1989 regarding May 24, 1989 letter to Grievant.
- e. Message to Vicki dated June 22, 1989 requesting information and documents.
- f. Memo from interview on June 29, 1989 with Rick Brown showing another request for documents that was made at the third step hearing.
- g. Attachment to grievance regarding requests that were made at step three and step four.
- h. Memo dated February 19, 1991 written by Ruth Spencer prior to expedited hearing regarding material received by Union.
- i. Letter dated February 28, 1991 to Ruth Spencer regarding further requests by the Union as directed by Arbitrator Fullmer.
- j. Letter dated November 14, 1991 from Mr. Sampson to Mr. Steele regarding preparation of this hearing for December 19, 1991.
- k. Memo to Rodney Sampson from Robert Steele dated December 12, 1991 final request for documents and copies.
- l. Handwritten note titled Pre-Disciplinary Notice Report/Recommendation listing records which were expunged of disciplined initial by Linda K. Page and Joyce Frazier Clark received 12/18/91.

## Relevant Contract Sections

### Preamble

This Agreement, entered into by the State of Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union or the Exclusive Bargaining Agent, has as its purpose the promotion of harmonious relations between the Employer and the Union; the establishment of an equitable and peaceful procedure for the resolution of differences; and the establishment of wages, hours, and other terms and conditions of employment.

### ARTICLE 2 - NON-DISCRIMINATION

#### § 2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer shall not solicit bargaining union employees to make political contributions or to support any political candidate, party or issue.

#### § 2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

### 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 The Ohio Revised Code, Section 4117.08(C), Numbers 1-9.

#### ARTICLE 23 - PERSONNEL RECORDS

##### § 23.01 - Personnel Files

An employee's official personnel file will contain all matters required by the Ohio Revised Code and will be maintained within the Division of Personnel of the Department of Administrative Services in Columbus. All other matters pertaining to an employee will be retained within the Agency for which the employee works. In the case of employees working for the Department of Administrative Services, all other matters pertaining to an employee will be retained within the Division of Personnel of the Department of Administrative Services.

Only materials maintained in an employee's official personnel file shall be available to the public.

##### § 23.02 - Review of Personnel Files

Employees and/or their authorized union representatives shall have the reasonable right to review the contents of their personnel files. Employees shall have access to all materials in their files except those prohibited by Ohio Revised Code Section 1347.08(C). Such review may be made during normal working hours. Employees who are not normally scheduled to work when the Personnel Office is open may request to review their files through their supervisor. The supervisor will make the file available in a reasonable amount of time. Reasonable requests to copy documents in the files shall be honored at no charge.

No persons except those authorized by the employee and those whose job entails access to personnel files shall be permitted to review employees' personnel files, except as required by the Ohio Revised Code.

#### § 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.

#### § 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.

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.

#### § 24.03 - Supervisory Intimidation (in part)

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

#### § 24.04 - 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.

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

#### § 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employer and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing.



The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

#### § 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.

### ARTICLE 25 - GRIEVANCE PROCEDURE

#### § 25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance

procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday, or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. Written reprimands shall be grievable through Step Three. If a verbal or written reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal or written reprimand.

H. All settlement agreements that require payment or other compensation shall be initiated for payment within two payroll periods following the date and settlement agreement is fully executed.

## § 25.02 - Grievance Steps

### Step 1 - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event. The immediate supervisor shall render an oral response to the grievance within three (3) working days after the grievance is presented. If the oral grievance is not resolved at Step One, the immediate supervisor shall prepare and sign a written statement acknowledging discussion of the grievance, and provide a copy to the Union and the grievant.

### Step 2 - Intermediate Administrator

In the event the grievance is not resolved at Step One, a legible copy of the grievance form shall be presented in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the answer or the date such answer was due, whichever is earlier. The written grievance shall contain a statement of the grievant's complaint, the section(s) of the Agreement allegedly violated, if applicable, the date of the alleged violation and the relief sought. The form shall be signed and dated by the grievant. Within seven (7) days after the grievance is presented at Step Two, the intermediate administrator shall discuss the grievance with the Union and the grievant. The intermediate administrator shall render a written answer to the grievance within eight (8) days after such a discussion is held and provide a copy of such answer and return a legible copy of the grievance form to the grievant and a copy to one representative designated by the Union.

### Step 3 - Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise. In the Ohio Department of Transportation Step 3 meetings will normally be held at the worksite of the grievant. If the meeting is held at the district headquarters the chief steward will be permitted to represent.

The Agency Head or designee shall process grievances in the following manner:

A. Disciplinary grievance (suspension and removal)

The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective Bargaining. The response will be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The response shall be forwarded to the grievant and a copy to one representative designated by the Local Chapter Officer. Additionally, a copy of the answer will be forwarded to the Union's Central Office. This response shall be accompanied by a legible copy of the grievance form.

If the grievance is not resolved at Step 3, the Union may appeal the grievance to arbitration by providing written notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given whichever is earlier.

