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OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Public Safety

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For the State
Robert Booker, Advocate
Richard G. Corbin, Co-Advocate
Heather L. Reese, Second in Charge OCB
Howard Woodrow Hudson III, Sergeant
Daniel W. Gibson, Staff Lieutenant
Shawn R. Kiefer, Secretary
Robert Dean Gomph, DX II CDL

For the Union
Tim Rippeth, Staff Representative OCSEA
John Porter, Director of Dispute Resolution OCSEA
Lois Darlene Holdcroft, Grievant
Brian N. Richardson, Drivers License Examiner Supervisor
Steven M. Raubenolt, Commander of Compliance Services Headquarters
Patricia K. Crozier, AFSCME witness

Case-Specific Data
Hearing Held
February 27, 1998

Case Decided
April 14, 1998

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Discharge

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I. THE FACTS

A. General Background

The Commercial Drivers License/Salvage (or Inspection) Facility is located in Jackson, Ohio and is a division of the Ohio Department of Public Safety. The Ohio Highway Patrol operates the facility. Employees in the Commercial Drivers License Department (CDL) administer road and written tests for commercial drivers licenses. Employees in the salvage garage inspect vehicles to avoid titling stolen vehicles and to create vehicular records for various agencies as required by state statutes.

Both the CDL and the salvage garage are located in adjoining buildings. The CDL comprises offices, a three-way garage in the rear, and an asphalt parking lot; the salvage garage sets on the opposite end of the building. The break room for CDL employees is located between the CDL and salvage departments. The CDL and the salvage department have separate supervisors who in turn report to a general supervisor. During the time in question, Sergeant H. Leigh Thompson supervised the entire operation.

This dispute arose because customers of the salvage department (customer or customers) often purchased food and other gifts for employees in both the salvage department and the CDL. Almost all employees in both departments either consumed the food or accepted the gifts or both. Most gifts were food such as hot dogs, hamburgers, Amish bread, desserts, and pizzas. However, one customer provided eight fresh turkeys on November 26, 1996, and another customer provided a catered Christmas dinner on December 1996. Also, customers occasionally gave money for lunch and provided a variety of other items like automobiles, auto parts, batteries, hats, car jacks, and tires. Finally, salvage employees occasionally shared their food with customers, sometimes cooking the

food behind the facility on Trooper Cheadle's barbecue grill.

Customers' gifts triggered some quid pro quos from salvage employees. First, contributing customers were permitted to skip long queues of noncontributing customers on the waiting list for vehicle inspections. Some customers' vehicles were not thoroughly inspected. At least one customer had his vehicles inspected at his property rather than bring them to the salvage facility. Moreover, to preserve the integrity and effectiveness of the vehicle inspection process, applicable regulations and standing orders required all customers to remain in the customer waiting area while their vehicles were inspected. Nevertheless, some contributing customers were permitted to wait in the salvage garage.

One instance of this infraction is especially remarkable. While waiting in the salvage garage for her vehicle to be inspected, a young woman displayed semi-nude photographs of herself to Trooper Stevison and Trooper Cheadle. Their comments about the woman's tattoo led her either to pull her jeans below her hips or to stretch her waist band to display the tattoo to the Troopers.

B. The Grievant's Background and Behavior

The Ohio Department of Public Safety employed Ms. Lois Darlene Holdcroft (the Grievant) from 1980 to 1997. In 1997, the Grievant was a Driver's License Examiner 2 (DX2) assigned to the CDL in Jackson, Ohio which was operated by the Ohio State Highway Patrol. As part of her duties, the Grievant scheduled customers for road tests and conducted road tests. After she completed her duties in the CDL the Grievant often spent considerable time in the salvage department because she apparently enjoyed the company of salvage employees more than that of her coworkers in the CDL. During her seventeen-year tenure with the Ohio Department of Public Safety, the Grievant has maintained a blemish-free disciplinary record as well as an impressive performance record. She never

received a performance rating below expectations. In fact, the record shows that she received 6 ratings that met expectations and 18 above. Furthermore, on several occasions, Captain Freeman among others complimented the Grievant on her job performance.

