#1018

In the Matter of the
Arbitration Between

Ohio Civil Service Employees Association	Grievance No. A-HR-BAM-4-3-93/ 29-04(3/23/93)167-01-14
Union	Grievant: Gochenouer, D.
and	Hearing Dates: 9/12/94, 10/20/94, 10/21/94
State of Ohio, Rehabilitation Services Commission	Closing Date: November 1, 1994
Employer.	Award Date: December 15, 1994
	Arbitrator: Rhonda R. Rivera

For the Union: Anne Light Hoke, Esq.
Ernesta G. Moody

For the Employer: Darla J. Burns
Thomas E. Durkee

Present at the Arbitration Hearing in addition to the Advocates named above and the Grievant were the following persons: Linda S. Krauss, Director, BDD (witness); Jack Varable, Area Manager, BDD (witness); Barbara Starker, Supervisor, BDD (witness); Jean Sammon, Office Assistant, BDD (witness); Karen Vroman, Secretary, BDD (witness); Sandy Leasure, Hearing Office, BDD (witness); Maxine Hicks, OCSEA, Observer.

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 Exhibits

1. Letter to Grievant from Linda Krauss dated December 4, 1992
2. Letter to Grievant from Robert L. Rabe dated December 22, 1992
3. Memo to John Connelly from Karen Vroman dated January 7, 1993
4. Letter to Grievant from Mr. Connelly dated January 27, 1993
5. Memo to Robert L. Rabe from Mr. Connelly dated March 18, 1993
6. Letter to Grievant from Mr. Rabe dated March 19, 1993
7. Letter to Grievant from Mr. Rabe dated April 2, 1993
8. OCSEA Grievance Form
9. Step 3 Grievance Response
10. OCSEA's demand for arbitration
11. Classification Specification for Disability Claims
12. Position description of Grievant

State Exhibits

A1. Letter to Grievant from Robert L. Rabe dated June 24, 1992

A2. Letter to Grievant from Robert L. Rabe dated September 9, 1991

A3. Letter to Grievant from Robert L. Rabe dated March 5, 1990

A4. Written Reprimand dated November 17, 1989

B1. Interoffice Memo to Grievant from Ms. Starker dated May 11, 1990, 3 pages

B2. Six one page interoffice memos to Grievant from Ms. Starker dated June 20, 1990, July 11, 1990, August 2, 1990, August 29, 1990, September 21, 1990, and October 4, 1990

B3. Interoffice Memo to Grievant from Ms. Starker dated November 1, 1990, 2 pages

B4. Interoffice memo to Grievant from Ms. Starker dated November 1, 1990

C. Disability Claims Adjudicator II Expectations, 2 pages

D1. Interoffice memo to Grievant from Ms. Starker dated July 11, 1991

D2. Interoffice memo to Grievant from Ms. Starker dated December 9, 1991

D3. Interoffice memo to Grievant from Ms. Starker dated March 27, 1992

D4. Interoffice memo to Grievant from Ms. Starker dated April 8, 1992

D5. Interoffice memo to Grievant from Ms. Starker dated April 9, 1992

D6. Interoffice memo to Grievant from Ms. Starker dated April 17, 1992

D7. Interoffice memo to Grievant from Ms. Starker dated April 16, 1992, 2 pages

D8. Interoffice memo to Grievant from Ms. Starker dated May 4, 1992

D9. Interoffice memo to Grievant from Ms. Starker dated June 22, 1992

D10. Interoffice memo to Grievant from Ms. Starker dated July 27, 1992

D11. Interoffice memo to Grievant from Ms. Starker dated October 26, 1992

D12. Interoffice memo to Grievant from Ms. Starker dated October 29, 1992

D13. Interoffice memo to Grievant from Ms. Starker dated November 4, 1992

E1. Supervisory Review (SR) of 217 day old claim, 127 pages

E2. SR of 29 day old claim, 46 pages

E3. SR of 138 day old claim, 45 pages

E4. SR of 41 day old claim, 48 pages

E5. SR of 21 day old claim, 90 pages

E6. SR of 68 day old claim, 72 pages

E7. SR of 145 day old claim, 12 pages

E8. SR of 76 day old claim, 99 pages

E9. SR of 79 day old claim, 70 pages

E10. SR of 150 day old claim, 35 pages

E11. SR of 134 day old claim, 103 pages

E12. SR of T-16 claim, 34 pages

E13. SR of 131 day old claim, 59 pages

E14. SR of 52 day old claim, 13 pages

E15. SR of 34 day old claim, 22 pages

**E16. SR of 89 day old claim

**E17. SR of 74 day old claim

**E18. SR of 44 day old claim

**E19. SR of 87 day old claim

**E20. SR of 43 day old claim

**E21. SR of 78 day old claim

**E22. SR of 135 day old claim

**E23. SR of 147 day old claim

**E24. SR stating "Need current MSE Do PD"

**E25. SR of 23 day old claim

**E26. SR of 58 day old claim

**E27. SR of 28 day old claim

**E28. SR of 43 day old claim

**E29. SR of 28 day old claim

**E30. SR of 28 day old claim

**E31. SR of 27 day old claim

**E32. SR of 170 day old claim

**E33. SR of 50 day old claim

**E34. SR of 40 day old claim

**E35. SR of 86 day old claim

**E36. SR of 27 day old claim

**E37. SR of 140 day old claim

**E38. SR of 79 day old claim

**E39. SR of 133 day old claim

**E40. SR of 28 day old claim

**E41. SR of 19 day old claim

**E42. SR of 51 day old claim

**E44. SR of 40 day old claim

**E45. SR of 82 day old claim

**E46. SR of 19 day old claim

**E47. SR of 29 day old claim

**E48. SR of 42 day old claim

F1. 8/31/92 to 9/04/92 case count report

F2. 9/07/92 to 9/11/92 case count report

F3. 9/14/92 to 9/18/92 case count report

F4. 9/21/92 to 9/25/92 case count report

F5. 9/28/92 to 10/02 case count report

F6. 10/5 to 10/9 case count report

F7. 10/12/92 to 10/16/92 case count report

F8. 10/19 to 10/23 case count report

F9. 10/26/92 to 10/29/92 case count report

F10. 9/24/92, 9/28/92 and 9/30/92 case count slips

F11. 10/29/92, 10/22/92, and 10/23/92 case count slips

*G. Interoffice memo to Grievant from Ms. Bixler dated December 14, 1992, DCA II Expectations, and Interoffice memo to Grievant from Ms. Bixler dated December 14, 1992, 6 pages

H. IOC from Sandi Hotchkiss to Grievant dated 12/26/85 entitled "Delayed Cases"

I. Letter of Reprimand to Grievant for Neglect of Duty dated 5/6/85 (admitted for impeachment purposes only)

J. Request for Suspension re Grievant and Suspension dated 3/19/86 (admitted for impeachment purposes only)

*The Arbitrator excluded Exhibits E-16 through E-48. See page 42.

**The Arbitrator excluded the testimony of Ms. Carol Bixler and the exhibits relating to her testimony. Ms. Bixler's testimony and the exhibits both related to matters subsequent to the conduct for which the discipline was administered.

Union Exhibits

1. Medical Operations Report

2. Supervisory Reviews by B. Starker

3. Union's Document Request of 10/27/92

4. Performance Evaluation of Grievant on 5/6/92

5. Sequential Evaluations

6. Grievance dated 11/9/92 together with the Step III and Step IV responses

7. Attendance and Payroll Record of the Grievant 1991/1992

8. Unsigned and undirected E-mail dated 11/28/89

9. IFA Format and Case summary #25220.100 Exhibit C

10. Section 6.01 from Disability Evaluation Under Social Security

11. Step III Response for Unknown Grievant dated 7/19/93

12. Medical Vocational Rules & User Guide

13. Pages 56-59 from Disability Evaluation Under Social Security

14. Presumptive Disability Cases

15. Various copies of folders with black lines

16. Request for Documentation from Karen Vroman, OCSEA, to Lori Trinkley, apparently dated 2/2/94 asking for information with regard to the Grievant, in particular for her Performance Evaluations 1988-1993, Quarterly Statistics for 1 year, AND "Association and/or cases for existing supervisory reviews included in your evidence package."