B. All other grievances

The Agency Head or designee shall give his/her written response and return a legible copy of the grievance form within fifteen (15) days following the meeting. The Agency shall forward the response to the grievant and a copy to one representative designated by the Local Chapter Officer.

### Step 4 - Office of Collective Bargaining Review

If the grievance is not settled at Step Three, pursuant to Step 3 (B), the Union may appeal the

grievance in writing to the Director of The Office of Collective Bargaining by sending written notice, and a legible copy of the grievance form to the Employer, within ten (10) days after the receipt of the Step Three answer, or after such answer was due, whichever is earlier.

The Director of the Office of Collective Bargaining or his/her designee shall issue a full response to the Union and the grievant within twenty-one (21) days of the appeal. The response will include a description of the events giving rise to the grievance and the rationale upon which the decision was rendered. The Director of the Office of Collective Bargaining may reverse, modify or uphold the answer at the previous step or request a meeting to discuss resolution of the grievance.

A request to discuss the resolution of the grievance shall not extend the thirty (30) days in which the Union has to appeal to arbitration as set forth in Step Five.

#### Step 5 - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of The Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four.

#### § 25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

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.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

#### § 25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

#### § 43.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

## Union's Procedural Objections

1. The Employer has refused to comply with almost all of the Union's discovery requests prior to the arbitration proceedings.
2. The Employer destroyed records of other disciplinary action and copies of 1989-1990 itineraries and expense reports of the three investigators.
3. A copy of the pre-disciplinary meeting report was refused; first, the Employer claimed it was not discoverable; then the Employer claimed it was not written, then just before the Arbitration hearing the pre-disciplinary meeting report was provided.
4. The original documents which were part of the Sedlacko investigation and the Employer used a pre-disciplinary meeting were denied to the Union, and the originals are claimed by the Employer that they cannot be located.
5. The pre-disciplinary notice was inadequate in three respects.
  - a) It did not include a specific statement of how the Grievant violated Commerce Policy memo 6.01(a) [#28].
  - b) The pre-disciplinary notice included charges which the pre-disciplinary hearing officer knew were false.
  - c) The Employer, through Linda K. Page, refused to make the charges more specific after a request by letter (5/10/89) for such a specification.
6. Commerce Department work rules (see Memo 6.01) gave Grievant a right to a pre-disciplinary meeting conducted by a neutral, detached administrator. Ms. Clark was not neutral and detached.
7. The investigation was unfair and inadequate.
  - a) Mr. Brown was excluded from the investigation report.
  - b) The investigation included irrelevant, but prejudicial, material about Grievant's stolen car.
  - c) Mr. Sedlacko was not a fair investigator but a prosecutor intent on building a case.

8. The Step 3 was unfair and procedurally incorrect.

- a) The Step 3 hearing officer was the subordinate of the pre-disciplinary hearing officer and had also been involved in the original discipline.
- b) She had no authority to adjust the discipline as required.

### Arbitrator's Rulings on Alleged Procedural Violations

#### Union Procedural Objection 1

Discovery per se is not granted except in a few specific instances during the Grievance Procedure (Article 24). But within the Arbitration Procedure significant discovery is mandated. Under § 25.08 - Relevant Witness and Information: "The Union may request specific documents, books, papers, or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied." This Article 25 discovery process would have begun after the request for arbitration August 8, 1989 (Employer Exhibit E-1(h)).

Thus any examination of this violation must be looked at from the period April 14, 1989 to August 8, 1989 (pre-arbitration period) and August 8, 1989 until December 19, 1992 arbitration period.

A limited discovery is granted by § 24.04 "When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at the time and documents known of at that time used to support the possible disciplinary



action." Employer's Exhibit (E-1) is the Notice of Pre-disciplinary Meeting. Neither a list of witnesses nor documents are attached to that exhibit. Mr. Brundige, in his testimony, said that § 24.04 only requires a list of witnesses and list of documents be presented with the pre-disciplinary notice. However, the words of the Contract are "list of witnesses . . . and documents. . . ." If only a list of documents were intended, the preposition "of" would have to precede the noun "documents." Therefore, this Arbitrator holds that, prior to the hearing itself, the Grievant is entitled to a list of witnesses and the documents as described in § 24.04. No evidence was adduced to indicate that the Employer complied with this procedure.

At the pre-disciplinary hearing, the Grievant was provided with some documents (see Employer's Exhibit 15). The Grievant testified that at the Hearing, Joyce Frazier Clark openly refused to provide him with all the documents that she was using. On May 10, 1989, the Grievant wrote Linda K. Page asking specifically for copies of all the documents (Union Exhibit 25c). The Grievant received no response to this letter. Elementary fairness, to say nothing of appropriate office procedure, (or common decency) required an answer. This Arbitrator holds that the lack of an answer constituted a refusal of this request.

The Employer's Exhibit 15 refers to a memo dated May 18, 1989 from Pre-Disciplinary Hearing Officer Joyce Frazier Clark to Director Linda K. Page outlining what items were given to the Grievant on May 11, 1989. A copy of that memo is found in the

Exhibits (U-21). More importantly, no evidence shows that the memo was copied to the Grievant, nor did the Employer claim that Exhibits A-N were all the documents known at the time and used by Hearing Officer Joyce Frazier Clark.

