

**IN THE MATTER OF ARBITRATION  
BETWEEN**

<b>STATE OF OHIO</b>	)	<b>CASE NO. 05-00-960402-0001-01-09</b>
	)	
<b>AND</b>	)	<b><u>OPINION AND AWARD</u></b>
	)	
<b>OCSEA/AFSCME LOCAL 11</b>	)	<b>BRUCE MENDLOWITZ, GRIEVANT</b>

**JAMES M. MANCINI, ARBITRATOR**

**APPEARANCES:**

**FOR THE STATE**

**Janet Conkey  
Michael Duco**

**FOR THE UNION**

**Brenda Goheen  
Tim Rippeth  
Bruce Mendlowitz**

FILED  
JAN 30  
P 1:51

## **SUBMISSION**

This matter concerns a grievance filed on April 8, 1996 by Bruce Mendlowitz. The Grievant alleged that he had been improperly discharged in violation of the Collective Bargaining Agreement between the State of Ohio (hereinafter referred to as the Employer) and the Ohio Civil Service Employees Association, AFSCME Local 11 (hereinafter referred to as the Union). The arbitration hearing was held on November 15 and 21, 1996. The parties submitted post-hearing briefs.

## **BACKGROUND**

The Grievant, Bruce Mendlowitz, began his employment with the State of Ohio in the Auditor's Office on June 4, 1978. The Grievant was subsequently transferred from the Auditor of State's Office to the Office of Budget and Management on July 7, 1985. At the time of his discharge, the Grievant was employed as a State Accountant Examiner by the Office of Budget and Management. Mr. Mendlowitz's duties as a State Accountant Examiner were to review vouchers submitted by the state agencies for accuracy and completeness, ensuring that payments are in compliance with purchasing policies, Department of Administrative Services directives, Accounting Review procedures and other applicable laws and rules.

The events giving rise to the Grievant's discharge include the following. During

the latter part of January, 1996, a quality review audit was conducted on the work performed by the State Accountant Examiners including the Grievant. The audit was conducted on vouchers reviewed by the State Account Examiners and released for payment on January 12, 1996. The audit was conducted by Judy Johnson, the Accounting Review Supervisor, as well as internal auditors, Gary Palmer and Rick Fletcher. According to Ms. Johnson, the purpose of the quality review audit was to insure consistency, address problems, and for training purposes.

The results of the audit indicated that thirty-seven of the regular review vouchers which had been approved for payment by the Grievant contained errors. As attested to by Ms. Johnson, the errors committed by the Grievant included incorrect voucher amounts, vendor names, altered invoices, and improper or incomplete invoices. Ms. Johnson also pointed out that the Grievant had approved travel vouchers that should have been reviewed by the travel examiner as well as American Express vouchers that should have been approved by the assistant administrator. There were also payments between state agencies that should have been on an intrastate transfer voucher, incorrect object codes and missing required information such as tear sheets for advertising payments. Ms. Johnson stated that the Grievant had by far the highest rate of errors of any of the State Accountant Examiners working under her supervision. The Grievant's error rate was 9.2 percent of the regular vouchers which he had reviewed and approved for payment. Other examiners had error rates ranging from zero to 2.8 percent.

Ms. Johnson as well as Gary Palmer, Internal Auditor, testified that all vouchers

that were released for payment on January 12, 1996 were reviewed in the quality audits. Ms. Johnson stated that the date selected for the audit was chosen because all examiners were at work on January 11, 1996. Due to a systems problem, vouchers that were reviewed by the examiners on January 11<sup>th</sup> as well as those on January 12<sup>th</sup> were included in the audit review. All nine examiners were audited for their review of regular vouchers on those dates. Regular vouchers must be reviewed according to legal requirements and accounting review procedures. Ms. Johnson stated that all state accountant examiners like the Grievant are properly trained as to the appropriate voucher review requirements. Regular vouchers must have proper invoices that have not been altered, correct totals, correct vendors, appropriate signatures and must reference encumbrances when required.