17. Copy of undated handwritten statement apparently by Grievant

18. Grievance dated 4/13/92

19. Section 314.01 Attention-deficit Hyperactivity Disorder (ADHD) pp. 50-53 from Chapter entitled "Disorders Usually First Evident in Infancy, Childhood, or Adolescence". Book unknown

20. Copy of handwritten memo to Bruce Hinkin dated 10/2/81 from Grievant

21. Statement of Overtime earning Jul-Oct 92

22. Form letter from BDD to Doctor

23. Attendance and Payroll record of the Grievant 1992/1993

24. Letter from Dr. Michael A. Chan, Psychiatrist dated 3/10/93

25. Grievant's annual Performance Assessment dated 4/27/93

26. Return to work form from Dr. Michael Chan dated 6/1/93

27. Dr. Covault's statement dated 8/1/88 with attachments

28. Copy of handwritten statement by the Grievant dated 7/21/87

Issue

Was the twenty day suspension for just cause? If not, what is the proper remedy?

Joint Stipulations

1. Grievant was originally employed by the Ohio Rehabilitation Services Commission, Bureau of Disability Determination (BDD) effective April 6, 1981 as a Disability Claims Examiner I.

2. Effective August 8, 1982 Grievant was promoted to the position of Disability Claims Examiner II the position she currently holds which has been retitled Disability Claims Adjudicator II.

3. Grievant was given a written reprimand effective November of 1989 for neglect of duty and insubordination.

4. Grievant was suspended for one working day effective March 8, 1990 for neglect of duty and insubordination.

5. Grievant was suspended for three working days effective September 16, 1991 for neglect of duty, insubordination, and dishonesty.

6. Grievant was suspended for ten working days effective July 13, 1992 for neglect of duty, insubordination, inefficiency, and dishonesty.

7. Grievant was suspended for twenty working days effective April 5, 1993 for neglect of duty, inefficiency, and insubordination.

8. The grievance of the twenty working day suspension specifically cited Articles 2.00, 5.00, 24.01, and 24.02, as being violated by BDD in suspending Grievant.

9. The Grievance is properly before Arbitrator Rivera.

10. The collective bargaining agreement in effect from January 1, 1992 through January 31, 1994 is applicable to the arbitration.

Relevant Contract Provisions

Article 2, Article 5, Article 24.01, and Article 24.02.

Facts

A. Description of the Agency

The agency involved in this Grievance is the Ohio Rehabilitation Services Commission, Bureau of Disability Determination (BDD). The Ohio Rehabilitation Services Commission has a contract with the Federal government whereby the BDD prepares disability determinations for Ohioans who have applied to the Social Security Administration (SSA) for benefits under the Social Security Disability Insurance Program (SSD) or under the Supplemental Security Income Program (SSI). These Programs provide financial benefits to eligible adults and children who are either totally disabled or until the adult can return to work or the child to age-appropriate behavior.

Linda Krauss, current Director of BDD, described the operations and responsibilities of BDD in detail. In particular, she focused on the work of claims adjudicators. Claims adjudicators are divided into four sections, each section being assigned a geographical area. Within these four sections are approximately 270 claims adjudicators. Claims adjudicators can either be Claim Adjudicator I's who are essentially new adjudicators (about 50-60 persons), Claims Adjudicator II's who are the majority of adjudicators (about 170-180 persons), and

Claims Adjudicator III's who do Reconsiderations (a type of "appeal" of an initial determination of no disability) (40-50 persons). Each claim for a determination of disability is assigned to a Claims Adjudicator I or II. The claims are assigned on a geographical basis and are assigned randomly within the geographical area. The method of assignment was manual at the time of the incidents at issue but has since been computerized. The job of a Claims Adjudicator is to obtain the necessary records and evidence to make a determination of disability and then to approve or deny the claim. Upon receiving the application for disability, the Adjudicator makes an initial request of records from medical sources, from the claimant, and from other appropriate sources e.g. schools and teachers in the case of a child claimant. These initial requests are most often written; although, in appropriate situations, information is obtained by phone calls.

Once the initial requests for documents and reports is made, the Adjudicator awaits the evidence. As mail arrives, the material received is placed in the appropriate file. At various set dates, the Adjudicator examines the evidence received and make appropriate further requests as warranted. The Adjudicator can order an consultative medical examination of the claimant. When all the necessary information is at hand, the Adjudicator makes a final determination. If the issue requires medical advice, the Adjudicator sends the file to the medical unit for a consult. When the claim is returned to the Adjudicator from the medical unit, the Adjudicator makes the final determination. Then, the claim goes

to the Clearance Unit for a technical check; a small number of claims are routed through Quality Assurance for a determination of the quality of outgoing determinations.

Ms. Krauss said that each Adjudicator receives, on an average, three (3) claims per day. Each Adjudicator is expected to finish 14 claims a week.

Ms. Krauss explained the BDD is completely funded by SSA and that SSA sets all the standards. Each year BDD is paid a certain amount of money, and, for that amount of money, BDD is expected to handle, in a timely fashion, a set number of claims per year. For example, in Fiscal 1994, BDD was allocated 54 million dollars to handle 154,590 cases. BDD must handle these cases for this amount of money and meet the deadlines of SSA with regard to time lines and quality. For example, SSA sets a Quality Assurance standard of 91%. In addition, SSA expects that 15-25% of the claims will be found to be "presumptive disabilities" and that only ten (10)% of these presumptive findings will be reversed. Every week the SSA requires a monitoring of productivity and cost per claim.

Overtime is sometimes permitted. However, if an Adjudicator is allowed to do overtime, the number of cases expected per week is not increased. The purpose of overtime is to encourage additional clearances. Ms. Krauss stated that, to the best of her recollection, some overtime was being allowed in October 1992. She indicated that SSA is very interested in the "age" of a claim. The age of the claim that is found in the upper left portion of the form (See Employer Exhibits "E") is the age within the agency. In

considering the time counted against individual adjudicators, time that the claim spends in the medical unit is not counted (assuming the control card was properly annotated).

The failure to process a claim in a timely manner not only affects the BDD's relationship with SSA but also, obviously, hurts the claimant. Errors in claim determination can injure the agency because then the SSA will pay out money incorrectly. An incorrect determination that denies a disability claim also injures the claimant who will have to seek a Reconsideration or pursue an Appeal; during that time, the claimant will be without benefits. Usually the persons who apply for SSD and/or SSI are without work or other benefits.

B. Procedural and Documented Facts

The Grievant was originally employed by BDD on April 6, 1981 as a Disability Claims Examiner I. On August 8, 1982, the Grievant was promoted to Disability Claims Examiner II, now retitled Disability Claims Adjudicator II.

The Grievant received a written reprimand on November 17, 1989 for neglect of duty and insubordination. The reason for this discipline was "unexplained time lapses (UTL's) on claims. (See Employer's Exhibit A-4) On March 8, 1990, the Grievant received a one (1) day suspension for neglect of duty and insubordination. The reason for this discipline was UTL's, inadequate case control records, and incorrect development of claims. (See Employer's Exhibit A-3 and Joint Exhibit #5 @ page 1)

Between May and October of 1990, the Grievant was on a Management Plan that focused on nine (9) specific areas of deficient claim development. (See Employer's Exhibit B-1) This Plan was reviewed on May 11, 1990 (See Employer's Exhibit B-2), on June 20, 1990 (See Employer's Exhibit B-2), on July 11, 1990, on August 2, 1990, August 29, 1990, and on September 21, 1990. (See Employer's Exhibit B-2) The Grievant successfully completed this management plan on November 1, 1990. (See Employer's Exhibit B-3) At that time, according to the assessment of the Grievant's Supervisor (Barbara Starker), the Grievant had 1) "improved satisfactorily in all the problem areas" and 2) attained an overall accuracy rate of over 90%. According to Supervisor Starker, "This clearly shows you have the ability to do cases correctly." (See Employer's Exhibit B-3)

On November 1, 1990, the Grievant was put on notice by her Supervisor that the level of her performance that she attained through the Management Plan must continue. The Supervisor indicated that over the following three months she would continue to do end-of-line (EOL) reviews on all the Grievant's decisions to check their accuracy. The Supervisor stated "[f]ailure to both develop and adjudicate claims at acceptable levels of accuracy could result in discipline." (See Employer's Exhibit B-4) On July 11, 1991, the Supervisor sent a memo to the Grievant on Proper Case Documentation. In this memo, the Supervisor said that the Grievant was not always documenting that she had attempted a telephone call

before sending a letter to the claimant. (See Employer's Exhibit D-1)

On September 16, 1991, the Grievant was suspended for three (3) days for neglect of duty, insubordination, and dishonesty. The underlying reasons for this discipline were UTL's, improper claim development, reporting daily counts incorrectly. (See Employer's Exhibit A-2.)