Although the Grievant neither requested nor accepted food directly from customers, she consumed food that she knew was provided by customers. On approximately fifty occasions she ate food like hotdogs and hamburgers that customers provided. Also, she consumed some of the catered Christmas dinner and accepted one of the fresh turkeys that customers provided. Furthermore, she occasionally purchased lunch for her and her coworkers with money she either knew or had reason to know came from customers. Finally, the Grievant mentioned to several employees including a customer/personal friend that she needed a car jack. The customer later gave her a car jack valued at from five to ten dollars and declined to accept payment.

The Grievant also was involved in another troublesome event. In the presence of a CDL secretary (Ms. Shawn Kiefer) and some salvage employees, the Grievant voiced a desire to enlarge her breasts through breast-implant surgery. In jest, Trooper Hugh S. Livesay responded by placing a post-it note stating "titty Kitty" on an open tin can. The can remained on Trooper Cheadle's desks for a while, and someone placed a nickel in it. The Grievant and her coworkers in both departments viewed the "titty Kitty" as an ongoing joke.

The practice of accepting gifts and extending favors began to unravel on or about March 13, 1997 when Ms. Kiefer concluded that the entire situation had gone too far and alerted Captain F. Freeman, Jr. about the activities. Captain Freeman then instructed Sergeant Thompson to interview Ms. Kiefer about her concerns. Sergeant Thompson took Ms. Kiefer's statement as ordered and submitted it to Captain Freeman who then ordered Staff Lieutenant Daniel Gibson to interview Ms.

Kiefer. Captain Freeman found the statement taken by Staff Lieutenant Gibson to contain criminal accusations. Consequently, Captain Freeman and Staff Lieutenant Gibson visited the CDL facility, interviewed Sergeant Thompson and ordered him to operate the CDL according to applicable regulations. Apparently, management then installed a miniature video camera in the salvage garage and connected it via coaxial cable to a VCR in the women's bathroom.

After interviewing Sergeant Thompson, Captain Freeman instructed Sergeant Hudson to take yet another statement from Ms. Kiefer. That statement was taken on March 18, 1997. Subsequently, management launched a full scale criminal and administrative investigation into the matter. Trooper Hudson conducted the criminal investigation; Captain Freeman and Staff Lieutenant Gibson conducted the administrative investigation.

Eventually the video camera was discovered and Sergeant Thompson was notified. Before leaving the facility to determine why a camera was hidden in the salvage garage, Sergeant Thompson instructed the employees not to touch the tape. The Grievant was present when he issued those instructions. Nevertheless, when Thompson left, the Grievant and Trooper Cheadle attempted to remove the tape from the VCR. The VCR program had to be deactivated in order for the tape to be removed. The Grievant apparently stood up on a toilet to reach the VCR and pushed buttons until the tape ejected. She then gave the tape to Trooper Cheadle who, along with other employees, viewed the tape. Later Trooper Cheadle surrendered the tape to Staff Lieutenant Gibson upon request.

II. The Stipulated Issue

In accordance with Section 25.03 of the labor agreement, the parties submitted the following issue to arbitration. Did the employer have just cause to terminate the Grievant, if not, what shall the

remedy be.

III. Positions of the Parties

A. The State's Position

The State maintains that it terminated the Grievant for just cause because she violated Rule C 10 d ("Failure of good behavior") by: (1) misusing her position for personal gain—accepting various types of gratuities; and (2) improperly tampering with a work-related record.

B. The Union's Position

The Union offers two alternative arguments. First, it argues that the State lacked just cause either to discipline or to terminate the Grievant for violation of Rule C 10 d ("Failure of good behavior"). Second, without conceding anything on the just cause issue, the Union insists that even if the State had just cause to discipline the Grievant, it subjected her to disparate treatment by failing to terminate some violators of Rule C 10 d and, worse, by not disciplining other violators at all.

IV. Relevant Work Rules and Contract Language

A. Rule C 10 d Failure of Good Behavior

Any misconduct which violates recognized standards of conduct including but not limited to . . . misuse of position for personal gain, taking bribes. . . .
The Ohio Department of Public Safety expects its employees to maintain a standard of conduct that is consistent with the mission, goals and objectives of the Department. Employee actions that adversely affect their duties and compromise or impair the ability of the Department to carry out its mission, goals and objectives will be subject to the disciplinary process.

