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STATE OF OHIO AND OHIO
CIVIL SERVICE EMPLOYEES ASSOCIATION
VOLUNTARY LABOR ARBITRATION
PROCEEDING

In The Matter of the Arbitration Between:

The State of Ohio, Bureau of
Workers Compensation

-and-

The Ohio Civil Service Employees
Association, Local 11,
AFSCME, AFL-CIO

Grievant: Kent Cicerchi (Removal)

Grievance No.: 34-22 (95-07-19) -0114-01-14

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: June 27, 1997

Appearances

For the Employer

Roger Coe	Labor Relations Officer
John McNally	OCB
Gina Kuhlman	Observer
Brian Walton	OCB
Georgia Brokaw	OCB
Edward Lentz	Supervisor, Law Section
Lori A. Augusta	Industrial Commission, District Hearing Officer
Michael Travit	Director of Labor Relations
Gary C. Johnson	Advocate

For the Union

Kent B. Cicerchi	Grievant
Leroy Bell	Stewart
Patty Gralm	OCSEA
Sally Walters	Staff Attorney II

Steve Lieber	Staff Representative
Rachel Upchurch	Witness
Anne Light Hoke	Advocate

Issues

Is the disputed matter not arbitratable as a consequence of a procedural defect?

Did the Employer remove the Grievant for just cause? If not, what shall the remedy be?

Stipulated Facts

1. Kent Cicerchi was employed by B.W.C. as an Attorney II from 09/09/92 to 07/14/95.

2. Kent Cicerchi was removed from employment by a letter dated 07/11/95.

3. Ed Lentz became Kent's New Supervisor on or about 03/27/95 and was still a probationary employee at the time of the dismissal of the Grievant.

4. Ed Lentz received discipline in the form of a 10-day suspension for giving the tape to Channel 5.

Introduction

This is a proceeding under Article 25, entitled Grievance Procedure, Section 25.03 - Arbitration Procedures, Section 25.04 - Arbitration/Mediation Panels of the Agreement between The State of Ohio, Bureau of Worker's Compensation, hereinafter referred to as the "Employer," and Ohio Civil Service Employees Association, AFSCME, Local 11, hereinafter referred to as the "Union," for the period March 1, 1994-February 28, 1997. The arbitration hearing was held on October 22, 1996 and March 20, 1997 in

the Laushe State Office Building in Cleveland, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

Pertinent Contract Provisions

Article 24 - Discipline

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from a separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

24.02- Progressive Discipline

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

Disciplinary action shall include:

A. One of more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
D. one or more days(s) suspension(s);
E. termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

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(Joint Exhibit 1, Pgs. 68-69)

Article 25 - Grievance Procedure

Section 25.01 - Process

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When different work locations are involved, transmittal of grievance appeals and responses shall be by U.S. mail. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

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(Joint Exhibit 1, Pg. 74)

Section 25.02 - Grievance Steps

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Suspension, Discharge and Other Advance-Step Grievances.

Certain issues which by their nature cannot be settled at a preliminary step of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may by mutual agreement be filed at the appropriate advance step where the action giving rise to the grievance was initiated. A grievance involving a suspension or a discharge shall be initiated at Step Three of the grievance procedure within fourteen (14) days of notification of such action.

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Step 3 - Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step 2 response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise. By mutual agreement of the parties, agencies may schedule Step 3 meetings on a monthly basis, by geographic areas, so that all grievances that have been newly filed, that have been advanced to Step 3 or that have been continued since the previous month, can be heard on a regular basis.

At the Step 3 meeting the grievance may be settled or withdrawn, or a response shall be prepared and issued by the Agency Head or designee, within thirty-five (35) days of the meeting. The response will include a description of the events giving rise to the grievance, the rationale upon which the decision is rendered. The Agency may grant, modify or deny the remedy requested by the Union. Any grievances resolved at Step 3 or at earlier steps shall not be precedent setting at other institutions or agencies unless otherwise agreed to in the settlement. The response shall be forwarded to the grievant and a copy will be provided to the

Union representative who was at the meeting or one who is designated by the Local Chapter. Additionally, a copy of the answer will be forwarded to the union's Central office. This response shall be accompanied by a legible copy of the grievance form.

Step 4 - Mediation/Office of Collective Bargaining

If the grievance is not resolved at Step 3, or if the Agency is untimely with its response to the grievance at Step 3, absent any mutually agreed to time extension, the Union may appeal the grievance to mediation by filing a written appeal and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within fifteen (15) days of the receipt of the answer at Step 3 or the due date of the answer if no answer was given, whichever is earlier. OCB shall have sole management authority to grant, modify or deny the grievance.

Upon receipt of a grievance, as a result of a failure to meet time limits by the agency, OCB shall schedule a meeting with the Staff representative and a Chapter representative within thirty (30) days of receipt of the grievance appeal in an attempt to resolve the grievance unless the parties mutually agree otherwise. Within thirty-five (35) days of the OCB meeting, OCB shall provide a written response which may grant, modify or deny the remedy being sought by the Union. The response will include the rationale upon which the decision is rendered and will be forwarded to the grievant, the Union's Step 3 representative(s) who attend the meeting and the OCSEA Central Office.

Either the Office of Collective Bargaining or the Union may advance a grievance directly from Step 3 to Step 5 if that party believes that mediation would not be useful in resolving the dispute.

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Step 5 - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of the Office of Collective Bargaining with sixty (60) days of the mediation meeting unless either party notifies the other that such grievance can no be effectively mediated.

25.03 - Arbitration Procedures

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

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

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(Joint Exhibit, Pg. 70-80)

25.05 - Time Limits

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step. Such extension(s) shall be in writing.