On December 9, 1991, the Supervisor sent the Grievant a memo on Job Performance. The Supervisor outlined the specific steps that the Grievant should take on case development. The Supervisor stated that "[f]ailure to comply with the above directive could result in discipline." (See Employer's Exhibit D-2)

On March 27, 1992, the Supervisor sent the Grievant a memo. In this memo, the Supervisor referred to a conversation on March 9th between the Supervisor and the Grievant about prioritizing work. The Supervisor said "[w]e were both in agreement your work had suffered due to many personal problems. You stated during the meeting (of March 9, 1992) that you were aware your desk needed attention and that you were now ready to take charge of your responsibilities." Then, the Supervisor recounts that "while working your desk on overtime and looking for expedient write ups" she found old cases that she (the Supervisor) had already given directions on and other old cases. The Supervisor directed the Grievant to work up the 14 old cases that she found and complete the work ups and return them to her by March 31, 1992. (March 27th was a Friday, and the Grievant had three working days to meet this

deadline.) The memo ended with these words: "Failure to comply with this directive could result in disciplinary action." (See Employer's Exhibit D-3)

On April 8, 1992, the Supervisor wrote a memo to the Grievant stating that "You are to begin going through the supervisory reviews on your desk and return to me by the close of business 4/09/92. (April 8th was a Wednesday.) (See Employer's Exhibit D-4) On April 9, 1992, the Supervisor wrote to the Grievant and said that while doing work in the clerical area that she came across a "denial for QAT review" on one of the Grievant's cases. The Supervisor reminded the Grievant that all proposed denials were supposed to be reviewed by the Supervisor. The memo ended with these words: "Failure to comply with this directive could result in discipline." (See Employer's Exhibit D-5)

On April 17, 1992, the Supervisor wrote a memo to the Grievant referring to the April 8th memo. (See Employer's Exhibit D-4) The Supervisor noted that the Grievant had not returned four (4) of the supervisory reviews that were supposed to have been returned. The Supervisor gave the Grievant until noon of that day to take the action directed on those four cases. The memo ended with the words: "Failure to comply with this directive could result in disciplinary action." (See Employer's Exhibit D-6)

On April 16, 1992, the Supervisor wrote a lengthy memo to the Grievant. The Supervisor had done an audit of the 26 cases on the Grievant's desk. The Supervisor found UTL's in 14 cases and incomplete or inaccurate case development in 8 cases. In addition,

the Supervisor noted that the four (4) supervisory reviews noted in D-6 had still not been returned. Lastly, the Supervisor stated that the desk review had shown that the Grievant was not making accurate statements in her reports. (The Grievant wrote on the form that a rebuttal would follow.) (See Employer's Exhibit D-7)

On May 4, 1992, the Supervisor wrote a memo to the Grievant instructing her that pending files were to be pulled daily by the clericals and that she (the Grievant) was not to instruct the clericals to cease pulling. The memo ended with the words: "Failure to comply with the above directive could result in disciplinary action." (See Employer's Exhibit D-8)

On June 22, 1992, the Supervisor wrote to the Grievant stating that while "working your desk", she found five claims with significant delays that needed to be worked immediately. The Grievant was given until the close of business the next day to complete the five files to the Supervisor's standards. The Supervisor stated to the Grievant "you must report all cases over 5 days waiting action. The memo ended with the words: "Failure to comply with this directive could result in disciplinary action." (See Employer's Exhibit D-9)

On July 13, 1992, the Grievant was suspended for ten (10) working days for neglect of duty, insubordination, inefficiency, and dishonesty. The basis of this discipline was stated to be a desk audit held in April that allegedly revealed UTL's and numerous caseload management deficiencies. In addition, the Grievant was

disciplined for failure to report her case count accurately. (See Employer's Exhibit A-1)

Upon the Grievant's return from her suspension on July 27, 1992, the Supervisor sent the Grievant a written list of 12 steps that she was to take in case development. The memo ended with the words: "Failure to comply with this directive could result in disciplinary action." (See Employer's Exhibit D-11)

On October 26, 1992, the Supervisor sent a memo to the Grievant. In this memo, the Supervisor stated "As a result of reviews that I have done recently on "end of the line" cases that show both document and decision deficiencies, you must give me all "end-of-the-line" write-ups to me for both allowances and denials." The Supervisor added, "I am in the process of reviewing all cases that were on your desk on Friday. After completion, I will give you a summary of my findings." The memo ended with these words: "Failure to comply with the above directive could result in disciplinary action." The Grievant wrote on the bottom of the memo "I feel this is nothing more than ongoing harassment. This is why I am being moved & another grievance will be filed due to this harassment." (See Employer's Exhibit D-11)

On October 29, 1992, the Supervisor wrote a memo to the Grievant that requested that she stop blacking out the name and date of the sources listed on the back of the claim folders. The Supervisor noted that information was needed to properly document timely pulling of the claims. The memo ended with the words: "Failure to comply with this directive could result in disciplinary

action." The Grievant wrote on the bottom on the memo "This is nothing more than harassment." (See Employer's Exhibit D-12)

On November 4, 1992, the Supervisor wrote to the Grievant. This memo dealt with the 48 supervisory reviews that resulted from the desk audit mentioned in D-12. This memo said that on Tuesday, November 3rd, the Supervisor had told the Grievant that she had to respond to the Supervisory Reviews of those files by 9 a.m. Friday, November 6, 1992. The memo ended with the words: "Failure to comply with the above directive could result in disciplinary action."

On December 4, 1994, Linda Krauss wrote to the Grievant and said that "[a]s a result of at least three of your claims being returned to your supervisor with significant problems, an audit of your case work was undertaken. That audit of 48 cases revealed .... [the letter listed the alleged deficiencies]. In addition, you have been inaccurately reporting cases awaiting decision on your desk for more than five days." (See Joint Exhibit #1) The December 4th letter indicated that the Director was requesting a 25 day suspension.

Ms. Krauss testified that she made the recommendation for discipline in this case to the Appointing Authority, Mr. Rabe. (See Joint Exhibit 1) She recommended a 25 day suspension. She based her recommendation on the report of the Supervisor, Ms. Starker, the advice of Mr. Jack Varable, the Area Manager, the documentation, and the Grievant's prior record.

On December 22, 1992, The Grievant was notified of a pre-disciplinary meeting for the requested twenty-five (25) day suspension. (See Joint Exhibit 2) This pre-disciplinary meeting was rescheduled at the Grievant's request because of Grievant's vacation and the subsequent vandalization of her home. The pre-disciplinary meeting was held on February 4, 1993 (See Joint Exhibits 2, 3, and 4)

On March 18, 1993, the Pre-disciplinary Report was issued and found just cause for discipline. The Arbitrator notes the following items from that report:

1. The events that are alleged to have prompted the disciplinary request are a) the return of a claim done by the Grievant by the Medical unit that the Medical unit found improper in some respect that, in turn, b) caused the Supervisor to conduct a desk audit.

2. The Pre-disciplinary Hearing Officer heard evidence on conduct SUBSEQUENT to the request for discipline and unrelated to the event prior to December 4, 1994.

3. The Grievant presented evidence that she had been treated by a psychiatrist from February 1991 through January 1993. (See Union Exhibit 24)

4. The Hearing Officer noted that the Employee requested EAP deferral but that she had not completed a Treatment Outline or any other proof of acceptance by EAP.