The Grievant reiterated his request on June 29, 1989 (U-25(f)). The Arbitrator holds that the Employer failed to meet the standard imposed by § 24.04. The list and documents were not provided before the Hearing, nor at the Hearing, nor accounted for after the Hearing.

Did the Employer violate § 25.08? The documents in this Arbitration were many and varied. The Arbitrator concludes that once the Office of Collective Bargaining took charge a good faith attempt was made to provide the documents. The provision of documents was complicated by the departure of Linda K. Page, the director, Joyce Frazier Clark, the Personnel Officer, and Rick Brown, Division Chief. The Employer's representatives were laboring under events beyond their control.

One particular request remains exceedingly troubling:

The Grievant requested the original itineraries of all the investigators. These originals were never provided. Mr. Allerding, the records retention officer testified that the contemplated itineraries were not official state documents and, as such, had no retention schedule, so when and if they were destroyed, that destruction would not be the responsibility of his office. However, Angela Griffin, Secretary to the Licensing Division, testified that her job was to maintain all the

itineraries (contemplated and summaries) and that she did so in a 4 inch ring binder on her desk. She testified that Mr. Sedlacko asked for them and, to this day, has never returned them. Mr. Sedlacko is main figure in the investigation of the alleged misconduct of the Grievant. His apparent retention of this book remains unexplained by him or anyone else and casts a chill of impropriety over the proceedings.

#### Union Procedural Objection 2

No clear and convincing evidence was introduced proving that the Employer intentionally destroyed any relevant documents.

#### Union Procedural Objection 3

This Arbitrator has already ruled that Pre-Disciplinary Reports are discoverable (Bambino G87-0205-11-25-87). However, Ms. Treciak testified that the report was not found until the departure of Joyce Frazier Clark. Ms. Treciak testified that as soon as she discovered the report, apparently almost serendipitously, she gave it to Mr. Sampson who turned it over to the Union. No evidence was adduced to cast doubt on this sequence of events. While the story casts serious doubts about the records management of DOC, the failure to provide the report expeditiously does not rise to the level of a prejudicial error.

#### Union Procedural Objection 4

As addressed in Objections #1 and #2, some evidence supports these objections; however, the evidence is not sufficient to sustain the objection.

### Union Procedural Objection 5

The Pre-Disciplinary Meeting Notice did not contain any explanation of Commerce Policy Memo 6.01(a) (#28). Eugene Brundige testified for the Employer mainly that the purpose of the pre-disciplinary meeting was to inform the Grievant of the basis for the contemplated discipline. The pre-disciplinary meeting was to place in the Contract the standards of Loudermill decision (Cleveland Bd. of Education v. Loudermill (1985), 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487, 1 BNA IER Cas. 424, 118 BNA LRRM 3041, on remand (CA6 Ohio) 763 F.2d 202, 120 BNA LRRM 2647 and on remand (N.D. Ohio) 651 F. Supp. 92, 1 BNA IEB Cass 855). Loudermill makes the failure to provide an employee with pre-termination notice and an opportunity to respond (emphasis added) to an order of removal a violation of due process and constitutes reversible error. "An opportunity to respond" is key; one can only respond to what one is notified of. The Grievant did not receive notice of the content of a violation of 6.01(a) (#28). On May 10, 1989, he requested an explanation from Linda K. Page. Ms. Page did not respond. The Arbitrator finds #28 "Other actions that could compromise or impair the ability of the employee to effectively carry out his or her duties as a public employee" to be inherently vague. Without a clarification from the Employer, the Grievant was denied his "opportunity to respond."

In 5(b) the Union claims that pre-disciplinary notice included charges which the pre-disciplinary hearing officer knew were false.

The Arbitrator finds this claim substantiated. Rick Brown told Joyce Frazier Clark that the Grievant only refused to answer because he feared criminal charges and was, therefore, exercising his fifth Amendment rights. According to Rick Brown, Joyce Frazier Clark specifically directed Mr. Brown not to tell the Grievant that no criminal charges were being considered; hence, she clearly knew or had reason to know he was not being insubordinate.

Mr. Sedlacko testified that the Grievant had never received any federal, state or public funds at the time of the pre-disciplinary meeting up until and including the Arbitration Hearing. Mr. Sedlacko was the investigator; Ms. Clark allegedly relied on his report to prepare the Pre-Disciplinary Notice, so that she knew or must have known that charge #19 was without foundation. The Arbitrator finds that the charges of #2(b) insubordination, #19 Intentional Misuse of funds and #28 Other Actions were improper and intentionally misleading. The stacking of these three charges on top of #1(b), #13, and #18 can only have been for an "in terrorem" effect and hence were improper.

Union Procedural Allegation 5(c) was already addressed in Procedural Objection 1.