In the absence of such extensions at any step where a grievance response of the Employer has not been received by the grievant and the Union representative within the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure.

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(Joint Exhibit, Pg. 82)

Case History

Kenneth B. Cicerchi, the Grievant, has been employed by the Bureau for approximately four (4) years. He held the position of Staff Attorney II at the time of the disputed incidents. In this capacity, the Grievant provided: legal advice to CEO/Administrator regarding administrative hearings at all levels of the Industrial Commission; attended administrative hearings at all levels and filed appeals when necessary; researched and drafted opinions on various legal matters; and acted as liaison between the Employer and the Attorney General's Office. The Grievant's office consists of two (2) Staff Attorney II, a Supervisor and a Clerk/Secretary. The matters in dispute involve related categories of alleged misconduct, even though not all of the incidents took place on the same date.

Edward Lentz, the Grievant's immediate Supervisor and Supervisor of the Law Section, provided some background to a portion of the events leading to the Grievant's removal. Everyone concerned acknowledged that a series of controversies caused a great deal of disarray in the Cleveland, Ohio office. Lentz was told about these difficulties during his interview for the position. Some of these difficulties, more specifically dealt with his predecessor's relationship with the Grievant and Sally Walters, the Grievant's counterpart Staff Attorney II. Some of the other problems dealt with is his predecessor's conduct while in office; which eventually resulted in her departure. In addition, Lentz was told that other Supervisors had a great deal of difficulty initiating any efficiencies because of the Grievant's and Walter's general attitude. They would perceive these attempts to initiate change as retaliations because they were "Whistle Blowers".

On or about March 27, 1995, Lentz became the newly appointed Supervisor in the Cleveland office. He testified that regardless of the orientations provided by others prior to his arrival, he decided to give everyone the benefit of the doubt and attempted to initiate a collegial atmosphere.

Approximately a few weeks after his arrival, Lentz experienced a number of problems with the Grievant. The Grievant appeared to resent Lentz's authority by belittling his position. He also got in a confrontation with Lentz over a bathroom key he had attached to a spatula. Lentz thought the arrangement was unprofessional and tried to initiate an alternative approach.

Lentz attempted to determine the state of the office by checking the status of files on the computer system. To his surprise, many of the files were protected and not accessible. Other files were not protected but contained, in his view, inappropriate material. Some files contained copyrighted legal annotations which were work related. Other files contained personal material. Of specific import were two items he found while reviewing the files. The Grievant and Walters had written a planned parenthood support letter on law section stationary. Also, another file contained a secretly recorded transcript of a conversation which was faxed to the Plain Dealer, a local newspaper.

Based on his review of the unprotected files, he desperately wanted to determine what information was contained in the protected files. He called his supervisors in Columbus, Ohio for guidance. They told him they recognized the import of his concerns, but they were concerned about a potential confrontation. Lentz's predecessor was under investigation for several alleged improprieties while in office,

and the Grievant and Walters were potentially the primary witnesses to be used by the Prosecutor.

Lentz contacted the Prosecutor for guidance. He also downloaded the unprotected files and sent them to Columbus for review. On March 19, 1995, upon returning from a seminar, Lentz observed that all the unprotected files were downloaded and deleted from the computer system. Lentz testified that almost simultaneously his subordinates' behavior seemed to change in a positive direction.

Lentz also testified he perceived some phone-related problems which he attributed to the Grievant. During this time frame, he would engage in a phone conversation, hang-up the phone, and shortly thereafter, would receive a hang-up call. On other occasions, individuals he had talked to would receive hang-ups after he had spoken to them. Probably the most disturbing telephone incident dealt with a phone message Lentz received from a friend in the Prosecutor's office. His friend called him and left a message. The next day, Lentz's friend was confronted by a co-worker who stated he was contacted by either Walters or the Grievant. They asked why a member of the Prosecutor's Office was calling Lentz in his office. The Grievant followed this inquiry by going to the office of Lentz's friend and accused him of interfering with an on-going investigation. Once he departed, Lentz's friend called and advised that based on his exchange with the Grievant, he was obviously looking at his messages.

On or about May 10, 1995, Lentz perceived that his office was being regularly searched. He had lost his personal planner even though he searched everywhere with an unsuccessful outcome.

Shortly after the personal planner incident, he was contacted by a Channel 5 reporter who asked whether an investigation concerning the activities of the Grievant and Walters had been initiated. Lentz refused to confirm or deny any investigation. He did, however, ask the reporter whether he had available any video equipment he could place in his office because he held certain suspicions regarding security problems. Neither individual discussed what would become of the video if, in fact, the surveillance venture engendered positive results.

On or about May 17, 1995, Lentz picked-up the video camera at Channel 5. Since he felt he was dealing with a local security issue, Lentz informed Richard Crawford, Cleveland Service Office Manager. Crawford purportedly indicated he had no problem with Lentz's surveillance venture.

Lentz did, in fact, install the surveillance camera right after work on or about May 17, 1995. He returned at approximately 6:30 P.M. and reviewed the video tape (Employer Exhibit 9). Lentz observed the Grievant improperly searching his desk and trash basket. He also observed the Grievant accessing his phone with a napkin or tissue used to pick-up the receiver.

A prior incident involving Lori Barrett, an Industrial Commission Cleveland District Hearing Officer, took place on or about May 4, 1995. Barrett testified that the Grievant came into her hearing room as she was paging or conducting a hearing. The Grievant began to desperately shuffle files in an attempt to locate a particular file. Barrett then asked him if he was going to attend the hearing and he responded in the negative. As a consequence, she asked the Grievant to leave the hearing room since he was disrupting the hearing.