* * * *

The progressive disciplinary process, depending upon the nature of the misconduct, might involve a series of steps including verbal or written reprimands in accordance with the applicable labor agreement.

The steps of progressive discipline shall generally be followed. However, more serious discipline or a combination of disciplinary actions may be imposed at any point if the infraction or violation merits the more severe action.

B. Section 24.01—Standard

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

C. Section 24.02—Progressive Discipline

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

A. one or more 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 five (5) days pay for any form of discipline; to be implemented only after approval from OCB
D. one or more day(s) suspension(s)
E. termination

D. Section 24.05—Imposition of Discipline

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

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

V. DISCUSSION

A. The State's Charges

The State formerly charged the Grievant with violating two applicable work rules. Specifically, it claimed that the Grievant's conduct constituted "Failure of good behavior" as set forth under Rule C 10 d and that she "[I]mproperly tampered with a work-related record."[1] Although it is unclear whether the State intended for the charge of "Failure of good behavior" to encompass the "tampering" charge, the Arbitrator assumes the charges to be distinct because the State listed them

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[1] Joint exhibit # 5.

separately.

With respect to the charge of ""Failure of good behavior"," the State specifically accuses the Grievant of: (1) soliciting and accepting a car jack directly from a customer; (2) consuming food that she knew was provided by customers; (3) accepting $20.00 directly from a customer; and (4) insubordination. The latter charge arose from the Grievant's having touched the VCR tape allegedly in violation of Sergeant Thompson's specific orders to the contrary.

In charging the Grievant with "tampering," the State claims she ejected and removed a video tape from a VCR which was set up to observe operations in the salvage garage. Finally, because this is a disciplinary dispute, the State has the burden of persuasion to establish just cause for disciplining the Grievant based on these charges.[2]

1. Soliciting and Accepting a Car Jack

The State accuses the Grievant of directly soliciting and accepting a gift in the form of a car jack from a customer and thereby displaying a "Failure of good behavior". The Grievant admits accepting the car jack from the customer who also was a close friend. She also admits that he declined to accept payment for the jack.[3] However, she denies actively soliciting the jack, claiming that, in the presence of the customer and others, she happened to voice her need for a car jack. The Union emphasizes that the jack came from the Grievant's friend who happened to be a customer and, therefore, according to the Union, accepting the jack was not a "Failure of good behavior". The first issue is whether she solicited the car jack.

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[2] Article 24.01.

[3] The customer claims that the Grievant paid for the jack, but the Arbitrator agrees with the State that the Grievant's admission against her self interest makes her version more credible.

Clearly she did. She voiced her desire to obtain a car jack in the presence of the customer and others. Specifically, she said, "[I]f you ever run across a jack . . . I need a jack." Although the request was not addressed solely to the customer, he was a target. This constituted solicitation of the customer and anyone else at whom the request was aimed. It would make no sense for the Grievant to voice her need—in the manner that she did—in the presence of persons not reasonably expected to have access to a car jack. The next issue is whether her acceptance of the car jack without paying a fair market price for it constituted ""Failure of good behavior"" or misuse of "her position for personal gain."[4]

It does. Contrary to the Union's position, the customer's status as a friend neither excuses nor justifies the Grievant's behavior which unavoidably commingles the solicitation and acceptance of property with the Grievant's status as a state employee who is prohibited from either soliciting or accepting gratuities. The Union's approach would create a loophole that would permit any employee who happens to befriend a customer to then accept gratuities in the name of friendship. Obviously there can be no hard and fast distinction between an employee's right to accept gifts from a friend and an employee's duty not to accept gifts from a customer. Yet, it is clear that the State is entitled to rigorously enforce its rules in this area, lest this potential exception swallows those rules. Also, the matter is aggravated if the behavior occurs on the State's property either during or after working hours.

2. Consuming Customers' Food

Also, the State charged the Grievant with knowingly consuming food that customers provided. The Grievant admits having regularly eaten food that she knew was provided by customers,

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[4] Joint exhibit # 5.

including the catered Christmas dinner. Therefore, except for accepting the fresh turkey, these infractions are not in dispute. Although the Grievant admitted accepting a turkey on November 26, 1996, she denies that she knew customers provided it, and the hearing record establishes that she never admitted having such knowledge. Consequently, the issue here is whether the Grievant accepted the turkeys with the knowledge that customers provided it.