### Union Procedural Objection 6

The Union alleges that the Department violated its own rules and the Contract by designating Joyce Frazier Clark as the Pre-Disciplinary Hearing Officer. Section 24.04 makes only one specific referral to the Pre-discipline Officer "The Appointing Authority's designee shall conduct the meeting." However, the work rules of the Department of Commerce provide that "An employee has the right to a meeting conducted by a 'neutral, detached administrator.'" (Union Exhibit 9)

The testimony of N. Eugene Brundige, the Employer's witness, was most instructive on this issue. He noted that § 24.04 does not require in words a "neutral" hearing officer. However, the purpose of that hearing under Loudermill was to let the Grievant tell their story "to a person not involved." He said that Employer designees were trained to begin with these words "I am part of management, but I am not involved in the incident." He was asked about work rules. He said that work rules were not negotiable (see 43.03) but that the Employer had a duty to inform employees of the work rules, and the work rules had to be reasonable and consistent with the Contract. If an agency, he said, promulgated (i.e., gave notice) of a discipline policy which was reasonable and consistent with the Contract, the agency should follow the rule or give notice of its retraction. He said that the words "neutral and detached" as used by the Department did not mean "impartial" like an arbitrator, but "neutral in the sense that the person was not involved in incident so that he/she

could be "detached and objective." In the Pre-Discipline Notice, Joyce Frazier Clark claimed to the Grievant that she was an "impartial" administrator (see E(1)(a)). On May 10, 1989 (Union Exhibit 25(C)), the Grievant immediately challenged the appointment of Joyce Frazier Clark as "neutral and detached." Linda K. Page, the Director, never replied to this challenge.

Testimony from Rick Brown indicates that Joyce Frazier Clark was embroiled in this discipline even before the Investigatory Interview. Mr. Brown testified that normally he would have been the investigator but that he was told by Joyce Frazier Clark to "distance himself" presumably because she viewed Mr. Brown as "too lenient" on the Grievant. Mr. Brown also consulted Ms. Clark in the middle of the investigatory interview. Moreover, he had been specifically directed by Joyce Frazier Clark to fill out a document called "An Analysis of Potential Discipline" (Union Exhibit 4).

As the Pre-Disciplinary Hearing Officer, Joyce Frazier Clark wrote two (U-21, U-22) reports. Apparently U-21 was designed to be the public document, while U-22 was labeled "Confidential notes to file on Randy Burley." This "two document" event calls into question, yet again, the fairness and non-involvement of Ms. Clark. While § 24.04 does not require a written report, elementary fairness requires that all the findings be embodied in one document. In U-21, Ms. Frazier Clark describes herself in one part of the "neutral administrator" and later on says "We charged the Grievant with the following violations:"

In the "confidential document," Ms. Clark concludes "It appears from the above that Randy was trying to make a case for being 'set up.' It does not, however, negate the fact that he admitted not being in Toledo during the working day on April 14th." Mr. Brundige, a witness for the Employer, interpreted \$ 24.04 as requiring a pre-disciplinary hearing officer who was not involved in the incident. The work rules of which the Grievant had notice and upon which he was entitled to rely gave him "the right to a neutral and detached" person. The work rule was reasonable (one of the just cause tests) and consistent with the Contract (Mr. Brundige). The Arbitrator finds that Joyce Frazier Clark was inappropriate as a pre-disciplinary hearing officer; she was clearly involved and, hence, neither neutral or detached.

#### Union Procedural Objection 7

No evidence was adduced nor Contract section cited which required Mr. Brown to do the investigation. However, the packet of investigatory material prepared by Mr. Sedlacko did contain irrelevant and potentially prejudicial matters: Exhibit B Columbus Division Police Report, Exhibit C Stolen Property Supplement, Exhibit D Stolen Vehicle Supplement. No evidence was adduced as to the relevancy of any of these exhibits and calls Mr. Sedlacko's fairness into question. Mr. Sedlacko made two inconsistent statements which also raise question. In his testimony, he described the investigation as beginning about 3:30 p.m. on Friday, April 14th when Mr. Brown directed him to begin. Yet, he admitted at that point no evidence existed that the



Grievant had not been in Toledo. Moreover, Mr. Sedlacko did not receive the Grievant's expense reports until Monday, April 17th in the afternoon, and until those items were received, the Grievant had not claimed to be in Toledo. Lastly, Mr. Sedlacko admitted that he did not investigate nor come up with a satisfactory answer as to why the Grievant was sought in Toledo for the errand and his fellow investigator Mr. Anderson who was also in Toledo on April 14th, having listed himself there on April 13th thus making himself more likely to be found at 8:30 a.m. in the a.m. than Mr. Burley. Even Ms. Clark inferred the possibility of a set up. Mr. Sedlacko and the Grievant had been engaged in a long term problem of the timeliness of the Grievant's expense reports. Moreover, before the investigatory interview, Mr. Sedlacko admittedly never asked the Grievant directly where he was on that Friday. Lastly, testimony at the arbitration revealed that the three letters from the three persons listed on the Grievant's itinerary were not composed by themselves, rather Mr. Sedlacko composed them based on his interpretation of their conversations with Mr. Brown and himself. In fact Brown, not Sedlacko, talked to 2 of the 3 persons. The composed letters were then given to the persons to sign which they did. (See Joint Exhibits 3(1) (m) and (n)). These letters cannot be regarded as evidence. The Employer should have written the persons with specific questions and let them reply in their own words. The Arbitrator cannot find that Mr. Sedlacko was

intentionally unfair, but the investigation was clearly incomplete and unfair.