After the conclusion of the hearing, the Grievant returned and attempted to retrieve the missing file. Barrett observed that the Grievant was upset so she purportedly attempted to diffuse the situation. She noted he was treated no differently than any other person who shuffled through files and disrupted her hearing. The Grievant responded that he was just trying to find his file. He also mentioned that the hearing room is to be cleared between hearings and that there was "ex parte" communications going on between Barrett and an advocate.

Barrett attempted to clarify the matter, but a confrontation eventually surfaced in George Oryshkewych's office. He is the Hearing Administrator. At the time of their arrival at Oryshkewych's office, Lentz was meeting with Oryshkewych. He separated the protaganists and heard both versions of the events. The Grievant admitted making the accusation of "ex parte" communication. He based his observation on the basis that two parties were speaking to each other in a hearing room without a hearing in progress. Barrett was professionally offended by this statement. Lentz recommended that disciplinary action should be initiated.

An investigatory interview took place on May 31, 1995. A fact-finding ensued where the Grievant was asked questions regarding the previously described incidents. The Grievant acknowledged the accuracy of his memo (Employer Exhibit 7) depicting the incident with Barrett on May 4, 1995. When asked about allegations dealing with improper entry into his Supervisor's office as captured on video tape, the Grievant pleaded the 5th Amendment, and stated he was refusing to answer any questions relating to any alleged taping unless he had his attorney present. Lentz, then, informed the Grievant that the query from his Supervisor to answer the question, and failure to

do so, would be viewed as insubordinate conduct. The Grievant purportedly acknowledged his understanding of this statement or directive, again he refused to respond.

This exchange completed the investigatory interview portion of the meeting. Michael Travis, Director of Legal Operations presented the Grievant and his Union Representative a copy of an administrative leave letter (Joint Exhibit 2) which contained the following relevant particulars:

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> Pending the outcome of an internal investigation, you are placed on administrative leave with pay effective Tuesday, May 30, 1995. You are to remain off Ohio Bureau of Workers' Compensation property unless otherwise instructed.
>
> You are hereby instructed to advise your immediate Supervisor, Ed Lentz, as to your whereabouts at all times during normal working hours. Failure to do so will result in disciplinary charges for insubordination.

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(Joint Exhibit 2)

Another investigatory interview was scheduled for June 15, 1995. Travis contacted the Grievant via telephone at approximately 9:45 A.M. The Grievant was informed that an investigatory interview would be conducted later that day at the Rockside Road Office of The Bureau of Workers' Compensation. The purpose of the interview was related to allegations dealing with the Grievant's improper entry into his immediate supervisor's office after hours. Travis, moreover, advised the Grievant that he would be calling back later that morning with the specific time and location of the

investigatory interview. Travis concluded the call by reading the Grievant a Garrity Warning insulating his statements from any subsequent criminal proceeding; but not against any subsequent disciplinary action. The Grievant acknowledged he would be awaiting his call for specific instructions.

At approximately 11:55 A.M., Travis contacted the Grievant via telephone. He informed him that the investigatory interview would be conducted via telephone at 2:00 P.M. The Grievant was to report to the office of Louise Buchanan at the Rockside Road service office. The Grievant, moreover, was advised that he was allowed to have a Union Representative present.

At approximately 2:00 P.M., Travis contacted Buchanan. She informed him that Leroy Bell, a Union Representative, was present but that the Grievant was not in attendance. Travis was then advised by Bell that he had conferred with the Grievant who was sending a fax containing his position on the matter. Bell noted that he believed the Grievant would not be attending the investigatory interview.

The fax finally arrived. It contained a number of justifications in support of the Grievant's non-compliance. It also confirmed that the Grievant would not be attending the investigatory interview.

Travis advised Bell that there was no need to continue the investigatory interview. The Grievant had voluntarily elected not to appear despite the direct order from a Supervisor.

A pre-disciplinary hearing was held on June 23, 1995. The Hearing Officer concluded enough evidence existed to go forward on all three charges.

On July 11, 1995, the Employer issued a removal letter. It included the following relevant particulars:

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(Joint Exhibit 17)

> This letter is to inform you that you are hereby removed from employment as an Attorney 2 in the Cleveland Lausche Office of the Ohio Bureau of Workers' Compensation, effective close of business July 14, 1995.
>
> After reviewing the recommendation of the meeting officer, it has been determined that just cause exists for this action. The charges you have been found in violation of are under BWC Progressive Disciplinary Guidelines, "Insubordination (a) Willful disobedience/failure to carry out a direct order, Failure of Good Behavior (a) Discourteous treatment of fellow employees, management, or the public and Violation of the Ohio Revised Code or the BWC Administrative Rules (b) Violation of O.R.C. Section 124.34."
>
> Specifically, on June 15, 1995, you refused to answer questions asked of you by management personnel. Further, on May 4, 1995, you made defamatory remarks to an Industrial Commission Hearing Officer which constituted discourteous treatment and on or about May 24, 1995, you entered the office of your supervisor, Ed Lentz, and improperly searched his desk and trash basket.

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(Joint Exhibit 17)

A grievance was filed on July 17, 1995, contesting the Employer's administrative action (Joint Exhibit 8). The Union requested reinstatement to full employment as an Attorney 2.

On Friday, August 11, 1995, a meeting was held to hear the Level III grievance submitted by the Grievant and Union. It should be noted the time frames for the Level

III meeting and response were mutually extended by the parties. The Hearing Officer concluded that the Employer had not violated the Agreement (Joint Exhibit 9).

