#1663

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF COMMERCE

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Noel Williams

Case No. 07-00 (011214) 0361-01-04

Date(s) of Hearing: February 19, 2003 and March 19, 2003

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Allison Vaughn, Esquire
2nd Chair: Bob Steele

Witnesses:

William E. Lawson, Esquire
Maggie Hamilton
Carrie Varner, Esquire
Noel Williams
Bob Steele

For the Employer:

Co-Advocate: Jason S. Woodrow
Co-Advocate: Beth Lewis, Esquire

Witnesses:

Jason Dutton
Michael F. Rea
John E. York
Deborah Dye-Joyce, Esquire
Blaine Bockman
Robert Lang, Esquire

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 5, 2003

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2000, through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Noel Williams ("Williams"), for violating the Department of Commerce ("Commerce") policy regarding neglect of duty, insubordination, theft of state property, unauthorized use of state property, absence without leave, dishonesty and failing to cooperate in an official investigation. The discipline was issued because the Grievant's conduct was such of a serious nature that removal was warranted.

The removal of the Grievant occurred on December 12, 2001 and was appealed in accordance with Article 24 of the CBA. This matter was heard on February 19, 2003 and March 19, 2003 and both parties had the opportunity to present evidence through witnesses and exhibits. Post hearing briefs were received on April 23, 2003 at which time the record was closed. This matter is properly before the Arbitrator for resolution.

BACKGROUND

This matter involves Williams, an African-American female, who worked eight (8) years for Commerce, as a paralegal. The Grievant worked in the Division of Securities primarily on regulatory matters entrusted to the Division of Securities. The Division of Securities is the State's regulatory agency responsible for banking and the sale of securities in Ohio. Enforcement of regulations and investigations of security violations are integral functions of Commerce. The Grievant worked at the Vern Riffe ("Riffe") Tower located on State Street in downtown Columbus, Ohio.

The Grievant was also chapter president of the union from 1997 until the time of her removal. In enforcement of the CBA, the Grievant filed Unfair Labor Practice ("ULP") charges with SERB and pursued numerous grievances against Commerce. In late November and early

December 2001, the Grievant testified at SERB regarding a ULP charge involving attorneys doing bargaining unit work. Commerce, in 2001, had two (2) separate OCSEA chapters and an election was to occur in January 2002 to merge the chapters. The Grievant was going to run for president of the merged chapters against Beverly Brown ("Brown"), who was white and was viewed as less contentious than the Grievant in her relationship with management.

In early July 2001 Blaine Brockman ("Brockman") began an investigation into allegations that Grievant used a State of Ohio credit card to purchase gasoline for a personal vehicle. While pursuing the gasoline allegation Brockman uncovered additional areas of potential misconduct regarding the use of a parking pass, personal telephone calls, being insubordinate and absent without leave ("AWOL"). After the conclusion of the investigation the Grievant, on December 12, 2001, was removed for violating the following Commerce policies: insubordination, neglect of duty, deliberate theft of state property, unauthorized use of state property, AWOL, dishonesty and failure to cooperate with an official investigation. The union filed a grievance challenging the Grievant's discharge on the same day. The Grievant filed charges with the Ohio Civil Rights Commission, which were dismissed, alleging her removal was due to race.

On December 20, 2001 the Step 3 meeting occurred where the following defenses were raised by the union: (1) the investigation was unfair; (2) the telephone calls/gasoline purchase(s) discipline was not timely; (3) discipline was retaliation for filing ULP's with SERB; (4) the AWOL/insubordination charges were subject to a pending grievance; and (5) charges not fully explained (i.e. neglect of duty and dishonesty). The union was seeking all the information in the possession of Commerce including the investigation report conducted by the Ohio Highway Patrol ("OHP").[1]

At the pre-disciplinary meeting on November 16, 2001 Bob Steele ("Steele"), OCSEA Staff Representative, in addition to the defenses cited above, indicated that the timing of the

[1] OHP began a criminal investigation in August 2001 and was ongoing as of December 2002. (Joint Exhibit ("JE") 2F) Moreover, at the arbitration hearing no evidence was offered that any criminal charges were ever filed against the Grievant or that the criminal investigation was ever concluded.

Grievant's discipline served to intimidate other witnesses who were scheduled to testify in the upcoming SERB ULP hearing.