Although the record does not establish that the Grievant actually knew that customers provided the turkey, the record does establish that she had reason to know or to strongly suspect as much, given the broad and persistent practice of customers' providing food to salvage employees. In her administrative interview, the Grievant said someone told her that there were turkeys in an automobile that was parked in the rear of the CDL.[5] The Grievant was well aware of the frequency with which customers provided food for salvage employees. Any reasonable person with this knowledge should and probably would have suspected—if not absolutely concluded—that customers supplied the turkeys. If customers did not supply the turkeys, then who did? Employees?

The Grievant admitted that she knew employees did not give the turkeys.[6] It is highly unlikely that coworkers would place eight fresh turkeys in a van behind the facility and then simply alert other workers that turkeys were out back. As pointed out earlier, the scope and duration of customers' generosity together with the inexplicable and mysterious appearance of fresh turkeys in a vehicle parked in the rear of the facility must have alerted the Grievant to the fact that customers provided the turkeys.

Furthermore, the Grievant admitted that she knew *customers* supplied the turkeys but she

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5 State exhibit # 4 at 4-5.

6 State exhibit # 3 at 7.

denied any knowledge of exactly *which customer* might have provided them. The following passage establishes this fact.

1.	Sergeant Hudson:	[Y]ou knew . . . [the turkey] wasn't purchased by an employee or from the highway Patrol. . . .
2.	Grievant	Right.
3.	Sergeant Hudson	[I]t was general knowledge . . .[the turkey] came from . . . one of these customers.
4.	Grievant	Right a customer.

Therefore, it is fair and reasonable to conclude that while the Grievant might not have known exactly which customer supplied the turkeys, she knew a customer supplied them. Armed with this constructive knowledge, the Grievant displayed a "Failure of good behavior" by accepting the turkey, at least without first verifying the identity of the provider.

3. Accepting Money

In its brief, the State claims that the Grievant took $20.00 directly from a customer (Mr. Wilburn) to buy lunch for herself and her coworkers. Moreover, the State alleges that the Grievant's statement in the criminal investigation contradicts her statement in the administrative investigation on this point. In fact, twice in its brief, the State flatly accuses the Grievant of accepting money from customers—once from Mr. Wilburn [7] and once from customers in general.[8] In making these accusations, the State cites the exchange between the Grievant and Sergeant Hudson who interviewed her during the criminal investigation.[9] Witness the essence of that passage below:

1.	Hudson:	Ok . . . remember . . . Dale Wilburn?
2.	Grievant	*Yeah.*

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[7] State's brief at 2.

[8] State's brief at 5.

[9] State exhibit # 2 at 9-10.

3.	Hudson	Ok . . he has made a habit of either bringing in Pizza or lunch . . . or . . . dropping a twenty dollar bill on the desk . . . and telling people in the garage to go out and buy lunch with it. *Are you familiar with that*?
4.	Grievant	*Yeah.*
5.	Hudson	How many occasions do you remember where he put money on the table?
		* * * *
6.	Grievant	Aah I really don't know but say maybe two or three.
7.	Hudson	More than two or three?
8.	Grievant	I don't know . . . .
9.	Hudson	How many times . . . did you take the money and go buy lunch for everybody?
10.	Grievant	I didn't actually take it *maybe I was given the money* to go cause I usually went for lunch.
11.	Hudson	Ok.
12.	Grievant	*[I] might have been given the money* to go pick up something.
13.	Hudson	[Y]ou were there when he put it down and then it was collected and then you. . . .
14.	Grievant	No, well *I can't say I was there when it was actually put down* but, *I . . . was given money* one time or two times and said go get pizza.
15.	Hudson	And you knew it was from Wilburn, he was right there and he had a habit of buying lunch or . . . dropping the money down.
16.	Grievant	I assume it was I didn't you know *I don't know for sure* but. . . .[10]

The foregoing passage does not reveal that the Grievant admitted either taking $20.00 or any other sum of money either from Mr. Wilburn or from any other customer. Nor does this passage establish that she picked up money which she knew Mr. Wilburn had placed on a desk, table, or counter. Also, in her administrative statement, the Grievant denied taking money from Mr. Wilburn.[11] As a result, there is insufficient evidence in the hearing record to establish that the Grievant either took $20.00 directly from Mr. Wilburn, picked up money that he left on a table or counter, or contradicted herself on this particular point. There is more, however.