Ms. Johnson as well as Loretta Herron, State Accounting Administrator, stated that following the review audit, they met with the Grievant concerning his high error rate in handling regular vouchers. They both stated that the Grievant had committed similar kinds of errors in reviewing vouchers in the past. When they attempted to counsel the Grievant in the past about his errors, he made little effort to correct his deficiencies. During their meeting with the Grievant following the January 12<sup>th</sup> audit, the Grievant showed little interest in making an effort to remedy his errors. Ms. Herron and Ms. Johnson acknowledged that there was no established minimum level of acceptable errors for State Accountant Examiners. They also admitted that all examiners make errors on

occasion. However unlike the Grievant, Ms. Johnson and Ms. Herron indicated that other employees have made efforts to improve their proficiency without making the same kind of error over and over again. In the Grievant's case, they stated that the errors which he committed during the audit of January 12<sup>th</sup> were not only excessive but were a repeat of the kind of errors which he had committed in the past. Moreover, the Grievant seemed unwilling to recognize his deficiencies even though every effort had been made to counsel him and to assist him in improving his performance.

The Grievant disputed many of the errors found in the quality review audit. He stated that he followed acceptable practice in approving certain vouchers especially those related to travel expenditures. The Grievant testified with respect to each of the regular vouchers which were allegedly erroneously processed by him on January 12, 1996. In some instances, the Grievant noted that support documentation or small tear sheets were now missing from the copies of the vouchers which he had approved. Moreover, the Grievant indicated that on the date of the audit, he processed over 750 vouchers which was well above his average. The Grievant attributed some of his errors to the unusually high volume of work which he had that day. The Grievant questioned why the January 12<sup>th</sup> date was selected for the audit.

With respect to travel vouchers, Sandy Allen, State Accountant Examiner, testified that when she was present, she was the only examiner that was to review travel vouchers. The Grievant stated that he had an arrangement with Ms. Allen that he could review and approve travel vouchers if there were only a couple of such vouchers in a

batch. Ms. Allen stated that she had no such arrangement with other examiners who were to review all non-travel vouchers in a batch and then forward the batch to her for a review of the travel vouchers.

The next incident which led to the Grievant's discharge occurred on January 31, 1996. On that particular day, Ms. Johnson, the Grievant's supervisor, discovered that the Grievant was reviewing the wrong day's work. According to Ms. Johnson, Mr. Mendlowitz should have been working on vouchers received on January 29, 1996 so that the work could be completed before he proceeded to a later date. Ms. Johnson explained that the department operates on a first in, first out basis and on that particular day, the Grievant should have been working on vouchers received on January 29<sup>th</sup> rather than a later date.

With respect to the January 31<sup>st</sup> incident, Mr. Mendlowitz testified that he merely worked from his basket in the order which the vouchers were placed that day. He blamed the individual who put the vouchers in his basket for the error which occurred because they did not properly remove the travel vouchers which were there. In any case, the Grievant stated that once he discovered the error, he began to work on the correct day's vouchers. He also stated that he completed the review of all of the vouchers which were in his basket on January 31, 1996.

The third incident which served as a basis for the Grievant's discharge occurred on January 23, 1996. On that day, the Grievant failed to inform his supervisor that he

would not be able to complete his work. Ms. Johnson stated that work rules require advising the supervisor by 2:00 p.m. if an employee is unable to complete work for that day. The rule is designed to allow management sufficient time to redirect manpower needs in order to keep the work current within the section. Ms. Johnson acknowledged that there are occasions when examiners do not realize that they cannot finish their work for that day until after 2:00 p.m. When that happens, she stated that everyone in the department pitches in to help get the work done. Mr. Mendlowitz admitted that he failed to notify his supervisor by 2:00 p.m. on January 23<sup>rd</sup> that he would be unable to complete his work for that day. However, he pointed out that he did notify Ms. Johnson later that afternoon that he would not be able to complete his vouchers. The Grievant claimed that he had a heavier work load than other examiners on the day in question.