5. The essential defense of the Grievant was as follows:

a. She had for the past two years experienced personal problems that led her to seek medical treatment. These problems impacted her ability to concentrate at work.

b. Her Quarterly Assessment for 1992 indicated that she had met her goals.

c. The mistakes on the claims E-1 through E-48 were inadvertent or, according to a supervisor other than her own, were not deficiencies.

d. She was treated disparately. She provided no names or instances of the disparate treatment.

On March 19, 1993, the Grievant was suspended for 20 days from March 29 through April 23, 1993. This suspension period was changed to allow the Grievant to attain a proper waiting period for a disability claim. (See Joint Exhibits 6 & 7) On April 5, 1993, the Grievant filed a grievance with regard to the 20 day suspension. She relied on Articles 2 & 5 of the Contract and Article 24 Sections 1 & 2. (See Joint Exhibit 8)

A Step III was held on August 3, 1993, and the report was issued on September 30, 1993. (See Joint Exhibit 9) The Grievance was denied. The Arbitrator notes the following items from that report:

1. Employer Exhibits included E-1 through E-48 inclusive.

2. The Grievant acknowledged that she signed a document on December 15, 1989 that outlined the expectations of her position. (See Employer Exhibit C)

3. The Union made objection to the lack of documentation for Employer Exhibits 16-48. (See page 7 of Joint Exhibit 9)

4. The Step III Hearing Officer heard evidence unconnected with, and subsequent to, the December 4, 1994 request for discipline. (See pages 7-8 on Joint Exhibit 9.)

5. The Grievant requested EAP deferral but did not present the appropriate documentation of acceptance by EAP.

The defense of the Grievant followed these essential lines:

1. The Grievant was being harassed by her Supervisor.

2. The 20 day suspension was disparate and unfair treatment.

3. The Union contended that the Employer should have used some other method (other than discipline) to correct the Grievant's performance problems. The Union noted that the four prior disciplines had not corrected the problem and that discipline should not be used to control the situation.

4. The desk audit was a judgement call by the Supervisor.

5. The alleged errors shown in Exhibits E-1 through E-15 were disputed.

6. The death of Grievant's mother caused many of the problems, and the Employer disciplined the Grievant nonetheless.

7. The Grievant was treated differently than other employees.

8. The Union acknowledged that some performance problems existed but that the Grievant was not being given the direction that she needed.

The Grievant submitted four items to the Step III hearing. Exhibit #1 is a list of why the problems cited in Exhibits E-1 through E-15 were incorrect. Exhibit #2 was a personal statement of the Grievant. Exhibit #3 was entitled "Title II & XVI: Medical Vocational Profiles Showing an Inability to Make an Adjustment to other Work. Exhibit #4 related to an incident subsequent to December 4, 1992. (See Joint Exhibit 10)

On October 29, 1993, the Union requested Arbitration. (Joint Exhibit 10)

This Arbitration was held in response to that request.

C. Testimony

1. Employer

Ms. Barbara Starker, the Grievant's Supervisor, had been a Unit Supervisor for five (5) years at the time of the Hearing. Previously, she was a Disability Program Specialist for two (2) years and, prior to that position, she had been a Disability Claims Adjudicator for ten (10) years. Ms. Starker started with BDD as a typist in 1972, moving to Disability Adjudicator I in 1977. At the time of these incidents, she supervised a group of Disability Claim Adjudicator II's, usually 8-9 people. Her duties required her to review all their work, handle claims for purchased examinations, do two evaluation reviews per adjudicator per month, handle quality assurance items that are returned, evaluate personnel, and other tasks.

Ms. Starker said that she had supervised the Grievant after the Grievant was transferred into her unit, that she had knowledge of the Grievant's prior work, and that she had discussed the Grievant's performance issues with the Grievant's prior supervisor. After reviewing the Grievant's work when the Grievant transferred into her unit, she concluded that the results were poor. As a consequence, the Supervisor initiated a training program for the Grievant, called a Management Plan. (See Employer Exhibits B1-B4) Ms. Starker testified that at the end of that plan, the Grievant was doing good work but subsequently her work quality declined, (See Employer Exhibits D-1 through D-9), and she was disciplined. When the Grievant returned from her 10 day suspension on July 27, 1992, Ms. Starker testified that she met with her and reviewed the standards. (See Employer's Exhibit D-10) Ms. Starker also decided to do E-O-L (end of the line) reviews on the Grievant's work. The problems continued. (See Employer's Exhibits D-11 through D-13) In late October, Ms. Starker said that she received a claim back from medical with an error caused by the Grievant and that, as a result of that error, she conducted a "desk review". She did Supervisory Reviews on 48 claims and documented the deficiencies and UTL's found. These reviews constitute Employer Exhibits E-1 through E-48 and are the basis of the discipline of December 4, 1992.

In the Arbitration Hearing, the Supervisor went over each of the Exhibits E-1 through E-15 and E-16 through E-48. The Union objected to the introduction of E-16 through E-48 because no

supporting documentation was attached to these exhibits. The Union stated that it had objected to this evidence at both the Pre-disciplinary conference and at the Step III. (See Joint Exhibits 5 and 9) In addition, the Union showed that on 2/4/94, the Union had specifically requested the supporting documents from the Employer (See Union Exhibit 16) The Arbitrator sustains this objection and holds that E-16 through E-48 shall not be received in evidence.

Ms. Starker testified to the following deficiencies in claims represented by Employer Exhibit's E-1 through E-15:

E1 The Grievant has written up the claim proposing a **DENIAL without developing the psychological issue.** Also, the claim contained a 45 day unexplained time lapse (UTL) at initial development and a 63 day UTL at mid-point development.

E2 The Grievant had written up the claim proposing an **ALLOWANCE with no current evidence and no documentation on the alleged arthritis.** The claim contained only an x-ray and **lacked any documentation on the function of joints.**

E3 The Grievant had written up the claim proposing an **ALLOWANCE** without a teacher report and with an incomplete ADL.

E4 The Grievant had written up the claim proposing an **ALLOWANCE.** The claim was stopped by a doctor and was returned for more development. When the claim was given to Ms. Starker a post-it note was on it that stated that medical had seen the claim on October 8, had sent it back for more development, and that the claim had been sent through again with no intervening action.

E5 The Grievant had written up the claim proposing an **ALLOWANCE.** The claim was stopped by a medical doctor saying the claim was not an allowance. Additionally a consultative examination (CE) was needed for the psychological issue. The proposed allowance did not meet the listing.

E6 The Grievant had written up the claim proposing an **ALLOWANCE.** The claim was reviewed by the medical operations staff who returned it with a request for a consultative exam that had not been obtained by the Grievant. Also, the claim contained a 30 day UTL.

E7 The Grievant had written up the claim proposing an **ALLOWANCE.** The doctor had stated that if his review resulted in an allowance, he requested the Grievant return the claim to him so that he could contact the attending physician. Instead of returning the claim to the doctor, the Grievant wrote up the claim.

E8 The Grievant had written up the claim proposing a **DENIAL** on the grounds the impairment was slight. The claim was returned to Ms. Starker as a technical return. Ms. Starker's review found the claimant had a history of mental problems, had attempted suicide, and an allegation was made of a back condition. The Grievant had not addressed these conditions.

E9 The Grievant had written up the claim proposing a **DENIAL** on the grounds the impairment was slight. The claim had no proper documentation of anorexia, malnutrition, cancer of the kidney, head injury, or depression.

E10 The Grievant had done **no real development, and the claim was 150 days old.** A 37 day UTL was also claimed. This claim was a possible presumptive disability.

E11 An 80 day UTL from August 4, 1992 to the date of the audit, October 24, 1992 was found. Additionally, an 87 day UTL existed on the physical examination because the Grievant **had not done a follow-up.**

E12 The Grievant had not followed up on a medical source that resulted in a 44 day UTL from September 10 to October 24, 1992. Additionally, medical evidence had been received on August 31, 1992, and the Grievant **had not developed** this material further that cause a 54 day UTL from August 31 to October 24, 1992.

E13 This claim was a priority claim. A congressional inquiry on the claim had been received. **The Grievant had not given the claim priority, and she delayed the medical exam for 62 days.**

E14 The claim had been assigned to the Grievant on September 2, 1992. As of October 23, 1992, she had **taken no action** on the claim that resulted in a 51 day UTL.