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[10] State exhibit # 2 at 8-9.

[11] State exhibit # 4 at 2.

Ultimately it is irrelevant whether the Grievant accepted lunch money directly from Mr. Wilburn so long as she had either actual or constructive knowledge that he provided the money she used to purchase lunch. The cited passage and the general environment in the salvage department shows that the Grievant assumed—and had every reason to assume—that money she accepted to purchase lunch came from Mr. Wilburn. The record shows that the Grievant was well aware that Mr. Wilburn gave lunch money to salvage employees.[12] Specifically, the italicized language shows that the Grievant admitted that she: (1) knew Mr. Wilburn sometimes gave salvage employees lunch money;[13] (2) usually fetched lunch for salvage employees;[14] and (3) was occasionally given lunch money, which she assumed came from Mr. Wilburn.[15] Therefore, with that knowledge and her explicit assumption that at least some of the lunch money given to her came from him, the Grievant clearly is not free of culpability on this point.

4. Tampering With Work-related Record

In addition to tampering with a work related product, the Grievant contradicted herself on this point, which to some extent compromises her credibility as a witness. During her interview in the criminal investigation, she admitted pushing buttons until the tape ejected but claimed that she had no knowledge of how the video tape got out of the VCR. She said, "[A]s far as actually how it got removed *I don't know* I can't say.[16] Earlier Sergeant Hudson specifically asked her: "You don't know

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12 *Id.*

13 *Id.* at 8.

14 *Id.* at 9.

15 State exhibit # 2 at 9.

16 State exhibit # 2 at 16. (emphasis added).

how that tape got out of that machine?" she answered, "no."[17] Later, during her administrative interview, the Grievant said she did not wish to reveal how the video tape got out of the VCR.

While conducting the administrative interview, Staff Lieutenant Gibson asked her whether she touched the video tape, she answered, "probably when it was, it ejected a little bit. . . But as far as having the video tape, no I didn't have it."[18] Later, she admitted knowing how the video tape got out of the machine but flatly declined to say how.[19] Finally, in a follow-up administrative interview, she admitted removing the tape from the VCR and giving it to Trooper Cheadle.[20] Clearly, she contradicted herself on this point.

Finally, it is one matter to exercise one's right not to answer questions in a criminal investigation; it is quite another—at least with respect to credibility—to deliberately mislead investigators by claiming to lack knowledge that one in fact possesses.

5. Insubordination

The State accused the Grievant of insubordination because she allegedly touched the video tape in violation of Sergeant Thompson's specific orders not to touch the video equipment. In his interview with Captain Freeman, Sergeant Thompson claimed the Grievant was present when he ordered employees not to touch the tape.[21] However, the Grievant denies that she was present when

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17 *Id.* at 12.

18 State exhibit # 4 at 7.

19 *Id.* at 8.

20 Supplemental to Administrative Investigation # 97-0554; from Staff Lieutenant Gibson to Captain Freeman, File # 2ADM, 7/23/97 at 4.

21 State exhibit # 6 at 16-17.

this order was given and claims that she was unaware of the order when she ejected and removed the video tape from the VCR. This is entirely an issue of credibility. The difficulty with the State's position here is that Sergeant Thompson was not present to testify at the arbitral hearing, forcing the State to rely solely on a copy of his statement to Captain Freeman to establish the Grievant's presence.[22] Therefore, the statement is hearsay and has little probative value without independent corroborating evidence.