Leroy Bell, the Chief Steward and President of the Local, testified he properly mailed a Step 4 appeal to the necessary principles on October 16, 1995. (Union Exhibit 2). He hand delivered one appeal packet to Steve Lieber, the Staff Representative, and sent two others via mail to the Office of Collective Bargaining and the Union's Central Office in Columbus, Ohio. These packets were purportedly mailed, after hours, at the Beachwood, Ohio Post Office.

Patty Graham, the Arbitration Classification Coordinator for the Union, testified the Appeal and Preparation Sheet regarding this matter was received by the Union on October 19, 1995. Within two (2) weeks, she contacted Amy Beach, her counterpart at the Office of Collective Bargaining, with proposed mediation dates for the disputed grievance. Beach responded by noting the Office of Collective Bargaining had never received a Step 4 appeal.

This circumstance caused a controversy between the parties. The Office of Collective Bargaining was hesitant to schedule a mediation date because it might acknowledge a grievance it did not have in it's system; a circumstance which might constructively waive any future arbitrability claim. This impasse was eventually overcome when the Union waived mediation for the disputed matter on August 12, 1996.

The Employer raised a procedural defect claim dealing with timeliness of the Step 4 appeal. This Arbitrator will deal with the threshold arbitrability claim. Only thereafter will the merits be considered if the grievance is deemed arbitrable.

THE ARBITRABILITY ISSUE

The Employer's Position

The Employer opined that the Union failed to comply with the Grievance Procedure time-limits in processing the disputed grievance. As such, the clear language contained in the Agreement (Joint Exhibit 1) renders the grievance null and void. Since the Union failed to appeal the grievance within the designated time limits specified in Step 4 of the Grievance Procedure, Section 25.05, requires that the grievance shall be treated as a withdrawn grievance.

Clearly, the record suggests the notion that the Step 4 filing was defective because OCB never received a written appeal and a legible copy of the grievance form within fifteen (15) days of the receipt of the answer at Step 3. Obviously, OCB never scheduled the mediation date within thirty (30) days, and never issued a written response within thirty-five (35) days since a formal appeal was never received.

The Employer did eventually receive a written appeal nearly ten (10) months following the Step 3 response. This appeal, however, is also procedurally defective based on the sixty (60) day provision contained in Step 5 of the Grievance Procedure. It also violates the language agreed to by parties regarding advanced step filing from Step 3 to Step 5 "if that party believes that mediation would not be useful in resolving the dispute".

In addition to these contract construction arguments, the Employer asserted that the Union failed to provide any tangible evidence that it filed a timely appeal. The Union's primary witness, Leroy Bell, testified he placed the proper appeal prep sheet in

the mail. And yet, none of the relevant parties acknowledged they received the original appeal preparatory sheet. The Union, moreover, failed to submit a certified mail receipt. Also, the fact that the appeal was neither received by the Office of Collective Bargaining, nor returned to the Union demonstrates the appeal was never mailed. Graham acknowledged that the destination and return address specified on the pre-printed envelopes are clearly legible.

Brian Walton, former Scheduler at the Office of Collective Bargaining, reviewed the process utilized for handling appeals. He maintained that once the entry clerk receives documents from the mail clerk, she creates an electronic file and a hard copy file. Once a file is created, it is never deleted from the computer file. Walton strongly asserted that it is not probable that mail would be lost once it is received by the Office of Collective Bargaining.

The Union's Position

The Union opined that the appeal was properly forwarded to the Office of Collective Bargaining in accordance with time frames mutually agreed to by the parties. As such, in the Union's opinion, the matter is arbitratable because the Employer failed to prove that the grievance was nor processed in a timely fashion. The Union emphasized that the burden placed on the Employer as the moving party was highly critical since it represents a forfeiture of a substantive right.

In the Union's opinion, evidence and testimony presented at the hearing clearly evidenced compliance with Section 25.02, Step 4 requirements. The Step 3 answer was issued on October 10, 1995. Leroy Bell testified that he received the answer on or about October 12, 1995. He, moreover, maintained that he mailed the appeal and

preparation sheet and the proper grievance form to the Office of Collective Bargaining and the Union's Arbitration Department on October 16, 1995. These documents were mailed by regular U.S. mail in accordance with Section 25.01 (D). Nothing in the Agreement (Joint Exhibit 1) suggests that the Union's appeal to Step 4 needs to be sent by registered or certified mail.

By negotiating the language contained in Section 25.01 (D), the Employer, by inference, has acknowledged the attendant possibility that documents might be lost or misplaced either by the post office or the Employer's clerical staff. The "mail box" rule is also applicable to the present dispute. Once the Employer agrees that the "mail" is the means of communicating notice, the communication is complete when the document is deposited in the mail.

The grievance appeal form was timely submitted to Step 4. The deadline for appealing the grievance was October 27, 1995. Graham testified the Arbitration Department received an envelope, sent by Bell, which was postmarked October 17, 1995. By receiving the envelope well within the fifteen (15) day window with the proper appeal documents contained therein, the Union was able to substantiate proper and timely submission. This conclusion is especially true since the Union never received the Office of Collective Bargaining's envelope. The envelope was obviously lost in the mail or by the Office of Collective Bargainings' clerical staff. Walton confirmed this proposition when he testified that a document of this sort could be misplaced by the clerical staff, and has been misplaced in the past.

If a timeliness flaw does in fact exist, the Employer is partially at fault which should render the grievance arbitrable. Uncontested testimony indicates Graham

contacted Beach on or before October 27, 1995; a date which provided the grievance with standing. Graham was eventually contacted by Beach in mid-November of 1995, when she advised her that the appeal was not in the system. It appeared never to have been received. If the Union had been advised of this problem at the time of the initial contact, the Union could have faxed its' own copy to the Office of Collective Bargaining.