E15 Ms. Starker had reviewed the claim for the CE request. The Grievant had failed to clarify 5 issues prior to the CE.

Ms. Starker said that part of her job was to do supervisory reviews of all personnel, 2 per month per person. (In a twelve month period, these reviews would amount to approximately 219 reviews.) The Union Advocate showed Ms. Starker four (4) supervisory reviews that the Union had received from a document request for other supervisory reviews done by Ms. Starker. (See Union Exhibit 2) Ms. Starker said that these four items were part of a larger stack that she copied, but she could not account for the discrepancy. She said that she had done all the obligatory reviews. Ms. Starker said that she never considered a second management plan for the Grievant because, at the end of the first plan, the Grievant clearly showed she could do the job. Ms. Starker said that, in her supervisory reviews, she tried not to count days when the Grievant was sick in counting UTL's but that she did not consult attendance records when counting UTL's. The Union showed the Supervisor Employer's Exhibit D-3 and asked if the Grievant had not asked for help in organizing her desk. Ms. Starker said that the Grievant did not ask specifically for help organizing her desk but, upon her return after the death of her mother, that the Grievant had said that she was ready to get back to work and do her work. Ms. Starker said that the "desk coverage plan for illnesses" was as follows: no coverage was slated for 8 hours but that after 8 hours a supervisor would organize the desk and that after 16 hours the supervisor would get mail and

distribute the work to others. Ms. Starker said that all her Adjudicators handled priority reviews. Ms. Starker was directed to Union Exhibit 4 where the Grievant's accuracy for the period April 6, 1991 through April 6, 1992 was shown at 100%. Ms. Starker said that the accuracy was 100%, because she (the Supervisor) had cleaned up everything before it got to Quality Assurance.

The Employer called as its witness Jack Varable who was the Operations Manager over Ms. Starker. He said he was aware of the Grievant's work deficiencies because the discipline "came through me." He said that all of Ms. Starker's decisions with regard to the Grievant were supported by adequate evidence in his estimation and to his satisfaction. He said that with regard to Congressional inquiries that, in his area, he does the initial response and the follow-up is done by the Adjudicators. He said that he had been aware that the Grievant was under a Management Plan and that the plan was unusually long. He said that other management plans had been done for other employees, and those plans were usually only 2-3 months in length as opposed to 5-6 months.

The Employer's witnesses consisted of Ms. Krauss, Ms. Starker and Mr. Varable.

2. Employer

The Union called Ms. Tina Moody, a BDD Disability Claims Adjudicator III, who had previously been a Reconsideration Specialist, a Disability Adjudicator I, II, & III. Her claims experience had been extensive. In 1992, Ms. Moody was also the

Chief Union Steward in her area. Ms. Moody described 1992 as a crisis year in BDD. This crisis was brought on by two factors: 1) The SSA Administration lost the Zebly case and as a consequence all claims for children since 1980 had to be reviewed and numerous changes were required to meet the Zebly standards and 2) in 1990-91, the governor of Ohio had limited General Relief causing many more persons to attempt to obtain SSD or SSI benefits. The Quality Assurance of BDD was so low that the Federal government intervened.

Ms. Moody reviewed Employer Exhibits E-1 through E-15.

E1 The Grievant should not have denied the claim without the psychological information.

E2 The year old x-ray was sufficient because it showed degenerative arthritis that could not improve.

E3 The claim did have a school report and a consultative examination. These reports are sufficient. (Ms. Moody used Union Exhibits 9 & 10 to explain her points.)

E4 Ms. Moody noted that she had a situation occur to her similar to what happened to the Grievant.

E5 Ms. Moody disagreed with both the Grievant's work and the Supervisor's assessment. She did admit on cross examination that the Supervisor was correct in directing that the client be contacted.

E6 Ms. Moody said the claim should have been allowed as a vocational grant, and, therefore, the Grievant's decision was not in error. (Ms. Moody used Union Exhibit 10 to explain her points.) However, on cross examination, Ms. Moody agreed that the Grievant should have completed the forms as directed by the Supervisor.

E7 Ms. Moody said that the Grievant and the Supervisor interpreted the Dr.'s request differently. Ms. Moody said that the ultimate decision was consistent with the Grievant's decision.

E8 No response

E9 Ms. Moody said that the documentation was all in the file. She did not state whether she agreed with the denial.

E10 Ms. Moody would not have sent out an exam for a person who had not had a seizure in 2 years. (She used Union Exhibit 14 to explain her point.) On cross examination, Ms. Moody agreed that other actions existed that the Grievant should have taken.

E11 If her supervisor had asked for this type of documentation, she would have done it even though she personally did not think it was needed.

E12 Ms. Moody said since school was not in session, requesting a teacher's report was fruitless. The caregiver's report should be enough.

E13 Ms. Moody said that, in her area, supervisors process Congressional inquiries.

E14 Ms. Moody said that cases are sometimes lost.

E15 No phone call was necessary.

After her review of the "E" exhibits, Ms. Starker stated that, in her opinion, the work being done by Grievant was "average". Ms. Moody was shown Employer's Exhibit D-10, a list of standards given to the Grievant by her Supervisor, and Ms. Moody said that, in her opinion, the Grievant had been following the directions of D-10 in the "E" Exhibits. Ms. Moody said that she personally knew of other employees who had been put under more than one management plan.

On cross examination, Ms. Moody was shown Attachment #1 to Joint Exhibit 9 that represented the Union's presentation at the Step III as to what E-1 through E-15 meant. Ms. Moody was asked if she agreed with all the assessments made in this document. She said no. She was asked why employees are placed on management

programs. She said management programs were for employees with performance problems.

In addition to Ms. Moody, the Union offered the testimony of Ms. Jean Sammon, an Office Assistant, who had been at BDD 13 years. She described her tasks as clerical. Ms. Sammon had also been a union steward. She testified that as a friend of the Grievant she had helped her organize her desk on occasion because the Grievant had trouble keeping her desk and its files organized. She did this unofficially.

The Union also offered the testimony of Ms. Sandi Leasure who has been with BDD since 1974. She has been an Adjudicator I, II, & III, a Disability Claims Specialist I & II and a Hearing Officer. She is the author of Exhibit #1 attached to Joint Exhibit 9, a review of the "E" Exhibits. Ms. Leasure said that case development could be done in different ways and still be appropriate. She noted that in Exhibits E-1 through E-15 some pages were missing and that a complete independent third party review was, therefore, impossible.

E5 Grievant granted claim on "equals"; the claim should have been granted but on another basis.

E6 Ms. Leasure said that the Supervisor's analysis was in error.

E7 No decisional error on the part of the Grievant.

E9 Ample documentation was in the file.

E11 The Supervisor who did the development did not do it correctly and the consultant sent in the x-ray in an untimely manner.

E13 Supervisor undertook initial development and ordered wrong item.

E15 No need existed to clarify all the claims since the claimant's hip problems were life long.

Ms. Leasure characterized the Grievant's work as average. On cross examination, Ms. Leasure was asked if she disagreed with all of Ms. Starker's comments. She answered: "not everything".

The Union offered the testimony of Ms. Karen Vroman. Ms. Vroman started as a mail clerk with BDD then became a technical typist, and is now secretary for the Division. She was the Union Steward in 1992-93. She testified that she had made a request for the back-up documents to E-16 through E-48. (See Union Exhibit 16) She said she also asked for these documents at the time of the Pre-disciplinary conference. (See Joint Exhibit 5)

The Grievant testified in her own behalf. She stated that she had an Associate's Degree in Cardio-Pulmonary Technology and had been a Nurse's aide, a Nursing technician, and a Respiratory Therapist prior to coming to BDD. In addition, she had been a Union Steward at BDD. The Grievant referred the Arbitrator to Union Exhibit 17, a summary of her experiences with different supervisors. According to this document and her testimony, the Grievant remained in the same unit for 9 years with 5 different supervisors. According to her statement, she had no problems with the first four supervisors and only had problems with the fifth supervisor because he was pressured by management to harass her. She said she moved from that unit only because the sixth supervisor engaged in sexual harassment. She went from that sixth supervisor

to Ms. Starker. She was asked by her Advocate if before this move had she had any discipline. She said NO.