However, the record contains such evidence. Ms. Shawn Kiefer credibly testified that Sergeant Thompson instructed the Grievant not to touch the tape. Moreover, nothing in the record establishes that Ms. Kiefer had anything to gain by falsely accusing the Grievant. Instead, the record suggests that Ms. Kiefer decided to alert management to a practice that tainted virtually every employee in the facility, including Ms. Kiefer. Finally, given her inconsistent statements in the arbitral record, the Grievant's credibility simply cannot offset the credibility of Sergeant Thompson's statement as corroborated by Ms. Kiefer's statement and testimony. Therefore, evidence in the hearing record establishes that the Grievant was present when Sergeant Thompson ordered employees not to touch the video equipment. By denying that order, the Grievant committed an act of insubordination and thereby displayed a "Failure of good behavior."

B. The Union's Affirmative Defenses

1. Procedural Irregularities

The Union claims that Captain S. M. Raubenolt, the Meeting Officer for the Grievant's predisciplinary hearing, did not fully sift the facts and weigh the circumstances surrounding the Grievant's case. The rationale is that Captain Raubenolt notified the Grievant of his decision to fire

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[22] State exhibit # 6.

her merely two hours after he held the predisciplinary hearing.

The Union offers several arguments in support of this accusation. First, it argues that after holding the Grievant's predisciplinary hearing, Captain Raubenolt had several other hearings that stretched into the afternoon. Still he somehow completed all of his tasks and notified the Grievant, on or about 2:00 p.m. the same day of the hearing, that she was terminated. According to the Union, two hours is simply insufficient time for Captain Raubenolt to have thoroughly weighed the evidence in the Grievant's case, drafted his report, submitted it to the director who then had to draft a notice of removal and to notify the Grievant's supervisor, who then notified the Grievant. Moreover, Captain Raubenolt had five days within which to draft his report of the predisciplinary hearing which suggests such procedures usually require considerably more than two hours.

The Union's chronology of events and the fact that Captain Raubenolt had five days to complete his report certainly underscore the improbability of his completing the report—not to mention processing it through several other levels—in two hours, . If five days are normally allowed for the report, how could the State have considered "all the evidence" as required?[23] Nor does any evidence in the record address or contradict the Union's version of these particular facts.

Even so, these facts fall short of actually proving a procedural error, but they do constitute circumstantial evidence of such an error and thus provide a basis for an inference of procedural irregularity. However, in this arbitrator's view, that inference does not rise to the level of proof of procedural error in this particular instance.

More evidence is needed. For example, how complete were Captain Raubenolt's files on the Grievant's case before the predisciplinary hearing? And how much new evidence did the Grievant

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[23] Joint exhibit # 6.

present for consideration at that hearing? Furthermore, even if the Union's evidence established a procedural error, the Union still must prove that the procedural error was harmful to the Grievant, i.e., caused an adverse decision and, therefore, actually harmed the Grievant.

When disciplining its employees, the State is not free to flout either internal or external applicable procedural standards. Nevertheless, the party alleging procedural error must clearly establish both the error and its adverse impact on the outcome in question. The Union did not satisfy these criteria here in this instance.

Finally, the Union claims that the State failed even to notify the Grievant of the measure of discipline it imposed on her. If established, this is a clear violation of Section 24.05. Again, nothing in the record suggests that this accusation is erroneous. However, the hearing record does not reveal how this procedural defect actually harmed the Grievant by adversely affecting the outcome of the procedure. Consequently, the Arbitrator can take no remedial steps here either.

The foregoing discussion establishes that the Grievant engaged in misconduct and, therefore—contrary to the Union's argument—the State had just cause to impose some measure of discipline upon the Grievant. The remaining issue is whether the measure of discipline imposed was excessive, given that other wrongdoers received either no discipline or less discipline than the Grievant.

2. Disparate Treatment

The Union claims that the State treated the Grievant disparately by terminating her while failing to impose equally severe disciplinary measures upon other employees who committed infractions that were the same as or similar to the Grievant's. The State, on the other hand, argues that the Union bears the burden of proof on this issue and must show that the disparate penalties were

imposed on employees who committed the same or similar violations. Finally, Sections 24.02 and 24.05 support the proposition that the State must refrain from dispensing disparate penalties.