On February 20, 1996, Mr. Mendlowitz approved a batch of vouchers for payment that rejected during the release process because the totals were incorrect. Ms. Johnson reviewed the batch and found nine problems with the vouchers the Grievant had approved. She stated that the errors included questionable purchases such as gift wrap with no explanation, travel vouchers that should have been approved by the travel examiner, American Express vouchers that should have been approved by the Assistant Administrator, vouchers that did not reference an encumbrance, and approved payments issued with no supporting vouchers.

The Grievant testified with respect to each of the alleged errors which he made on

February 20, 1996. He stated that he approved payment for gift wrap because it involved a small amount and was not an unusual purchase for the agency involved. With respect to travel vouchers, Mr. Mendlowitz testified that he had approved them in the past. He stated that although this may not have been the proper procedure, other examiners have also approved travel vouchers. The Grievant admitted that he did not notice the American Express bills which were attached to two of the vouchers which he approved. He acknowledged there was a recent policy regarding American Express vouchers which were to be reviewed by another examiner. Finally, the Grievant stated that he never approves vouchers without encumbrances. He testified that they are often small pieces of paper and may have been lost by others who subsequently reviewed the vouchers.

The evidence shows that on March 5, 1996, an investigatory meeting was held in Ms. Herron's office to discuss the work performance of the Grievant. Following that meeting, Ms. Herron issued a notice of a pre-disciplinary conference on March 18, 1996 which stated that the Employer was recommending that the Grievant be disciplined for the various incidents which had occurred. The pre-disciplinary conference was held on March 26, 1996. At the pre-disciplinary conference, the Grievant was given the opportunity to respond to the charges against him. However, the hearing officer recommended that management proceed with progressive discipline because it was established that the Grievant had failed to follow written procedures of the section, a violation of Item 3 of the OBM Disciplinary Guidelines. Subsequently on March 29,



1996, the Director of the Office of Budget and Management informed the Grievant that he was being discharged for failing to follow written procedures of the section.

Ms. Herron testified that the Grievant was discharged only after he was given every opportunity to improve his performance and correct his deficiencies. She stated that the Grievant had been repeatedly counseled and offered training in an attempt to get him to improve his job performance. However, Ms. Herron stated that the Grievant showed little interest in taking the necessary steps in correcting the errors which he repeatedly made. Moreover, Ms. Herron stated that the Grievant had been previously disciplined for failing to follow proper procedures and was told that he would be subject to further disciplinary action if improvement was not shown. Ms. Herron stated that the decision to discharge the Grievant was in accordance with the Office of Budget and Management's disciplinary grid.

The parties stipulated that the Grievant had received a written reprimand dated September 26, 1994 for insubordination, refusal to carry-out an assignment, willful disobedience of a direct order by a supervisor, and failure to follow written policies and procedures. The Grievant received a one day suspension on March 7, 1995 for insubordination and failure to follow written policies and procedures. On June 30, 1995, the Grievant received a three day suspension for failure to follow written procedures of the section and for using abusive and threatening language towards a supervisor. Mr. Mendlowitz received a five day suspension on October 6, 1995 for failing to follow written procedures of the section.

The evidence shows that on September 1, 1995, the Office of Budget and Management agreed to allow Mr. Mendlowitz to enter into the Employee Assistance Program. The purpose of the EAP agreement was to allow the Grievant the opportunity to seek assistance for dealing with his problem of failing to follow written policies and procedures as well as that of insubordination. According to Ms. Herron, even after the Grievant entered the EAP program, he failed to show improvement in his job performance and remained incorrigible. According to Ms. Herron as well as Ms. Johnson the Grievant's actions were at times disruptive to the workforce. They stated that on occasion the Grievant would at times start yelling at supervision when they attempted to counsel him in order to correct his errors.

The Grievant testified that his participation in the EAP program which he completed in February, 1996 had helped him to realize that he had to be more cooperative with management. He stated that he had learned to try to let things "roll off his back." Mr. Mendlowitz stated that he was never given the opportunity to demonstrate to management that he had benefited from his participation in the EAP program.