Union Procedural Objection 8

Step 3 (25.02) requires that ". . . the parties shall meet in an attempt to resolve the grievance. A 'designee' or the Agency head shall prepare a Step 3 grievance response." Mr. Brundige described a proper Step 3 as the selected person starting by saying "I am the director's designee. My job is to review the department's decision. I am not neutral. I am the final review by management." The Grievant objected to Ms. Treciak as the Step 3 official.

On June 20, 1989, the Grievant wrote Director Page voicing his challenge to Ms. Treciak. His primary allegation was that since Ms. Treciak was a subordinate of Ms. Clark, who had already found just cause, then Ms. Treciak could not be in a position "to resolve the grievance." In her testimony, Ms. Treciak maintained that her first involvement with this Grievance was with the Step 3 designee. Subsequently, she admitted to having "a number of discussions about the Grievance with the supervisors prior to the Pre-Disciplinary Hearing. She agreed that, in and of herself, she could not resolve a grievance with finality but could have recommended a change. The contractual requirements for a Step Three designee are minimal, and the choice Ms. Treciak cannot be found to violate the contract. However, to avoid the appearance of unfairness, the choice of someone else would have been wiser.

### Summary of Arbitrator's Findings on Procedural Objections

Objection 1 The Employer violated § 24.04 by failing to provide a list of witnesses and the documents called for under § 24.04. Moreover, the Arbitrator finds that the Director violated elementary due process by failing to answer the Grievant's letters which raised legitimate procedural questions. The Arbitrator finds that § 25.08 was not violated.

Objection 2 The Arbitrator overrules this objection.

Objection 3 The Arbitrator overrules this objection.

Objection 4 The Arbitrator overrules this objection.

Objection 5 The Arbitrator finds that the pre-disciplinary letter was insufficient notice to the Grievant of charges 2(b), #19, and #28. Since all of these charges were dismissed before or at arbitration, the error was not prejudicial.

Objection 6 The Arbitrator finds the designation of Joyce Frazier Clark as the Preliminary Hearing Officer as improper and prejudicial.

Objection 7 The Arbitrator finds that the investigation was incomplete and, thus, unfair.

Objection 8 The Arbitrator overrules this objection.

### Issue

Was the Grievant suspended for just cause? If not, what shall the remedy be?

## The Facts

### The Agency

The Ohio Department of Commerce has approximately four-hundred seventy (470) employees and is one of the State's chief regulatory Agencies. The Ohio Department of Commerce enforces a variety of regulations that apply to financial institutions, fire codes, private investigators, personnel placement services, unclaimed funds, pawnbrokers, precious metal dealers, small loan and second mortgage businesses, auctioneers, and insurance premium finance firms. The Department of Commerce is different from many governmental agencies, since it must operate like a private business enterprise, as opposed to being funded primarily by General Revenue Fund dollars. This agency exists on the fees and assessments from the industries that it regulates.

The Division of Licensing, within the Department of Commerce, regulates licensed auctioneers, personnel placement agencies, private detectives, and security guards. The interest and welfare of the general public and those who have dealings with the licensed agencies are protected by the Division's oversight powers. Applicants for licensure are screened by staff to insure that legal qualifications for licensure are met. Additional protection is provided to the public by requiring licensees to be bonded to meet insurance requirements. Also, investigations of licensees are conducted by Investigators in the Division of Licensing Enforcement Section.

Investigators directly influence what information is relevant to issue or refrain from issuing licenses. Investigators must work closely with company administrators, other regulatory agencies, police, prosecutors and the Ohio Attorney General Office.

The Grievant is an Investigation Specialist in the Licensing Division located in Columbus. He has been employed by the Department of Commerce since October 31, 1982. At the time of this incident leading to this Grievance, the Grievant had two disciplines in his records.

Verbal Reprimand of August 24, 1987

On Monday, August 17, 1987, Grievant took a short lunch period and left work about one half hour early. On the morning of Tuesday, August 18, 1987 I counseled Grievant about not "flexing" his time without prior approval. I told him he was not to repeat Monday's actions, and he stated he understood. He stayed through the regular lunch hour answering phones (at the request of the Deputy Chief) then did not take lunch and left thirty five minutes early. On Wednesday, he reported over one hour late and did not phone in as our policy requires.

I warned Grievant that he had violated rules concerning leaving early, leaving the work area without permission, being AWOL (for not calling in), and failing to follow written policies of the Director. I stated my belief that Grievant's actions not only impaired his effectiveness to carry out his duties as an employee, but his actions could also have a detrimental effect on other Division employees and morale in general.

Grievant spoke briefly of the circumstances surrounding his actions. He again stated he understood the rules and pledged to abide by them.

I informed Grievant that I intended to enter a verbal warning into his record, and that any

further breach of policies or directives could lead to further discipline.