Although it is hearsay for some purposes, one can assume that charges which Captain Freeman leveled against Sergeant Thompson are accurate.[24] The number and seriousness of charges against Sergeant Thompson far exceed those against the Grievant. Moreover, Sergeant Thompson holds a position of leadership. This dissimilarity between Sergeant Thompson's position and the Grievant's position magnifies his infractions relative to hers. Traditional principles of discipline suggest that the State should have disciplined Sergeant Thompson at least as severely as it disciplined the Grievant, given the greater visibility and responsibility associated with Sergeant Thompson's position. However, the Grievant was terminated and Sergeant Thompson was demoted.

After initially testifying that he never took anything of value from a customer, Robert Dean Gomph, a DX2 in the CDL, admitted that he violated the rule against accepting gratuities several times and even gave the state's property to a CDL customer. Specifically, he accepted a hat from a customer purportedly to build up the CDL's operation. However, management was apparently unaware of this infraction for some time. He also ate customers' food at a party and accepted a loaf of Amish bread from a customer. Finally, he was orally reprimanded for giving a traffic cone to a customer. Apparently, Mr. Gomph was one of the Grievant's superiors, since he was able to legitimately threaten to fire her if she did not do her job. Again, as her superior, he was not just another similarly situated employee. Instead, to some extent, he occupied a position of leadership and had some responsibility to set an example of proper conduct. Yet he failed in this respect. The State merely gave him an oral reprimand. Mr. Gomph's attempt to justify or distinguish his behavior

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[24] Union exhibit # 2 at 4.

is unpersuasive. If the rule against accepting or giving gratuities is to have any meaning, then management must narrowly interpret the list of recognized justifications for violating that rule. Otherwise the justifications will supercede the rule.

Ms. Shawn Kiefer also presents a problem for the State regarding disparate treatment. Despite her misconduct in this case, the State mere;y reprimanded her in writing. Ms. Kiefer admitted, under cross examination, that she ate food and accepted a turkey. Also, in her statement to Staff Lieutenant Gibson on July 7, 1997, Ms. Kiefer denied accepting any type of gratuity or gift directly from customers but specifically admitted: eating food that she knew customers had provided; accepting a turkey that she knew customers had provided; and eating some of the catered Christmas dinner that she knew customers had provided.[25]

There is also some difficulty with another statement Ms. Kiefer made during cross examination. She denied knowledge that employees used customers' money to buy pizzas. Yet, by alleging that she saw the Grievant pick up twenty dollars that a customer placed on the counter, she admitted knowledge that customers actually gave lunch money to employees. While Ms. Kiefer may have lacked actual knowledge that the customers provided the money for pizzas, she certainly had reason to conclude as much, given her own observations and the types of practices and behavior that characterized her work environment.

Finally, Ms. Kiefer, the Grievant, and others seem to find solace in the fact that they accepted no gratuity directly from customers. But that fact hardly excuses their violations of Rule C 10 d. In this regard, it is largely irrelevant whether employees accepted gratuities directly from customers or accepted gratuities they knew or should have known were provided by customers. Accepting gifts

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[25] Joint exhibit # 1.

directly from customers might constitute an aggravating factor because that behavior brings the employee face-to-face with the customer, thereby perhaps rendering the employee more susceptible to customer pressures for quid pro quos. However, salvage customers were the gift givers and CDL employees were in no position to favor salvage customers. Therefore, other things equal, CDL employees like the Grievant and Ms. Kiefer were less susceptible to quid-pro-quo pressures than were salvage employees.[26]

Finally, in her July 7 statement to Staff Lieutenant Gibson, Ms. Kiefer stated: "I really never gave these things a second thought. I assumed this was acceptable because these things were going on when I started working here in February of 96."[27] In effect, Ms. Kiefer is claiming ignorance of applicable work rules as an excuse. That is no excuse, however. A traditional and long standing labor relations principle is that employees are charged with actual and constructive knowledge of applicable work rules like Rule C 10 d.

The State argues that the nature—and perhaps the number—of the Grievant's violations warrant harsher discipline. Specifically, the State relies on the Grievant's tampering with the video tape and her refusing fully to cooperate in the administrative investigation as justification for sterner discipline.

The record clearly reveals that only the Grievant and Trooper Cheadle engaged in some misconduct. Indeed, only the Grievant and Trooper Cheadle tampered with work-related evidence.