The Grievant was shown Union Exhibit 7 (payroll record) and Employer Exhibit D-3. The Grievant said that she had met with Ms. Starker on March 9th. The Grievant said that immediately prior to this meeting that she (the Grievant) had missed a lot of work because of her mother's illness and death and, consequently, her desk was behind. She said she had asked for help to get back on track. Then, on the 27th, Friday, Ms. Starker had given her 14 files that she had reviewed and wanted a response and work up by Tuesday the 31st. The D-4 memo dealt with 25 supervisory reviews. The Grievant filed a grievance over this action. (See Union Exhibit 18) The Grievant testified that memos D-6, D-7, D-8, D-9 and D-10 were "in effect" when other discipline was issued. She said she replied to D-11 and that since memo D-12 she had not blackened out any lines. (See Union Exhibit 15) She said that D-13 referred to the 48 supervisory reviews that are the basis of this discipline and that she did not have time to respond and act on all the reviews within the time lines set down by Ms. Starker.

The Grievant claimed that she was the victim of discrimination based on disability. She stated that she has Attention Deficit Hyperactivity Disorder. She introduced Union Exhibit 19 as a definition. She said that she had informed BDD in 1981 of her disability. She introduced Union Exhibit 20 to support this position. This item is a copy of a hand written memo on what appears to be notebook paper, addressed to Bruce Hinkin (her

supervisor) and dated 10/2/81. Nothing on the document indicates whether the document was received by Mr. Hinkin.

The memo states that the Grievant has Attention Deficit Disorder. She asked for help in organizing her desk. She stated that when she worked for Hinkin he assigned to her the best clerical support worker who organized her mail for her on a regular basis. She said that when she transferred to the 5th supervisor (the one before Ms. Starker) she lost that help and started getting discipline. She also claimed that she filed a "504" card with EEO officers in 1981-1982. She claimed that she told Ms. Starker that she had ADD and that ADD caused her poor organizational skills. She said she never "directly" asked Ms. Starker for help with her desk. She said she did not "ask for an accommodation."

She introduced Union Exhibit 21 to show that she has only one hour of overtime during the period July-October 1992. She introduced a form letter RSC 5044 (Union Exhibit 22) and said that she was not allowed to use it in her case development while other Adjudicators used the form letter all the time. She said that this alleged refusal constituted an instance of harassment. The Grievant also reviewed for the Arbitrator Exhibits E-1 through E-15. The Grievant's testimony indicated that when she received these supervisory reviews she had insufficient time before she left to respond to all of them.

The Grievant stated that the desk audit was only done as harassment by Ms. Starker because the Grievant was going to be transferred out of her unit. (See Union Exhibit 6)

The Grievant was asked by her counsel about an incident referred to in the Pre-Disciplinary report having to do with an unsubstantiated charge of fraud. The Employer stipulated that incident was not part of this discipline, and the Employer withdrew Employer's Exhibit "L". The Union offered the testimony as proof of harassment. However, the incident was significantly subsequent to the desk audit that the Employer has alleged to be the basis of this discipline. Therefore, the Arbitrator struck the Grievant's testimony with regard to that incident.

The Grievant also testified that she had a history of depression since August of 1988. (See Union Exhibits 24, 26, and 27) She indicated that this depression affected her work.

Under cross examination, the Grievant was asked if the Management Plan that she had with Ms. Starker was the first Management Plan she had ever been under. The Grievant replied yes. The Grievant was asked to identify Employer Exhibit G and asked if it was a Management Plan for her with Supervisor Sam Coulter (the Supervisor before Ms. Starker). The Grievant said yes. The Grievant was shown and asked to identify Employer's Exhibit H. This memo was from Sandi Hotchkiss to the Grievant and dated December 26, 1985. The Grievant was asked whether Sandi Hotchkiss had been her acting Supervisor during that time. The Grievant said "sort of." She was asked if the memo represented a performance plan or a management plan, and she denied both interpretations. She did identify her signature on the document.

Under cross examination, the Employer's Advocate asked the Grievant if she remembered answering a question asked by the Union Advocate to the effect of whether you had any discipline before you transferred to Ms. Starker in 1989 and did she remember answering no. Grievant concurred that she was so asked and that she did answer no. The Employer asked the Grievant to identify Employer's Exhibit I.

The Union objected on the grounds that the Contract forbade the use of certain prior discipline and that this Exhibit fell within that prohibition. The Employer asked that the document be allowed solely for impeachment purposes. The Arbitrator overruled the Union and admitted the document solely for that limited purpose. Employer's Exhibit I is a Letter of Reprimand for Neglect of Duty issued to the Grievant and signed by the Grievant on 5/6/85. The Grievant acknowledged that the discipline had occurred.

The Employer asked the Grievant to identify Employer's Exhibit J. Exhibit J appears on its face to be a one day suspension issued to the Grievant on March 24, 1986. (The original request had been for a three day suspension.) The Union objected. The Arbitrator admitted the document solely for the purposes of impeachment. The Grievant claimed that this discipline had been grieved and removed. She was asked whether she was confused; the discipline perhaps was grieved and lowered from a three (3) day to a (1) day? She was unclear. She could not remember the circumstances.

The Grievant was asked when she learned that she had ADD. She stated that it was diagnosed when she was a child. She admitted that she submitted no information about the ADD at her pre-disciplinary hearings for all the four prior disciplines. She admitted that she had not submitted any information about ADD in the pre-disciplinary hearing or Step III hearing for this discipline. She was shown Union Exhibit 20 (the handwritten memo to Bruce Hinkin in 1985 referring to ADD). She was asked if at all the disciplines and the various hearings connected with them, including this disciplinary matter, if she had ever offered this document before. She said no.

She was shown Union Exhibit 9 (personal statement on problems). She was asked if it mentioned ADD. She said no. She was asked to what sources did she attribute her problems in Union Exhibit 9. She replied depression, divorce, and her mother's illness. The Grievant was shown Union Exhibit 24, a letter from the Grievant's psychiatrist, discussing her treatment for depression. The Grievant was asked how long she had been under the care of Dr. Chan. She replied that she had been seeing him since 1991. She was asked if Dr. Chan had taken an extensive medical history when her treatment began. She said that he had. She was asked if she told him about her ADD. She said no.

On redirect, the Grievant explained that Employer's Exhibit H resulted when the author was filling in for the Supervisor and got "heady". She said that she had informed management of her problems with "organization and management" in a 1981 memo to

Hinkin and the a 1987 memo to Tim Cox. (See Union Exhibit 28) She said she had not mentioned the ADD before because she had not realized that she had a disability that could be accommodated.

D. Rebuttal

The Employer offered the testimony of Ms. Starker on rebuttal:

Q: Did you know that the Grievant had ADD?

A: The Grievant had referred to it in a conversation when the Grievant said (while apparently looking at some document with regard to her son) "My son's got ADD just like me." Other than that passing reference, the Grievant did not discuss ADD with me."

Q: Why did you do the desk audit?

A: Because, I was getting complaints about cases.

Q: What was the basis of the discipline?

A: Poor performance.

Q: If a doctor does not respond to the adjudicator's original inquiry, how should the adjudicator follow up? Can the adjudicator use the phone or send a letter? Does the adjudicator who works for you have that discretion?

A: Adjudicator can use either.

Q: Did you prohibit the Grievant from using the follow-up letter (See Union Exhibit 22)?

A: She was to use the form when the evidence was not crucial to the case; if the evidence was crucial, she was to call.

Q: Please refer to Employer's Exhibit D-10; how do you know the Grievant can do these tasks?

A: Because she has done so successfully in the past.

The Employer offered the testimony of Mr. Jack Varable on rebuttal:

Q: Have you had information that the Grievant has ADD?

A: No.

Q: Did she ever inform you?

A: NO, Barb (Ms. Starker) mentioned that the Grievant's son had it and that the Grievant said she might have it also.

Mr. Varable also testified about an incident subsequent to the desk audit. The Arbitrator struck that testimony.