## **POSITIONS OF THE PARTIES**

### **POSITION OF THE EMPLOYER**

The Employer contends that it had just cause to discharge the Grievant for failing to perform his job duties as State Accountant Examiner in an acceptable manner. It was shown that the Grievant was repeatedly informed that his job performance was unacceptable and that continued poor performance would result in further discipline. Despite the warnings given to the Grievant, the evidence clearly showed that he failed to improve his performance. Progressive discipline was properly applied and the discharge was in accordance with the disciplinary grid.

The Employer argues that the quality review audit that resulted in charges against the Grievant was conducted in a fair and objective manner. The results of the audit clearly showed that the Grievant's error rate of 9.2 percent was excessive and much higher than other examiners' error rates. The Grievant committed errors on thirty-seven vouchers which he reviewed, all of which were serious in nature. Contrary to the Union's claim, the quality Review audit was not flawed. Rather, it was the Grievant who failed to explain away the various errors which he had committed in his review of regular vouchers which were released on January 12, 1996. The quality review audit clearly showed that on numerous occasions the Grievant had failed to follow written procedures of the section.

The Employer further maintains that the disciplinary action was progressive and

commensurate with the offense. The evidence shows that the Grievant was repeatedly counseled and offered training in an attempt to improve his performance prior to the imposition of any disciplinary action. Progressive discipline was then applied when the Grievant showed no improvement in his performance. The Grievant received a written reprimand, a one day suspension, a three day suspension, and then a five day suspension preceding his discharge. Moreover, the termination was in accordance with the Office of Budget and Management's Disciplinary Grid.

Contrary to the Union's claim, the disciplinary process was conducted timely according to the Employer. The investigatory interview was conducted within two weeks of the last incident. Two weeks later, the Grievant was given notice of his pre-disciplinary conference. Finally, the Grievant was notified of the appointing authority's decision to remove him soon after the issuance of the pre-disciplinary officer's report.

The Employer takes exception to the argument that because the Grievant was a long term employee, his discharge was unjust. The Employer maintains that length of service does not dictate a higher standard of just cause for termination. State employees like the Grievant are expected to perform their job duties in an adequate manner. In that the Grievant did not perform his job duties adequately and failed to improve his work performance after repeated warnings, his termination was justified.

Finally, the Employer submits that the Grievant's participation in the EAP program failed to result in any improvement in his job performance. Even the Grievant's

testimony at arbitration shows that he continues to lack the understanding that he must perform the job duties of State Accountant Examiner in an adequate manner. The EAP program did not help the Grievant in this case as demonstrated by the record before this arbitrator. Thus the Employer requests that the Grievant's discharge be upheld and that his grievance be denied.

#### POSITION OF THE UNION

The Union contends that the Employer failed to show by clear and convincing evidence that the Grievant's termination was for just cause. The Union takes the position that a higher degree of proof should be required in a case such as this which involves a long term state employee. The evidence offered by the Employer was often conflicting and certainly did not clearly show that the Grievant's termination was justified.

The Union argues that the quality review audit which was intended to identify areas where improvements were to be made and to establish possible training topics, should not have been used to discipline Mr. Mendlowitz. The Grievant was clearly subjected to disparate treatment in that he was the only employee disciplined as a result of the audit. The Grievant was inappropriately subjected to greater scrutiny than other employees during the audit. Moreover, some of the errors committed by the Grievant were undoubtedly due to the fact that he had a much bigger caseload than the other employees on the day of the audit. The Grievant was also able to explain away some of

the other errors which he committed which were likewise made by other examiners. Because management acknowledged that all employees make errors, it was totally inappropriate to have disciplined the Grievant as a result of the audit.