Other arguments were raised dealing with contract provisions which contain no deadline requirements. Section 25.02, Step 4 contains no deadline by which a grievance can be moved from Step 3 to Step 5. Historically, when a timeliness problem has arisen, the parties have either resolved the matter before mediation or through the mediation process. Here, no plan could be developed because the normal problem solving process was not engaged. The grievance merely resided in purgatory for an excessive period of time.

In a like fashion, Section 25.02, Step 5 does not contain a deadline for waiving mediation and moving directly to the arbitration step. As such, the Union's formal waiver of this right on August 12, 1996 (Joint Exhibit 14) was not untimely and provided the Employer with proper and sufficient notice.

Section 25.02, Step 5, moreover, provides that either party should waive mediation if it believes that the grievance cannot be effectively mediated. The circumstances here were muddied causing inordinate delay outside the Union's control. The Union wished to mediate the dispute, while the Employer refused to mediate, but would not waive medication. The Union felt it was the Employer's responsibility to waive mediation, if it did not want to mediate. A violation of Section 25.02, Step 5 is clearly evidenced by the Employer's noncompliance regarding waiver of mediation.

The record clearly discloses reasonable doubt as to the arbitrability of this grievance. The arbitral axiom of an abhorrence of a forfeiture clearly applies in this instance.

THE ARBITRTOR'S OPINION AND AWARD REGARDING THE ARBITRABILITY ISSUE

From the evidence and testimony introduced at the hearing, and an impartial and complete review of the record including pertinent contract language, it is my opinion that the disputed matter is arbitrable and ripe for adjudication. Time lines contained in pertinent contract provisions were not violated causing the proper appeal of this cause of action to Step 4 of the grievance procedure. A mediation hearing date should have been mutually agreed to but for a potential clerical error or mailing mistake. Otherwise, the parties, individually or jointly, could have bypassed mediation by advancing the grievance to Step 5 - Arbitration.

This Arbitrator is intimately aware of the prohibitions contained in Section 25.03 dealing with the scope of an arbitrator's authority. The circumstances surrounding this arbitrability matter, however, clearly support the conclusion that a timely Step 4 appeal did in fact take place. Bell's credible testimony and other circumstances support this finding.

Bell testified he mailed the Office of Collective Bargaining an appeal and preparation sheet and a grievance form at the same time he mailed identical documents to OCSEA's arbitration department. Bell clearly testified to the location of

the mailing, and the reasons for mailing these documents from the Beachwood Post Office after hours. The envelope (Union Exhibit 2) received by OCSEA supports Bell's description because it was stamped with a 441 cancellation. A designation which the post office admits evidences after hour processing at the general mail facility (Union Exhibit 1).

Graham testified and reviewed documents submitted to OCSEA which affirmed Bell's allegations. The arbitration department received an envelope with the postmarked date of October 17, 1995; which was received at OCSEA's central office on October 19, 1995 (Union Exhibit 2). Enclosed in this envelope was the grievance in dispute and an Appeal and Preparation Sheet (Employer Exhibit 2) which was date stamped October 19, 1995.

Based on this review, it appears that the appeal was sent to the Office of Collective Bargaining. It was, however, misplaced through no fault of the Union. As such, the grievance's standing cannot be jeopardized as a consequence of these unique circumstances. Any subsequent deadline error was caused by these triggering events, and thus, does not serve as a proper bar to a hearing on the merits.

Nothing in the record supports the Union's contention that the Employer waived the procedural contract complaint. If this was the Employer's mission, then none of the testimony and evidence would have been entered into the record. The Employer felt it had a strong case on the merits not withstanding the timeliness decision.

THE ARBITRABILITY AWARD

The grievance is arbitrable. The defects raised by the Employer are not supported by the record. The matter is ripe for review on the merits.

THE MERITS OF THE CASE

The Employer's Position

The Employer opines it had just cause to terminate the Grievant. In the Employer's opinion, it has proven each instance of misconduct, and has proven that the removal is commensurate with the proven offenses.

The Employer asserted that the Union did not dispute that the Grievant searched Lentz's office without authorization. This conduct constituted a "failure of good behavior" in violation of the Employer's Guidelines and "malfeasance in office" in violation of O.R.C. Section 124.34.

The actions engaged by the Grievant are not supported by his own underlying explanation. He advised that his entry and search were a consequence of some conspiracy to sabotage the Grievant's standing. The Union failed to provide any probative evidence to support the sabotage hypothesis. The hearing notices (Union Exhibit 14) retrieved from the supervisor's trash bin do not support this conclusion. These notices were moot since they predated the Grievant's wrongful and unauthorized entrance into the office.

Lentz's video-taping did not constitute an improper means of obtaining evidence. The video-taping was limited to the office area, as such, the Grievant should not have

held any privacy expectations. Lentz was never disciplined for violating guidelines dealing with the installation or use of a video-camera. Rather, he was disciplined for providing the media with access to a non-public forum.

The Grievant, moreover, engaged in serious and discourteous mistreatment of a hearing office in violation of the Employer's Guidelines and O.R.C. Section 124.34. This conduct was extremely serious since his accusation threatened the reputation of a hearing officer and another attorney. Not only was their reputation threatened but his actions jeopardized their licenses to practice law.

The Grievant admitted he did not make this accusation in jest. Rather, he based the allegation on a conversation which "sounded recreational" and inappropriate since it took place between hearings.

Accusations of this sort cannot be equated to harassing language between shop floor employees. As a professional, he was fully aware that these accusations potentially threatened the careers of two attorneys. The removal was, therefore, warranted since the Grievant in his capacity as a public servant, and an attorney, should be held to a higher standard of conduct.