Union's Position

1. During the period at issue, July 27, 1992 (the Grievant's return from her 10 day suspension) until October 28, 1992 (the desk audit period), BDD was as an organization under a lot of pressure, change and stress.

2. Many adjudicators worked overtime; the Grievant did not.

3. In February 1992, the Grievant's mother died. Between that date and July 27, 1992, the Supervisor gave the Grievant many written directives. (See Employers Exhibits D-3 through D-9)

4. The Grievant's statistics prior to April 9, 1992 (when Ms. Starker began an E-O-L reviews were good but plummeted thereafter. (See Joint Exhibit 5)

5. The Union claims that the Supervisor performed numerous supervisory reviews on the Grievant but did not do even the required reviews on other employees. (Union Exhibit 2) This treatment was disparate and unfair.

6. The desk audit of October 23rd was retaliatory. The directive to respond to the 48 Supervisory reviews within three days was unreasonable.

7. No evidence of insubordination has been presented.

8. The many delays in the Employer Exhibits E-1 through E-15 were under 30 days and, hence, were not a disciplinary matter. Some of the UTL's that did exist can be blamed on the Supervisor's instructions, i.e. having to make certain phone calls.

9. Both Ms. Moody and Ms. Leasure, experienced claims personnel, disagreed with many of Ms. Starker's conclusions. Judgment calls are the basis of many disability decisions. Both Ms. Moody and Ms. Leasure concluded that the Grievant was an "average" adjudicator.

10. The treatment of the Grievant was discriminatory in terms of the criticisms of her work and the supervisory reviews.

11. The desk audit was in retaliation because the Grievant was being transferred out of the unit. In Joint Exhibit 5 the Findings of the Pre-disciplinary Hearing Officer said that the desk audit was in response to a complaint on October 1. The desk audit was closer to the imminent move and more reasonably can be attributed to the move than the complaint.

12. The memo telling the Grievant not to blacken out certain items is an example of petty discrimination.

13. Other employees were placed on more than one Management Plan and the failure to do so for the Grievant is another instance of discrimination. The Supervisor's directives were not "corrective" but "punitive".

14. The Union claimed that "[t]he appropriate corrective action for a person with ADD is frequent reinforcement and very strict control. With such actions, signs of the disorder may be minimal or absent" (quoting from Union Exhibit 19). Ms. Starker instead provided the Grievant with the opposite: negative reinforcement and frequent discipline.

15. The Employer has discriminated against the Grievant on the basis of handicap. a) The Grievant is handicapped. b) She can do the essential functions of the job if c) she is accommodated through "frequent re-enforcement and strict control." Such discrimination violates Article 2 of the contract.

16. The Arbitrator has jurisdiction to deal with the discriminatory claim under Gilmer.

The Employer lacked just cause to discipline.

Employer's Position

1. Grievant lacked credibility:

a. The Grievant claims a lack of organizational ability; she produced for the first time in a series of disciplines a copy of a memo allegedly given to her supervisor in 1981.

b. The Grievant denied having any discipline prior to 1989. However, she was disciplined twice in that time.

c. The Grievant denied ever having been placed on a Management Plan prior to the plan with Ms. Starker. However, she was on two such plans in 1985.

2. The Grievant's claim is inconsistent

a. She claims that she gave management notice of her disability in 1981 but did not recognize any possible accommodation until the American Disability Act passed (in 1990.)

3. The Grievant was on notice of the required performance and the possibility of discipline. This notice was accomplished through prior discipline (the "B" Exhibits), the series of memos of the Supervisor (the "D" Exhibits), and Employer Exhibit C (signed by the Grievant). Clearly, the Grievant knew what was expected of her as she performed successfully at the end of the Management Plan.

4. The Employer made an effort to discover if the Grievant actually violated the rules. This function was performed by the reviews of Varable, Krauss, and at the Pre-disciplinary hearing.

5. The investigation was fair and objective. (Testimony of Krauss, Varable, and Starker.)

6. The rules were applied even-handedly to all employees. (Testimony of Ms. Krauss, Varable and Ms. Starker.) The Union provided no evidence of disparate treatment.

7. The discipline was commensurate with the seriousness of the offenses and with the Grievant's disciplinary record. The

seriousness of the offenses was addressed by Director Krauss when she reviewed the effect of errors on the budget and efficiency of the Bureau and the effect on claimants. The Grievant has a record of prior discipline for the same offenses, and this discipline is appropriately progressive.

The discipline was for just cause.

Discussion

1. Evidence

This Arbitration Hearing took two and one-half days of testimony and produced pounds of exhibits. The Arbitrator took a number of evidentiary matters under advisement. These matters are resolved in this manner: The time period at issue runs from July 27, 1992 when the Grievant returned from her 10 day suspension through October 28, 1993. 1) Employer Exhibits D-1 through D-13 involve some memos from a time period not at issue. The Arbitrator concluded that only those memos D-10 through D-13 can be considered as evidence for this particular disciplinary event. Memos D-1 through D-9 are received only for the limited purpose of establishing notice to the Grievant. Employer Exhibits E-1 through E-48 deal with the desk audit, a matter appropriately before the Arbitrator. However, Exhibits E-16 through E-48 lack supporting documents that the Arbitrator deems necessary for the Grievant to have fairly prepared her case. Moreover, these items were requested in a timely manner by the Union and were not provided nor was any cogent reason stated for the failure to produce them. The

Arbitrator therefore rejects Employer Exhibits E-16 through E-48. The Employer offered the testimony of Supervisor Carol Bixler. The matters to which she intended to testify were clearly subsequent to the decision to seek discipline; the Arbitrator refused that testimony. Consistent with that ruling, the Employer withdrew Employer Exhibit G.

Employer Exhibits I and J refer to prior discipline forbidden as evidence by the Contract. However, the Union Advocate opened this door by her questioning the Grievant about this period, and the Arbitrator admitted Items I & J for the purposes of impeachment only. Lastly, both parties sought testimony about the alleged allegation of fraud and the incidents surrounding it. This incident again was unrelated to discipline. The Arbitrator has rejected as evidence all testimony and documents (i.e. Employer Exhibit L) about this matter.

2. Prejudicial Procedure

Testimony of witnesses and Joint Exhibit 5 indicate that the Pre-disciplinary hearing, the hearing officer received evidence that the Arbitrator finds was unrelated to the matter before him. This information included the Employer Exhibits E-16 through E-48; however, the receipt of this material alone, although inappropriate, was not so prejudicial as to taint the hearing. However, the pre-disciplinary officer also heard the testimony of Supervisor Carol Bixler about matters subsequent to the decision to discipline. The receipt of this information and its

consideration (See p. 2) was prejudicial to the Grievant and tainted the finding of just cause on which the Appointing Authority relied. The Pre-disciplinary hearing officer also heard testimony about the alleged fraud problem. This matter was introduced apparently through Employer's Exhibit L. The receipt and consideration of this matter was also prejudicial.

3. Claim of Disability Discrimination

The Grievant charges the Employer with discrimination on the basis of disability. To make such a claim, the Employee must have a recognized disability. The Grievant presented no evidence other than her own unsubstantiated testimony that she has ADD. None of the medical evidence introduced by the Grievant made any reference to this condition. Not only must the Employee have a recognized and medically proven disability, but she must show that the Employer knew or had reason to know of the disability. Union Exhibit 20 is insufficient. No proof was adduced that Mr. Hinkin ever received that memo. Union Exhibit 28 is also insufficient evidence of knowledge. A claim of lack of organizational ability is not a substantiated claim of a medically diagnosable disability. Moreover, a casual mention to a supervisor in a conversation that one's son has ADD like the speaker is an insufficient notice to an employer. If the Grievant had proven the existence of her alleged disability and if she had proven that the Employer had knowledge of the disability, the Grievant still would have failed to raise the issue in a timely manner in order to give the Employer fair

notice of the claim. The Arbitrator has searched the record for any claim of disability discrimination prior to the Arbitration Hearing itself and finds none. The Arbitrator need not reach the issue of the effect of Gilmer on her jurisdiction. The Arbitrator rejects the claim of discrimination based on disability.