The Union also maintains that the State improperly stacked charges against the Grievant in order to justify his removal. The evidence shows that there were several minor occurrences which occurred between January 12, 1996 and February 20, 1996. Management had no reason to wait until the February 20<sup>th</sup> event other than to stack as many charges as they could to support his removal. The triggering offense should only be the February 20<sup>th</sup> event which of course was a relatively minor matter. Moreover, the Grievant explained away all of the alleged errors on the vouchers which occurred that day. In any case, it was clearly improper for the Employer to stack charges against the Grievant in violation of Article 24.05 which states that all discipline is to be corrective and not punitive.

The Union further argues that the discipline imposed against the Grievant was not progressive. To go from a five day suspension to a removal for a long term employee is not following progressive discipline. Moreover, Article 24 requires that discipline be commensurate with the offense committed. In this case, the Employer failed to show that the triggering event warranted the removal of the Grievant.

The Union submits that the discipline imposed was not timely. The incidents which served as a basis for the discharge occurred in January and February 20, 1996. However, a pre-disciplinary hearing was not held until mid March. The Employer

offered no good reason for this delay.

Finally, the Union points out that the Grievant had entered into an EAP agreement to help him identify causes of workplace stress and to learn to manage it better.

However, the Employer failed to allow Mr. Mendlowitz the opportunity to finish his EAP and to see what effect it would have on his performance. Given the fact that Mr.

Mendlowitz is a seventeen year employee, it is apparent that he deserved the chance for the EAP to work. For the reasons cited, Union requests that the Grievant be reinstated to his position as State Accountant Examiner with full back pay, seniority and benefits.

## **OPINION**

The issue presented herein is whether the Employer had just cause to discharge the Grievant, and if not, what is the appropriate remedy. Because of the seriousness of the discharge penalty, the burden in this case was on the Employer to establish by clear and convincing evidence that there was proper cause for the Grievant's termination. Such a heavy burden is especially appropriate in a case such as this involving a long term state employee.

The record before this arbitrator clearly shows that the Grievant had repeatedly committed errors in performing his job duties as State Accountant Examiner. The evidence shows that the Grievant has on numerous occasions failed to properly follow the written policies and procedures of the section in carrying out his job duties in reviewing vouchers submitted by state agencies. Without question, the Employer satisfied its burden of proving that the Grievant has been guilty of poor work performance.

The evidence clearly shows that the Grievant failed to follow proper procedures and committed numerous errors in the performance of his duties as State Accountant Examiner with the Office of Budget and Management. The type and extent of errors committed by the Grievant is best exemplified by those discovered during the quality



review audit. That audit indicated that the Grievant had made thirty-seven errors on regular review vouchers which he had approved for payment. The Grievant's error rate was 9.2 percent which was much higher than that of other examiners. The errors included incorrect voucher amounts, altered invoices, incomplete invoices, and missing supporting documentation. The quality review audit also showed that the Grievant had approved travel vouchers which should have been reviewed by the travel examiner and American Express vouchers which should have been approved by the Assistant Administrator. It is important to note that on February 20, 1996, the Grievant committed the same kind of errors as those discovered during the quality review audit. On that date, it was discovered that the Grievant had committed nine errors on vouchers which he had approved for payment. The errors once again included travel vouchers that should have been approved by the travel examiner, American Express vouchers that should have been approved by the Assistant Administrator, and vouchers that did not reference an encumbrance.

The Grievant's employment record further shows that in the past the Grievant has committed similar errors during his review of vouchers. During the past two years, the Grievant was written up and counseled for numerous errors including releasing vouchers without proper supporting documentation, improperly approving payments for travel reimbursement, and approving vouchers with the wrong amount. Moreover, the last three performance reviews showed that the Grievant was rated below standard for quality

of work. On each of the evaluations, there was an indication that the Grievant needed to improve his performance in the area of voucher review. Thus this arbitrator would agree with the Employer's assessment that the Grievant has repeatedly committed the same kind of errors over the past two years during his review of vouchers from state agencies.