The Grievant was also charged with willful disobedience and failure to carry out direct orders during the investigation of the disputed matter. The Grievant failed to comply with direct orders of his supervisors on two occasions. He failed to appear at the Independence/Rockside Road Service Office when specifically instructed to do so by Travis. The Grievant, moreover, willfully refused to answer any questions about his improper entry into his supervisor's office.

The Union's Position

In the Union's opinion, the Employer did not have just cause to remove the Grievant. Each of the charges was challenged and several mitigating factors were offered to rebut the removal decision.

Various arguments were raised justifying the Grievant's entrance into his supervisor's office. The Union's primary defense is based on an entrapment theory. Here, Lentz carefully devised a plan and extended invitations for the express purpose of capturing the Grievant in the commission of a wrongful act. Lentz's actions as the entrapper also supports this theory since he was disciplined for what he had done.

The Grievant explained his action's which clearly supported the entrapment theory. He admitted going into the office but was never told he was not allowed in the office. In fact, the supervisor never prohibited entrance into his office even after the supervisor held certain suspicions regarding unlawful entry.

When in the office, the Grievant's actions appear reasonable. He used Lentz's phone to forward his calls to the answering machine. Lentz left the Grievant's disciplinary file on his desk and left a book open dealing with disciplinary matters. Any reasonable person would have reviewed these items if they were left in open view. The Grievant provided a reasonable justification for searching the trash bin. He was looking for administrative hearing notices because Employer representatives had failed to respond to his complaints. By engaging in this activity, the Grievant was merely attempting to gather evidence that he was not neglecting his duty.

The Union argued that another criminal theory serves as a positive defense. The Grievant was not guilty as charged and "consented to the taking" by urging the

Grievant to commit the "crime". Put another way, Lentz, by his design, consented to the Grievant's actions.

A disparate treatment claim was also raised by the Union. Both the Union and Walters were in Lentz's office and looked at the discipline file. And yet, these similarly situated employees were treated differently. Walters was never forced to attend an investigatory interview, nor was she disciplined for her actions.

The Grievant admitted accusing Barrett of engaging in an ex-parte discussion with a civilian attorney. This charge, however, was defective since the Employer never told the Grievant that accusing a hearing officer of ex parte discussions was inappropriate even if the accusation was accurate. A defect of this sort is especially troublesome when the Employer has permitted the Grievant to behave in this manner. He had complained about ex-parte discussions by hearing officers in prior attorney reports (Union Exhibit 5).

The accusation in question was not defamatory. The Grievant never published his comment to a third person since no one besides the Grievant and the hearing officer was in the room. The statement, therefore, could not be defamatory.

Barrett overreacted to the Grievant's utterance. This response was a function of the friendship she had with the Grievant's prior supervisor. She admitted to this relationship which tainted her professional relationship with the Grievant. Once again the Union raised the claim of disparate treatment. Barrett also complained about Walter's conduct, but she was not disciplined.

The Grievant was not insubordinate when he refused to come onto the Employer's property to take part in an investigatory interview. His decision was viewed

as proper since it was based on circumstances which serve as an exception to an insubordination claim.

The Grievant reasonably believed that he would be arrested for trespassing if he come onto the Employer's property Being arrested places one in a dangerous and unsafe situation. These expectations were not unusual since the administrative leave notice (Joint Exhibit 2) advised the Grievant to remain off the Employer's property unless instructed otherwise.

Arrest for trespassing seemed highly probably since Travis never rescinded his initial instruction to the site manager. This instruction was contained in a letter (Employer Exhibit 15) to Annarino indicating the Grievant was "forbidden from appearing on BWC property without prior authority".

Garrity warnings normally take place when the employee and the employer/interviewer are together in the same room where the employee is being questioned. The interviewing process was not structured this way when Travis proposed the Grievant's attendance at the investigatory interview. The Garrity warning was provided over the telephone. The Grievant's failure to comply should not be viewed as insubordinate conduct since his Garrity right was not properly guaranteed.

An issue of first impression was offered to rebut the Employer's Garrity arguments. There appears to be a potential conflict between the Ohio Public Records Law O.R.C. 149.43 and Garrity. The conflict exists over the release of documents. As such, Employer's can only give employees limited guarantees that self-incriminatory statements in notes or statements will not be released pursuant to the public records law.

Procedural fairness required a more just investigatory process. The Employer did not provide the Grievant with a copy of the videotape after he asked for one. A telephone investigatory interview is inherently unfair because of potential misunderstanding and eavesdropping.

The Union argued that the Employer violated Section 24.04 by not providing the Grievant with proper notice. The Employer attempted at the arbitration hearing to articulate two acts of insubordination. This additional act was not articulated prior to the arbitration hearing leading to a procedural due process violation.

The removal order specifies a violation of O.R.C. 124.34. This statutory provision is irrelevant since the parties are bound by the just cause provision contained in Section 24.02

Several mitigation arguments were proposed in an attempt to have the imposed penalty modified. First, the charges specified in support of the removal were not "malum in se" offenses. As such, the Employer should have considered progressive discipline as specified in Section 24.02. Second, the investigation was incomplete because Walters was only questioned about a limited portion of the inquiry. Also, the temporary secretary was never questioned. Her observations could have clarified some ambiguities on the record. Because of these deficiencies, the Employer relied to its detriment on Lentz's observations. Third, as an Attorney 2, the Grievant received job evaluations. He was rated as meets or exceeds expectations, while he was rated as exceeding expectations as a team player. Fourth, the Union asserted that the Grievant was removed as an over-reaction to his involvement with his predecessor

supervisor's removal from office. His whistle blowing, rather than his actions, was the underlying reason causing his removal.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record including pertinent contract provisions, it is this Arbitrators' opinion that the Grievant was, indeed, removed for just cause. The Union's attempt to rebut the Employer's arguments by proposing a series of procedural and criminal-related defects, and various retaliation and animus hypotheses, do not overcome the Grievant's own admissions and actions which undeniably support the propriety of the removal.