Charge of Insubordination

According to the Grievance Guide (8th Edition), "[m]ost cases of insubordination involve a worker's refusal or failure to follow the directive of a designated member of management or comply with an established procedure." (p.35) "When considering the propriety of discipline ... arbitrators will weigh the degree of insubordination involved." Insubordination is a serious charge. Engaging in direct conflict with a superior is harmful to the work process and the work place. In this case, the Arbitrator finds that the Employer did not clearly delineate the insubordinate acts or words. Moreover, the Employer did not introduce evidence that differentiated Grievant's alleged neglect of duty from acts alleged to have been insubordinate. The Arbitrator finds insufficient proof to find just cause for the charge of insubordination.

Charge of Dishonesty

According to the Grievance Guide (8th Edition), "...arbitrators demand a higher standard of proof in these cases (i.e. dishonesty charges) and frequently are reluctant to stigmatize an employee ... with the potential [that] this [charge]

has for causing permanent loss of employment." (p.61) In this case, the Employer has failed to point out to the Arbitrator exactly which acts or statements were dishonest and in what manner they were dishonest. The Employer has failed to differentiate between the Grievant's acts that might be characterized as neglect of duty and those which might be characterized as "dishonest". This Arbitrator believes that to call someone dishonest is to stigmatize them for life and must be alleged specifically and proven clearly. The Arbitrator finds insufficient proof of just cause for the charge of dishonesty.

The Grievant's Credibility

The Employer doubted the Grievant's credibility, and the Arbitrator finds this doubt well placed. The record amply supports a finding that the Grievant lied at the hearing under oath about prior disciplines, lied about the prior Management Plan, and egregiously dissembled about her claim of disability discrimination.

The Union's Position

The Union unfortunately has espoused at least two and perhaps three inconsistent positions. 1) The Grievant is disabled and can do the work if provided with a reasonable accommodation. 2) The Grievant was doing the work in an average manner without any accommodation, and any charges of neglect of duty are erroneous and the result of harassment and retaliation. 3) The Grievant was not doing the job because of her own emotional problems coupled with the Supervisor's mistreatment.

The Posture of This Matter

This Grievant does not come to the Arbitrator with a clean slate. The Grievant, as stipulated by the parties, has four prior disciplines in the period under review. All these disciplines involve neglect of duty (the remaining charge). A close reading of those disciplines indicate that the Grievant was being progressively disciplined with purpose of correction for exactly the same behavior alleged in this case. Neither the Arbitrator nor the parties can retry those cases and remove them from the Grievant's record.

Neglect of Duty Versus Supervisory Harassment

The Management Plan undertaken by supervisor Barbara Starker to correct the deficiencies in the performance of the Grievant was a success according to the Supervisor and the Grievant. At the end of that period, the Grievant was doing the work to the satisfaction

of her supervisor. During that plan and in all subsequent communications, the Supervisor made her standards abundantly clear. If the Grievant understood those standards, and no evidence was admitted to lead to any other conclusion, her job was to do her work according to those standards. If she disagreed with those standards, standard labor practice requires that the Grievant carry out the orders and directives of her supervisor unless those directives or orders would cause health or safety problems. If the Grievant believed those orders were illegal, violated the contract, discriminated against her, or were in any other way substantively or procedurally inappropriate, she must carry them out and then, and only then, grieve them. For example, if the Supervisor said I want you to call people when information that is critical to the file is missing, rather than using a form letter, the Grievant should call. If the Supervisor says I always want you to send a teacher's letter where the child is of school age (even if the letter would arrive during school vacation), the Grievant should send the letter. The Supervisor is in charge and while such matters may indeed be a judgment call between equally situated persons, the Grievant and the Supervisor are not equals and the Grievant's judgment is not relevant.

The Grievant's position (at least one of them) is that she was carrying out those orders and that the mistakes allegedly found and documented by Ms. Starker were not mistakes but false statements made by Ms. Starker used solely for the purpose of harassment. In addition, she claims that the desk audit that

turned up these alleged mistakes was solely a retaliatory action. The Arbitrator recognizes, that in and of itself, the desk audit is a legitimate supervisory tool. In fact, this desk audit was not the only desk audit that the Grievant has charged was harassment. In 1985, an acting supervisor did a desk audit and apparently found a serious number of errors. The Grievant said the woman was "getting heady". (See Employer's Exhibit H entitled "delayed cases.") The problem in 1985 did not lie in the Grievant but in the "heady" acting supervisor! Ms. Starker apparently was not the first supervisor who allegedly harassed her. According to Union Exhibit 17, the Grievant's own statement, Tim Cox was forced to harass her by management long before Ms. Starker began her alleged campaign. Ms. Starker said she did not know about the upcoming transfer when she began the desk audit. The Union never presented any evidence to contradict that statement. Union Exhibit 6 indicates that the settlement that created the transfer occurred on October 19, 1994; however, no evidence was introduced as to when that information became public knowledge. The Union's closing pointed out that the audit was certainly closer to the settlement than to the incident of October 1st that somehow triggered the desk audit three weeks later. Even assuming the worst, namely that the supervisor would spend the time doing a desk audit on a person who was leaving in order to harass that person, that bad motive does not change what she found, if indeed, she found the errors and neglect charged. What did she find?

Ms. Moody, a competent and experienced person, testified that, after her review of the 48 supervisory reviews, the Grievant did "average" work. Yet, the Arbitrator has to assume that she suffered from the same deficit that Ms. Leasure admitted, i.e. that the lack of documentation made a complete independent review impossible. How should the Arbitrator weigh the testimony of Ms. Moody and Ms. Leasure with regard to their criticism of Ms. Starker's methods and conclusions? The Arbitrator found both these women sincere, competent, and honest. Both admitted that a lot of their criticisms were "judgment calls". The real issue is that Ms. Starker and not either of these ladies was the Grievant's supervisor.

Ms. Starker invested a significant amount of time--close to 6 months--bringing the Grievant up to speed. The Grievant proved she could do the job. Yet, subsequently, as the prior disciplines show, she stopped doing the job to the standards she had already shown she could meet. Perhaps, Ms. Starker kept a sharp eye on the Grievant's work, but this attitude seems only natural for a supervisor with a problematic performer. The Union argues that what the Grievant needed was tight control; however, ironically, that very tight control is claimed by the Grievant to be "harassment".

The Arbitrator found Ms. Starker, Ms. Krauss, and Mr. Varable to be straight forward witnesses. Ms. Starker laid her claims out in a clear and straight forward way. The Grievant, on the other hand, lied, not once but twice, for self serving reasons.

The Union's third position is that deficiencies did exist but are, at least in part, explainable by the Grievant's depression. This Arbitrator has great respect for the effects of depression on an individual's work performance. However, at both the Pre-disciplinary Conference and at the Step III hearing the Grievant asked for a EAP deferral yet had done nothing to bring herself within that proviso. The Arbitrator is confident that had the Grievant seriously considered EAP that the Union was well able to advise her how to proceed. The contract provides a method for an employee to handle performance problems caused by psychological or other problems. The Arbitrator is at a loss as to why the Grievant failed to avail herself of this procedure.

Weighing all the evidence, the Arbitrator finds that the Employer has proven that the Grievant neglected her duty .

Remedy

This discipline is the 5th discipline for the same reason, neglect of duty. To be progressive, the suspension should be greater than 10 days. In the balance, the Arbitrator must also consider that prejudicial procedural errors occurred that should have been avoided by the Employer. These errors could have caused the imposition of too severe a suspension. Moreover, the Employer did not prove that the Grievant was insubordinate nor dishonest. Therefore, two of the three charges are dropped. If, however, this discipline is to be corrective, the Grievant must be sufficiently put on notice that she must meet the standards imposed on her by

her supervisors. She has failed to respond to this message four times. The Arbitrator reduces the twenty day suspension by 2 days because of the procedural errors and reduces the suspension by 5 days because of the reduction in charges. The Arbitrator finds just cause for a suspension of 13 days.

Award

The Grievance is denied in part and granted in part. A suspension of 13 days is found to be consistent with just cause. The Employer shall award the Grievant 7 days back pay.

December 15, 1994
Date

Arbitrator