It was certainly reasonable for the Employer to expect the Grievant to carry out his job duties without committing numerous errors. As attested to by the State Accounting Administrator, Ms. Herron, the purpose in having an examiner review the vouchers submitted by state agencies is to insure accuracy and completeness so that payments are in compliance with purchasing policies, directives, as well as applicable laws and rules. As stated by Ms. Herron, her section is charged with the responsibility of making sure that state monies are used for appropriate purposes. Thus it is apparent that the Grievant's errors in improperly approving vouchers were indeed quite serious. As stated in the written reprimand issued to the Grievant in September, 1994, his errors and failure to follow procedures "could result in illegal or erroneous payments and be a loss of state funds." Clearly, the Grievant's failure to follow proper procedures and policies of the section during his review of vouchers constituted a serious dereliction of duty on his part.

The Grievant offered no legitimate explanation for the many errors which he committed. First, the Grievant attempted to explain away the errors which were discovered during the quality review audit as well as those found on vouchers which the Grievant reviewed on February 20, 1996. However, the credible testimony offered by

both Ms. Johnson and Ms. Herron clearly shows that the Grievant did in fact make numerous errors in the processing of vouchers on the dates in question and experienced the highest error rate of all examiners. With few exceptions, this arbitrator finds that the Grievant's explanation for the errors he committed was totally inadequate. The Grievant also claimed that the workload in the department was unfairly divided and that other examiners received help while he did not. Once again, the evidence shows that this was not the case. The summary of examiner's logs which was submitted into evidence shows that Mr. Mendlowitz's daily average for reviewing vouchers was about on par with that of other examiners. Moreover, Ms. Johnson testified that the Grievant was not given an unfair workload and that assistance was available from others whenever the Grievant needed them.

This arbitrator further finds no merit to the Union's contention that the quality review audit was conducted in an unfair manner towards the Grievant. Testimony of Ms. Johnson as well as that of Gary Palmer, one of the two internal auditors who conducted the January 12<sup>th</sup> audit, shows that the release date chosen for the review was randomly selected and that the same standards for the audit were applied to the work of each of the examiners. Ms. Johnson and Mr. Palmer further testified that each auditor reviewed various boxes of vouchers which allowed them to audit the work of several different State Accountant Examiners. This arbitrator finds from the evidence that the quality review audit was conducted in a fair and objective manner. Once again, the results of the

audit showed that the Grievant had a 9.2 percent error rate while other examiner's error rates ranged from between zero percent and 2.8 percent. Contrary to the Union's claim, the additional errors committed by other examiners which may have been missed by the internal auditors during their review of the vouchers were few in number and certainly did not have any significant impact upon the overall results of the audit.

Moreover, it cannot be said that the Grievant was subjected to unequal treatment because he was the only one disciplined as a result of the quality review audit. Unlike the Grievant, the evidence shows that the other examiners had not in the past committed the same kind of errors discovered during the audit of January, 1996. The other examiners also did not have any prior disciplinary record for poor performance as did the Grievant at the time of the quality review audit. Thus given the Grievant's prior disciplinary record as well as the fact that he had repeatedly committed the same kind of errors in the past, this arbitrator must find that it was entirely appropriate for management to have subjected only the Grievant to disciplinary measures following the quality review audit of January, 1996.

The evidence further establishes that in the past the Grievant has not been receptive to the counseling offered by management concerning the errors which he was committing. Ms. Herron stated that the Grievant showed little interest in taking the necessary steps in correcting the errors which he repeatedly made. Moreover, there was evidence that the Grievant has at times acted in a belligerent and disruptive manner during his meetings with supervision. Ms. Herron described an incident which occurred

in a counseling session when the Grievant started to yell at her and then threw a notebook pad at her. In June, 1995, the Grievant received a three day suspension for “yelling loudly” at his supervisor and creating a disturbance in his area. His coworkers have also complained about the Grievant’s disruptive attitude in the office. Ms. Herron stated that the Grievant’s poor attitude towards his job was a factor in her decision to recommend his termination. Obviously, the Grievant’s antagonistic attitude towards management whenever they attempt to counsel him concerning his poor work performance is clearly unacceptable conduct.