Verbal Reprimand of January 9, 1989

TO: Grievant, Investigation Specialist  
FROM: Cyril L. Sedlacko, Deputy Chief, Licensing  
DATE: January 9, 1989  
SUBJ: Verbal Reprimand

MESSAGE:

This will confirm our conversation on January 3, 1989, relative to your failure to adhere to written directives. You will recall the following incident and discussion:

Your travel expense vouchers submitted on December 29, 1988, for the period September 28, 1988 - December 15, 1988, contained claims for travel expenses that occurred more than thirty (30) days prior to submission of said vouchers, and as such were not submitted in accordance with written instruction.

Our discussion resulted in an agreement that, in the future you will submit subsequent travel expense vouchers within thirty (30) days of the occurrence.

Mr. Sedlacko described the Grievant as an honest man. He said the Grievant was an excellent, even outstanding, employee when "he" wanted to be. However when "he (the Grievant) feels otherwise, some things could be better." Just prior to the April 14th incident, Mr. Sedlacko said that he and Mr. Brown had assigned the Grievant to an extremely complex and difficult case which "involved a great deal of unsupervised time," and they expected him to exercise "considerable independent judgment." Mr. Sedlacko said the Grievant had a long standing problem with

getting his travel expense reports in on time and had been disciplined for that (E-13) earlier in 1989.

Mr. Rick Brown stated that although Mr. McGough was the Grievant's regular supervisor, he (Brown) often worked with the Grievant on cases. Brown also said the Grievant was an honest person in all his matters.

Mr. Brown said that Investigators were supposed to get their contemplated itineraries approved. However, itineraries could be easily changed to meet the demands of the investigation. Brown said procedure to change was not a "formalized procedure." Usually, an investigator called his supervisor; if the supervisor was out, the investigator called him (Brown) or sometimes they just left messages with the secretary. Brown said that when in the office investigators' hours were 8:00-5:00, but when in the field, the 8-5 hours were not the parameter rather their work was "when the investigation required." Mr. Brown was shown a memo from himself to Gregory McGough (Emp. 10) "Extension of the Normal Eight Hour Work Day" dated September 23, 1988 which reads as follows:

Given the nature of enforcement activities, occasional extension of the normal eight hour work day may be necessary. To minimize confusion and provide for an orderly method for granting authorization for extension of the normal work day, the following procedures must be adhered to:

1. When an investigator ascertains that continuing to work beyond the normal eight hour work day will be in the best interest of the Division and he is willing to extend his work day, he will:

- a. Call you, the immediate supervisor, at (614) 466-2453, informing you of the situation and request authorization for extending his work day. The call must be made at an hour which is early enough to permit him to return home by the end of the normal work day, if the request is denied.
  - b. Given, there are days when you are concurrently scheduled out of the office, which should be known to your subordinates, and you will not be available to grant the authorization. On these occasions, your investigators will call the Deputy Chief at (614) 466-9111.
  - c. If neither you nor the Deputy are available, the respective investigator will ask the receptionist to transfer the call to me and I will make the decision.
  - d. In cases where investigators are scheduled outside the normal working hours (8:00 a.m. - 5:00 p.m.) and an investigator believes extended hours are appropriate, authorization will be requested by calling you at home at (614) 861-2497. If you are not available, the next person to be called will be the Deputy Chief at (614) 846-3536. Finally, if the Deputy Chief can't be reached, the Chief should be called at 889-8390. If none of us can be reached, the investigator should not work beyond the approved hours.
2. Recording of extended hours worked:
- a. The individual authorizing the extended work day will immediately, upon approval, initiate the attached inter-office form by completing the appropriate entries.
  - b. The investigator authorized to extend his normal work day will immediately upon next arriving at the Division contact the person authorizing the



extended hours and report the hours actually worked (including travel time).

- c. Upon completion of a. and b. above, the form will be signed by the individual authorizing the extended work day and submitted to Ms. Janet Green for recording. A copy of said form will be provided for your file.
- d. Extended hours worked will be granted and recorded on a one-for-one basis and must be used during the normal 40 hour work week in which accrued. Thus, the possibility of extending the normal eight hour work day on a Friday is remote, because an investigator would already have worked thirty two hours during the previous four day period.

3. Use of accrued extended hours worked:

- a. Must be used on a hour-for-hour basis during the normal forty hour working week in which accrued. Hours not used during said period will not be carried over and, thus, will be lost.
- b. Must be approved by you in advance, before the start of any normal work day.
- c. Authorization for its use will not be granted to cover periods of tardiness or absence without leave. (Calling in after the start of the normal scheduled workday).

NOTE: Questions relative to this memorandum should be addressed to the Deputy Chief of the Division.

Brown said the investigators were not given copies of the memo, but to the best of his knowledge, Supervisor McGough communicated the contents to them.