The Employer properly removed the Grievant for entering his supervisor's office without authorization and searching the office. This conduct clearly constitutes a violation of the Guidleines (Union Exhibit 15) dealing with failure of good behavior. It also violates the reference in the Guidleines (Union Exhibit 15) to O.R.C. Section 124.34 because of malfeasance in office.

This Arbitrator is well-aware that arbitrators have ruled against several state agencies which have attempted to substitute the disciplinary standard contained in O.R.C. Section 124.34 for the just cause standard contained in Section 24.01. This Arbitrator was one of the first panel members to raise such a distinction. The procedural matter raised by Union, however, does not deal with this type of dispute. The Employer in its' Guidelines references the Code section as a supplement to its' Guidelines (Union Exhibit 15) when a charge in this document does not contain

sufficient specificity. Malfeasance in office relates to the charge of failure of good behavior but is more specific. Thus it constitutes a more specific articulation of a charge. It also encompasses a series of potential unwrongful acts which not only include improperly searching a desk and trash basket, but unlawful entry and engaging in some activity with his supervisor's phone. As such, the removal order (Joint Exhibit 17) was not misspecified and properly placed the Grievant on notice in accordance with Section 24.04.

The Grievant admitted to various acts justifying removal; acts, clearly supported by the videotape (Employer Exhibit 9) submitted at the hearing. He did enter his supervisor's office without authorization, rummaged through items in the supervisor's desk and trash bin; and listened to messages on the supervisor's phone while holding the receiver wrapped in tissue paper or some other similar material.

Justifications provided for these activities are viewed as unpersuasive. Granted, the record does not disclose a prior general prohibition against the Grievant entering his supervisor's office for authorized business necessity reasons. Lentz commonly left his office door open and did not appear to normally lock his desk and files. Here, the entire episode is deemed unauthorized since the Grievant never entered the office space for justifiable professional reasons. Rather, he entered the office for self-serving unjustified reasons based on an unfounded paranoia and delusions dealing with unwarranted feelings of reprisals. His intentions were clear and unmitigated.

Two specific acts adequately document the Grievant's true intent. The record failed to properly disclose the practice of having subordinates forward supervisor's telephone calls to an answering machine. If, in fact, this was the practice in the office,

the Grievant had no reason to cover the receiver with some veiling material. This was not the sole argument provided by the Grievant concerning the activity. He stated he reviewed the telephone messages to determine whether the Employer and its agent, Lentz, were obstructing the criminal case of the predecessor supervisor, or initiating a criminal cause of action against the Grievant.

These justifications appear conflicting and contrived. Even if the Grievant felt that these activities were taking place, he should have initiated alternative legal or contractural means to protect his individual interests.

This Arbitrator holds similar views regarding the trash bin activities. Nothing in the record indicates that the Grievant and his co-worker were ever formally disciplined for their failure to attend hearings that were scheduled but they failed to attend. Rummaging through a supervisor's waste bin, within these circumstances, flies in the face of any reasonable justification. This is especially true considering the retrieved appeal notices dealt with historical hearing dates that the Grievant was not assigned to; and where no discipline resulted as a consequence.

Based on the above, neither the Union's affirmative defense of entrapment nor the defense of "consent to the taking" are properly supported by the record. Lentz did not implant his design on the mind of an innocent person, the disposition to commit the alleged offense and induce its' commission. Here, we are not dealing with an innocent person who entered his supervisor's office with specific intent to conduct work during the normal course of business. The actions he engaged in were self-imposed and do not reflect an innocent demeanor. The potential inducement of his disciplinary file and

the open text do not overcome the analysis of his other acts; and do not serve as a sufficient basis to rule in favor of the affirmative defense.

Nothing in the record provides justification for the Grievant's perception that he was being set-up because of his "whistle blower" status. This Arbitrator was never able to establish the link proposed by the Union; whether it dealt with the office scenario or the allegation raised by the hearing officer. The link seems unreasonable because surfacing office-related misconduct would appear to raise someones status within any work environment; but especially when the impropriety deals with in-office misconduct.

This Arbitrator strongly opposes, in no uncertain terms, the Union's attempt to discredit his refusal to issue certain subpoenas for several witnesses and documents prior to the hearing. I engaged in an extensive tele-conference with both parties where I gave the Union an opportunity to provide justification for each request. The Employer's advocate was also given an opportunity to rebut these requests. My rulings were based on the tentative issues raised by the parties and their potential nexus to the matters in dispute. It should be noted that some of the Union's requests were approved over the Employer's objections. Other requests were denied because an apparent nexus did not readily exist. Also, I did not wish to try the predecessor supervisor's case in absentia. Interestingly, the Union never wished to have a subpoena issued for her attendance. It failed to prevail not withstanding the rulings issued by the Arbitrator prior to the hearing.

An attempt to equate Walters' actions with those of the Grievant proved uneventful. The videotape indicates their actions were not similar because Walters

was called into the office by the Grievant. Also, once in the office, her actions do not evidence a similar intent, nor were her activities as invasive.

The Grievant's actions are in no way mitigated by Lentz's wrong doing and related suspension. Lentz was charged with "inappropriate sharing of information entrusted to a supervisor (Union Exhibit 7)." He was never found to have violated any guidelines pertaining to the installation or use of a video-camera. The taping, moreover, took place in Lentz's office. The Grievant should not have held any privacy expectations especially considering the wrongful acts engaged in.