This arbitrator finds no merit to the Union’s contention that the discipline was not rendered in a timely manner in accordance with the parties’ bargaining agreement. The final incidents which led to the Grievant’s discharge occurred in January and February, 1996. On March 5<sup>th</sup> an investigatory meeting was held to discuss the work performance of the Grievant. Subsequently, a pre-disciplinary conference was held on March 26, 1996. A few days later on March 29, 1996, the Grievant was informed that he was being discharged for failing to follow written procedures of the section. It is apparent from the above recitation of the significant dates involved leading to the Grievant’s discharge that the disciplinary process was conducted in a prompt and timely manner.

Thus this arbitrator has concluded from the record that the evidence clearly establishes that the Grievant has in the past committed numerous errors during his review of vouchers submitted by state agencies. The quality review audit as well as the February

20,1996 review of the Grievant's work once again demonstrated that the Grievant had a high error rate in his handling of regular vouchers. It was also shown that the Grievant had been resistant to counseling from management regarding his problems. Without question, the Grievant's continued failure to follow proper procedures and policies of the section during his review of vouchers warranted severe disciplinary action.

Having determined that the misconduct warranted severe discipline, the next question which must be addressed is whether the discharge penalty imposed was appropriate in this case. The Union argues that it was wrong for management to go from a five day suspension to a removal for a long term employee such as the Grievant. The Union further contended that Mr. Mendlowitz as a long term employee deserved the chance for the EAP to work. Based upon the evidence and circumstances presented in this case, this arbitrator finds merit in the Union's argument for a lessening of the discharge penalty imposed.

First, this arbitrator finds that the final triggering event cited by management failed to support the discharge decision rendered in this case. As indicated previously, the final triggering event which served as a basis for the Employer's discharge involved primarily the results of the 1996 audit as well as the review of the Grievant's work on February 20, 1996. The audit indicated that the Grievant had made thirty-six errors which included miscalculations, improper invoices, altered invoices, and insufficient supporting documentation. The record reveals that the last discipline which the Grievant received prior to his discharge was a five day suspension in October, 1995. He received the five

day suspension as a result of an audit conducted in July, 1995 which indicated that he had committed twenty-eight errors which were similar to those he subsequently committed during the quality review audit of January, 1996. Under the policy of progressive discipline, it is widely recognized that the last offense need not be a major one or one serious enough by itself to justify discharge. However, it must be one of sufficient magnitude which when taken together with the prior offenses justify the discharge. In the instant case, the evidence shows that the extent of the Grievant's final errors were basically the same as those which he previously committed when he was given a five day suspension. This arbitrator finds that this fact reduces the magnitude of the Grievant's last offense so as to make it difficult to conclude that there was just cause for his discharge.

This arbitrator also finds that the other two final charges which were brought against the Grievant failed to support his discharge. On January 31, 1996, the Grievant was charged with reviewing the wrong day's work. However, the evidence indicates that the error was due at least in part to the individual who put the vouchers in the Grievant's basket that day without properly removing the travel vouchers which were there. Moreover, it was shown that the Grievant completed the review of all the vouchers that were in his basket on January 31, 1996. Obviously if there was any error on the Grievant's part, it was not serious. With respect to the January 23<sup>rd</sup> incident, the Grievant was charged with failing to inform his supervisor by 2:00 p.m. that he would not be able to complete his work. Here again, the evidence indicates that other examiners have gone beyond 2:00 p.m. before notifying supervision that they needed assistance in order to

complete their work that day. It was also shown that later in the afternoon, the Grievant did in fact advise his supervisor that he needed assistance. In any case, it is apparent that the infractions committed by the Grievant on January 23<sup>rd</sup> and 31<sup>st</sup> were relatively minor ones which again failed to justify his termination.