Grievant explains the events of the week of April 10-14th, 1989 in the following fashion: He said he told his supervisor he

would go up to Cleveland the night of April 9th to avoid the bad roads the morning of April 10th. Then in the late afternoon of April 10, the Grievant called in and spoke to Rick Brown, Cy Sedlacko, and Guy McGough, on the speaker phone. He told them he'd gone to Cleveland Sunday night to avoid the bad roads. They said "no problem." He then told them his proposed itinerary for the rest of the week and said he would write it up Wednesday when he was in the office. On the evening of April 10th, Cy told him "use your own judgment."

When he came in to the office, he wrote up the contemplated itinerary. Sedlacko asked for his late expense reports. At first, the Grievant said he'd have them in on Friday the 14th but remembered he planned to leave for Toledo Thursday p.m. and be there all day the 14th. So he told Sedlacko, he would have the reports by noon Monday, April 17, 1992. Then on Thursday, he could not leave for Toledo because he was scheduled for an EEO meeting at 3:30 (U-11a). So while he was in the office, he attempted to call the three persons on his contemplated itinerary for Friday the 14th. He could not get hold of Cliff Kurt at Toledo BBB, but he did get hold of Robert Pyzik at his private office and accomplished what he needed so he (Grievant) would not need to see Pyzik on the 14th. When he left the office on the 13th, he saw both Rick and Cy and told them that it was too late to leave for Toledo on Thursday. Brown testified that he remembered the Grievant being in the office on Thursday and had "a vague recollection that he (the Grievant) discussed changes in

the Friday itinerary with him but he could not swear to it." The Grievant maintained he worked all day Friday at home, including making calls to Toledo. He was arranging evidence and files. He left for Toledo in the late afternoon and with a companion visited various clubs trying to track down a witness who was reputed to hang out in these clubs.

Friday morning, Supervisor Greg McGough decided that while the Grievant was in Toledo he could pick up a document and give a message to an employer. The Employer admits neither the document or the message was crucial nor particularly Grievant's job. So McGough called at least two places listed on Grievant's contemplated itinerary. 1) Robert Pyzik - his secretary said he would not be in until Monday. McGough left a message for the Grievant to call him. 2) Sgt. Frank Arvay at Sylvania Police Department. McGough was told Arvay was off on Fridays. He left a message for the Grievant to call him. When McGough left the office, he told Sedlacko of his attempts to reach the Grievant. When the Grievant had not called in by 3:00 p.m., Sedlacko called the offices of Arvay and Pyzik and learned Grievant had come to neither office that day. Sedlacko testified that he told Rick Brown these facts and was told in return "to start an investigation." On Monday April 17th, Sedlacko pressed the Grievant for his expense report. The report for Friday, April 14th, showed a departure from residence to Toledo at 7:00 a.m. and return to Columbus at 6:50 p.m. Sedlacko informed Brown. On April 18 and April 19, Sedlacko and Brown called Arvay, Pyzik,

and Kurt and learned that Grievant was not at those sites on Friday, April 14th. As a consequence, they held an investigatory interview on April 20, 1989, but Grievant refused to answer without a promise of immunity on potential criminal charges.

On May 11, 1989, a Pre-Disciplinary Hearing was held. After Joyce Frazier Clark promised that no criminal charges were forthcoming, the Grievant told her in front of Mr. Brown where he was on Friday, and he produced his personal phone bill to show he had made work related calls, including one to Mr. Kurt of BBB on Friday. On May 18, 1989, Joyce Frazier Clark rendered her decision (U-21, U-22) and found just cause for Neglect of Duty (minor), AWOL, willfully falsifying official document, #29 other actions, etc.

On May 24, 1989, the Grievant was suspended for 5 days. On June 12, 1989, the Grievant grieved the suspension. On June 26, 1989, a Step 3 was held. On July 11, 1989, a Step 3 response was issued. At the Step 3, the Grievant alleged race discrimination, disparate treatment, and discrimination based on Union participation as well as no just cause, lack of progresstivity, and lack of commensurate discipline. The Grievance was denied at Step 3. A Step 4 response was issued August 3 also denying the Grievance. On August 8, 1989, a request for arbitration was made.

The Arbitration Hearings ran three days (December 19, 1991, January 14, 1992, February 10, 1992). A Written Closing was chosen which was extended to March 20, 1992.

At the Hearing, in addition to the matters already described, the Grievant through witnesses and documents sought to substantiate the charges of race discrimination, union discrimination and disparate treatment.

#### Discrimination Based on Unionism

Clearly, the Grievant is heavily involved in Union activities and is an aggressive steward. Clearly, Ms. Treciak, the laborperson, and the Grievant had a tense relationship. However, no direct evidence was adduced linking this discipline to the Grievant's Union activities.

#### Discrimination Based on Race

Witnesses Beard, Bryant, Burns, and Griffin all testified to perceived injustices based on race. However, none of the evidence, while disturbing, supported directly that racial discrimination played a part in this discipline.

#### Disparate Treatment

The evidence of disparate treatment was of two kinds. The first kind dealt with comparisons to other individuals. The second kind dealt with a comparison to a broader type of disparate treatment described below.

With regard to the first kind of evidence of disparate treatment, the evidence was insufficient for the Arbitrator to find clear and convincing proof of its occurrence. However, the evidence of the second type was significantly greater.