The Grievant was properly charged with discourteous treatment of fellow employees, management or the public. Here, his ex parte comment amounted to discourteous treatment of a hearing officer and an independent attorney. This type of charge, if proven, is so severe that notice need not be given prior to a charge and subsequent penalty determination. As a member of the bar, and based on his Attorney II status, he should have known the devastating impact such a charge would have on the legal careers of those involved.

The Grievant admitted making the comment, and the record does not disclose that the statement was warranted. A statement (Employer Exhibit 6) submitted by the attorney and a sworn affidavit submitted by Barrett corroborate the version of the events reviewed by Barrett at the hearing. The Grievant's assessment of the situation represents an unjustified quantum leap based on the limited information he had available. The Grievant construed a "recreational" conversation as evidence that a hearing was on-going or underway. His perception was altered once he realized Barrett called the next hearing. He then assumed an ex parte discussion had

problems the Grievant and his co-worker had with specific hearing officers justify the Grievant's statement. These relationship problems in no way induced the comment.

Whether the Grievant's statement rises to the level of a tort action based on defamation is not the primary focus of this charge. His discourteous and inaccurate comments potentially jeopardized the careers of two attorneys which constitutes malfeasance and failure of good behavior.

A prior reference to an ex parte conversation in an attorney report (Union Exhibit 5) does not establish that the Employer condoned such conduct. Nothing was provided in the record to lend credence to the validity of this assertion. My reading of this document fails to identify whether anyone, including the Grievant, was explicitly barred from the meeting. Compliance, moreover, is hard to establish based on one documented incident.

The disparate treatment claim is totally unsupported by the record. The Union maintained Walters was treated differently because hearing officers had complained about both of them. The charge in question, however, does not deal with general complaints, but rather a specific charge dealing with an ex parte accusation. Walters was never charged nor disciplined for engaging in this type of misconduct.

In my opinion, the Employer had just cause to remove the Grievant for insubordinate conduct engaged in on June 15, 1995. He willfully disobeyed or failed to carry out a direct order in violation of the Progressive Disciplinary Guidelines (Union Exhibit 15).

The Union's attempt to accuse the Employer's of stacking charges is a bit of a reach. The removal order (Joint Exhibit 17) specifies the charge as refusing to answer

questions asked of the Grievant by management personnel. At the hearing, and in its brief, the Employer articulated the charge in the following fashion: the Grievant failed to appear at the Independence/Rockside Road Service Office when specifically instructed to; and the Grievant willfully refused to answer any questions pertaining to his improper entry into his supervisor's office. In my view, these charges are mere subcategories of the charge specified in the Removal Order (Joint Exhibit 17). Obviously, the way someone can refuse to answer questions is by failing to attend a meeting as instructed.

The exception proposed by the Union is misapplied. Traditionally, such an exception is proposed when dealing with safety and health concerns as specified in the Whirlpool decision authored by the United States Supreme Court. Potential trespass and resultant incarceration are not viewed by this Arbitrator as health and safety concerns requiring adoption of the exception.

The Grievant admitted to these acts of insubordination and failed to properly justify his non-compliance. Travis did not have to rescind the prior order in writing since the Grievant was not aware of these requirements at the time they were issued. The "without prior written authority" requirement was contained in a memorandum (Employer Exhibit 15) sent to Annarino by Travis on June 5, 1995. Nothing in the record indicates that the Union nor the Grievant received this document. the Grievant was, however, bound by instruction contained in the administrative leave notice (Joint exhibit 2) which specified:

(Employer Exhibit 15) sent to Annarino by Travis on June 5, 1995. Nothing in the record indicates that the Union nor the Grievant received this document. the Grievant was, however, bound by instruction contained in the administrative leave notice (Joint exhibit 2) which specified:

***

> You are to remain off Ohio Bureau of Workers' Compensation property unless otherwise instructed.

***

(Joint Exhibit 2)

There was no reference dealing with written authorization.

Nothing in the record, the Agreement (Joint Exhibit 1) or my review of the relevant case law establish that the Grievant had a bona fide reason to refuse to answer the Employer's questions regarding his reasons for entering his supervisor's office. The use of the phone to insulate the Grievant against potential criminal prosecution of statements made during the course of an investigation hearing, does not appear to be prohibited. The guarantee was properly tendered before the Grievant had to answer any questions. A refusal to answer once a guarantee is tendered is strictly viewed as insubordinate conduct.

In addition, nothing in the Agreement (Joint Exhibit 1) precludes the use of a tele-conference for the purpose of conducting an investigatory interview. This conclusion is evidently reasonable when Union representation is afforded at the location of the tele-conference.

This potential conflict between the public records law and Garrity is a matter of first impression and I, therefore, render an opinion on this matter solely as dicta.

Whether or not a conflict exists is irrelevant to the present matter. One would be hard pressed to conclude that materials released via a public records request would somehow pierce the veil of the guarantees contained in any Garrity warning. Even if certain matters are disclosed, it would be virtually impossible for any criminal court to allow their admission in support of a collateral criminal charge.

Other than this Arbitrator's prior rulings on several critical mitigating factors, those remaining issues introduced in an attempt to mitigate the penalty or overturn the removal are viewed as unpersuasive. They do not have to be dealt with even though they were considered.

In my judgment, each identified charge would have served as bona fide reasons supporting removal. The Grievant's actions were extreme and for the most part admitted by the Grievant as accurate depiction of the circumstances leading to removal.

AWARD

The Grievance is Denied.

DATE: June 27, 1997

Dr. David M. Pincus
Arbitrator