Moreover, it does not appear from record that management ever told the Grievant, either in counseling session or written form, that the very next time he was guilty of failing to follow proper procedures and committing errors that he would be discharged. Under the just cause concept, due process requires that the employee not only know what is required of him from the Employer but also that he be advised if the next succeeding infraction will lead to discharge. This was especially important in this case where the Grievant was a long term, seventeen year state employee. The record reveals that when the Grievant received his last five day suspension in October, 1995, he was only advised that his failure to correct his problems which led to disciplinary action "will result in more severe discipline." Again, due process required that the Grievant know, without a doubt, not only what was expected of him but also what could result if he failed to improve his job performance. In that a final warning was never given to the Grievant, it must be held that the discharge penalty imposed was improper.

The evidence shows that on December 1, 1995, the Grievant entered into the Employees Assistance Program. The Grievant stated that this gave him the opportunity to seek assistance for dealing with his problem of failing to follow written procedures of his section. The Grievant stated that he learned that he should be more cooperative with



management. It is significant that the Grievant was referred to the Employees Assistance Program prior to the discharge decision being rendered. The parties' agreement under Article 24.09, Employees Assistance Program, states that participation in an EAP program "may be considered in mitigating disciplinary action." This arbitrator finds that the Grievant's participation in the EAP program was a mitigating factor which should have been taken into consideration in this case. Significantly, the Grievant was never given the opportunity to demonstrate that he had benefited from the EAP program. This arbitrator would agree with the Union's assessment that Mr. Mendlowitz as a long term employee deserved the chance for the EAP to work. The Grievant was discharged prior to being given such an opportunity.

Therefore, this arbitrator finds that based on all of the circumstances in this case and for the reasons stated, the discharge penalty was too extreme. The final triggering events were insufficient in magnitude for the Employer to go from a five day suspension to a removal given the fact that the Grievant was a long term, seventeen year state employee who had never been given a final warning that his continued failure to properly perform his job would lead to his termination. It would be appropriate for the Employer to reinstate the Grievant and to give him another chance to show that he benefited from the EAP program. The object of the Grievant's reinstatement is to grant to a long term employee a final chance to prove that he can follow required procedures and perform his job as State Accountant Examiner in a satisfactory manner. The Grievant's reinstatement shall be on a conditional last chance basis. The Grievant shall be given a final warning that


if his error rate is found to be excessively high as compared to other examiners, he shall be subject to immediate discharge. It would also be appropriate to provide as a condition of the Grievant's reinstatement that he shall at all times fully cooperate with management and not act in an antagonistic manner whenever they attempt to talk to him about his job responsibilities. Thus the reinstatement is conditioned upon the non-reoccurrence of the excessive high error rate and antagonistic conduct engaged in by the Grievant which gave rise to the discipline in this case.

This arbitrator further finds that the Grievant is not entitled to lost wages in this case. It is evident that the Grievant's termination was essentially his own fault. It was clearly shown that the Grievant did engage in serious misconduct by failing to follow proper departmental procedures and committing numerous errors during his review of vouchers. The Grievant has also engaged in improper conduct by acting in a belligerent manner towards management when they have attempted to counsel him regarding his job deficiencies. Considering the seriousness of the Grievant's misconduct as well as the fact that he had a prior disciplinary record, it would be inappropriate to provide the Grievant with any lost wages. Moreover, reducing the Grievant's discharge to a disciplinary suspension without pay is justified in order to impress upon him the seriousness of his actions and to warn him that he must comply with proper procedures and follow management directives in performing his job duties as State Accountant Examiner.

## AWARD

The grievance is sustained in part. The Grievant engaged in serious misconduct by failing to follow proper procedures and committing numerous errors in the performance of his duties as State Accountant Examiner. However, there were mitigating factors which call for the lessening of the discharge penalty imposed. The Grievant's termination shall be reduced to a disciplinary suspension. The Grievant shall not be entitled to any lost wages. The Grievant shall immediately be reinstated with full seniority to his former position on a conditional last chance basis. The reinstatement is conditioned upon the non-reoccurrence of the excessive high error rate and antagonistic conduct engaged in by the Grievant which gave rise to the discipline in this case.

January 27, 1997

  
JAMES M. MANCINI, ARBITRATOR

RECEIVED  
JAN 30 1997

JAN 30 4:51