The Union introduced (U-6) a draft memo Re: Management Concerns written by Vicki Treciak for Linda K. Page, the then

Director. The report indicated that in the Unclaimed Funds section, numerous problems existed:

- a) inappropriate telephone use
- b) vague, inaccurate and/or false travel reports
- c) questionable expenses authorized
- d) poor planning, lack of operational efficiency and disorganized scheduling
- e) inadequate leave control
- f) management failure to follow policy.

This draft was dated August 8, 1989. Ms. Treciak said no individual was disciplined in that department because Linda K. Page concluded that lack of management control was the problem. Ms. Treciak was asked if all those employees were not on the same notice as the Grievant with regard to travel and expense vouchers, etc. She said yes.

Evidence given by Mr. Brown seemed to indicate that he treated the Grievant with great leeway because the Grievant was such a good investigator. In fact, he was told to stay out of the investigation of this Grievant because he was perceived as too lenient with the Grievant. Apparently the Grievant and Rick Brown developed a method of practice. Arguably, the Grievant relied that sloppy practices would not cause him harm because of past practice. However, at least two items should have given the Grievant fair notice of changing standards. On August 29, 1988, Cy Sedlacko distributed a memo to all Licensing Staff Members. The memo particularly directed attention to late travel vouchers

(see U-17). Secondly, on September 23, 1988, Rick Brown sent a memo to Greg McGough which was verbally transmitted to Investigators entitled Extension of the Normal Eight Hour Work Day. While on its face the memo could be interpreted as dealing only with overtime, the memo did emphasize calling supervisors when extending the 8 hour day. Arguably when the Grievant, after working all day at home, left for Toledo in the late p.m. and worked part of the evening he was "extending an 8 hour day."

### Discussion

By the end of the Hearing three charges remained.

1. Neglect of Duty (minor). The Employer stipulated that this charge rested on the failure of the Grievant to show up at the three sites listed on the contemplated itinerary (Joint Stipulation).
2. AWOL. The Employer argues that this charge rests on not doing work on Friday, April 14, 1989 in accordance with the parameters of the day shift schedule (see p. 2 closing).
3. Willfully falsifying an Official Document. The Employer rests this charge on the fact that the Grievant submitted a Travel Expense Report that falsely stated his travel times and dates.

Number 1. The itinerary was "contemplated" and mere failure to show up at those three sites did not constitute neglect of duty. Evidence showed that itineraries were changed to meet the

changing circumstances of investigations. Moreover, Rick Brown testified that Grievant probably did inform him in advance of these changes.

Number 2. Grievant was AWOL. The rules are that when you are not in the field, you are supposed to be in the office 8 a.m. - 5 p.m. The Grievant's home is not the field. The field was Toledo, and he was not there.

Number 3. The Grievant did falsify his travel voucher; however, the Arbitrator concludes his falsification was not wilful. The Arbitrator finds that management tolerated such misstatements to keep the records looking proper.

If the Arbitrator did not consider the previously discussed procedural errors, using the Grid (601a) (E-H) the Grievant could have received a Written Reprimand for the 1st offense of #13 (AWOL). However, this AWOL really is a second offense of a similar behavior (see E-12) and hence, a 1 day suspension could have been imposed. His misstatements on his Travel Voucher did not rise to the level of #18 "Willfully" falsifying any official document but more fairly might be characterized as 2(c) Failure to Follow Written Policies of the Director or Division Chief. This failure was a second offense of a similar nature (see E-13) and hence, a suspension could have been in order. Without the egregious procedural violations engaged in by the Department of Commerce, a two day suspension could have been in order. In addition to the egregious procedural violations, evidence of



disparate treatment between one section and the licensing section is strong.

A third element is added. The Employer's closing argues that the Grievant, in essence, misused his Union office in bad faith to thwart the grievance process at every turn. In essence, the Employer argues that the Grievant violated the preamble of the Contract which states that the purpose of the Agreement is "the promotion of harmonious relations between Employer and Union and the establishment of an equitable and peaceful procedure for the resolution of differences." This argument is not without merit. The line between appropriate assertion of due process rights and obstructionism by the Grievant is often a fine line.

The Arbitrator finds that at the Arbitration Hearing itself the Grievant continuously and after numerous admonitions violated "the establishment of an equitable and peaceful procedure for the resolution of differences." Not only did the Grievant constantly interrupt and undermine his own advocate, but he often attempted to act as an advocate. The Arbitrator repeatedly warned the Grievant that only one advocate was permitted. However, of even greater consequence is that the Grievant by his postures, his facial expressions, and words threatened and harassed the Employer's advocates. In sotto voce, the Grievant used epithets and threats against the Employer's advocates. In a court of law, the Grievant would have been held in contempt.

Award

Balancing the procedural violations by the Employer against the Employee's violations of the work rules mitigated by some evidence of Employer disparate treatment and then balanced against the Grievant's contemptuous behavior, the Arbitrator reduces the five day suspension to one day suspension.

April 22, 1992

Date

Arbitrator