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[26] The State reasons that because the Grievant wore a uniform, salvage customers could mistake her for a salvage employee and perhaps conclude that there is an opportunity for quid pro quos. Thus, the Grievant might have been able to elicit gifts from salvage employees. However, without some supporting, this inference is so weak as to be little more than speculation.

[27] Joint exhibit # 1 at 3. Statement made by Ms. Shawn R. Kiefer to Staff Lieutenant Gibson, July 7, 1997.

Moreover, according to the hearing record, only the Grievant declined to cooperate in the administrative investigation and offered conflicting statements. As shown in the following exchange, at one point in the criminal investigation, the Grievant flatly denied having any knowledge of how the tape got out of the VCR.

1.	Hudson	[W]hat I want to know is what happened between the time you're up there punching buttons on that machine?
2.	Grievant	That's it.
3.	Hudson	That's not it Darlene, there's a whole chunk missing in the middle of that
4.	Grievant	That's all I you know I can tell ya I did push some buttons and that was basically it. I didn't you know I can't tell you how I I you know I don't know
5.	Hudson	You don't know how that tape got out of that machine?
6.	Grievant	No.

In a criminal investigation, the Grievant has neither a duty to answer questions nor a right to falsify her answers, even after she waived her right to legal counsel and her right to remain silent. On line 6 she absolutely denies any knowledge of how the video tape got out of the VCR. Then in the subsequent administrative investigation, she admitted removing the tape and giving it to Trooper Cheadle. As mentioned earlier, inconsistencies damage her credibility where as a simple refusal to answer would not.[28]

Nevertheless, the difference between the Grievant's misconduct and that of Mr. Gompf, Ms. Kiefer, and Sergeant Thompson hardly justifies terminating the Grievant. Specifically, the difficulty is that Mr. Gompf was never disciplined for some of his misconduct; Ms. Kiefer received only token discipline for her misconduct; and Sergeant Thompson— a supervisor whose infractions exceeded

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[28] Because the issue of the Grievant's right to withhold information in this matter is being processed through the parties' negotiated grievance procedure, no opinion is offered here.

the Grievant's in both number and seriousness—was merely demoted. Clearly, Ms. Kiefer and Mr. Gompf did not engage in the same type of misconduct as the Grievant. In that sense, they are not similarly situated. However, this lack of similarity in misconduct does not support an unlimited difference in the severity of penalties imposed. Beyond a certain point, the range of penalties imposed on employees who commit different offenses can become so disproportionate as to exceed the difference in the underlying offenses. In short, mere dissimilarity in underlying misconduct should neither exonerate employees who commit lesser offenses nor insulate them from comparable discipline for their misconduct. The penal discrepancies in the instant case indicate that the State disciplined the Grievant too harshly relative to other employees mentioned here, and the Arbitrator finds nothing in the record to justify this disparate treatment.

Finally, three other factors operate in the Grievant's favor: (1) she maintained a fine performance record, which elicited continual praise from her superiors; (2) except for the misconduct in this case, she has maintained a discipline-free record; and (3) she has accumulated seventeen years of tenure with the Ohio Department of Public Safety.

VI. Award

For all the foregoing reasons, the Arbitrator holds that the Grievant's misconduct clearly warrants some measure of discipline and, thus, the State had just cause to discipline her. However, termination was too severe under the specific facts of this case. Consequently, the State shall reinstate the Grievant and reduce her termination to a thirty-calendar-day suspension. The parties shall deem this suspension to have commenced upon the date of the Grievant's official termination and to run forward for thirty calendar days. If at all possible, the State shall reassign the Grievant to the Athens DX Station. Finally, upon reinstatement, the Grievant shall receive all seniority and

benefits except those lost during the thirty-calendar-day suspension.

THE GRIEVANCE IS THEREFORE SUSTAINED IN PART AND DENIED IN PART.

Notary Certificate

State of Indiana)

)SS:

County of MARION

Before me the undersigned, Notary Public for MARION County, State of Indiana, personally appeared Robert Bookins, and acknowledged the execution of this instrument this 18th day of April, 1998

Signature of Notary Public: Lee Kirkwood Randolph

Printed Name of Notary Public: LEE KIRKWOOD RANDOLPH

My commission expires: 1/12/08

County of Residency: MARION

Robert Brookins

Robert Brookins