On March 15, 2002, and in July 2002, the union pursuant to Article 25.02 sought to schedule this matter for arbitration, to no avail. Additionally, on January 28, 2002, the union waived mediation and requested this case be scheduled for arbitration (JE-20). The employer, due to the expectation that OHP would conclude its investigation and initiate criminal charges against the Grievant, believed that the CBA did not require this matter to be scheduled for arbitration due to **new** contract language regarding discharge grievances, contained in Article 25.02. Due to the failure of the employer to schedule this matter for hearing, the union filed an action in state court to compel arbitration. The parties settled the lawsuit by agreeing to submit to arbitration the interpretation dispute regarding Article 25.02 (i.e. the interpretation of criminal charges versus criminal investigation).

Arbitrator John J. Murphy ("Murphy") on December 16, 2002, held that the strict timelines regarding the scheduling of an arbitration applied in this case since "the facts do not display a grievance involving criminal charges of on duty actions of the Grievant." (JE 2F, p. 8) Arbitrator Murphy directed the parties to proceed to arbitration without delay.

The union, at the hearing in this matter and in its post hearing brief, contends that Article 25.02 was violated by delaying the Grievant's arbitration for more than one (1) year and violated her due process rights guaranteed in Article 25. The delay is in direct conflict with the procedural requirements negotiated to ensure that removals are heard as quickly as possible. On the other hand, the employer argues that the parties entered into a joint stipulation that the grievance "...is properly before the Arbitrator." (JX 1) and by agreeing that the matter "**is properly**" before the Arbitrator the union waived any procedural defects. Furthermore, the union raised this objection on the second day of the hearing (March 19, 2003) as a surprise tactic and that the employer acted in good faith in extending the timelines in its interpretation of what grievances "involving criminal charges" meant.

The allegations of theft involve three (3) areas; gasoline, telephone calls and parking pass. Regarding the gasoline matter, two employees at a BP station in Lewis Center, Ohio, informed Michael Rae ("Rae") during the week of June 1, 2001 on at least two occasions, a black lady driving a Department of Commerce car (white Taurus) and a van either light blue, gray or teal pulled directly behind the Taurus and some gas was pumped into the van using the state gas credit card. A search extending back to 2000 of the credit card usage, indicated that on May 29, 2001, at 9:34 p.m. gas totaling $28.30 was purchased for vehicle number 27-324.[2]

Other transactions occurred on January 16, 2001, involving vehicle 27-324 and on September 12, 2000, involving vehicle 27-350 where 19.3 gallons was purchased. The sign out logs indicated that the Grievant had the pool car on those dates. The employer alleges that on May 29, 2001, based on the amount of gasoline in the car as well as the verified odometer reading it was impossible for the car to hold 15.3 gallons of gas. The credit card ("Voyager") receipt contains the odometer reading (JE 3G) at the time gas was pumped. The ending odometer reading prior to the Grievant taking the car out on May 29, 2001 was 9676 (JE 3G) and 9700 miles according to the Voyager receipt at fill-up by the Grievant. However, mileage records were not complete regarding the January 16, 2001 or the September 12, 2000 transactions. The employer presented evidence that the dealer specification indicates that an 18 gallon tank capacity is associated with that Taurus.

The union, on the other hand, indicates that Brockman cleverly molded the facts to support his conclusions as oppose to accurately reporting the data. An example is Brockman's statement in the investigative report that a **blue** mini-van was present on May 29, 2001 despite the other witnesses who indicated that the color was either light blue, gray or teal. Brockman was attempting to tie the Grievant's roommate into this scheme and by making the blue van the other car, his theory would be complete. The employer also failed to investigate vehicle numbers 27-171 and 27-371 as to gas purchased at the same gas station, by "other" pool cars

[2] All vehicles noted herein are Department of Commerce **pool cars** that are assigned to employees upon proper request. A gas credit card and parking pass are assigned to pool cars. The pool cars are located in the Riffe garage on Level 3 and three (3) pool cars were assigned to Commerce.

during this same time period. The variables relied upon by Brockman (i.e. driving habits of other drivers, accurate calibrated pumps, gas tank size, etc.) are not reliable. The gas station attendants did **not** see gas being pumped by anyone into a personal vehicle. Simply, where's the gas theft, and the inaccurate paperwork on the pool cars undermines reliability.

Regarding the parking pass, during July and August of 2001 the Grievant would sign out a pool car, take the parking pass assigned to the car and then use the pass to bring her own car or others in and out of the garage without paying. While the pool car was assigned to the Grievant, the July and August records indicates that the parking pass was used forty-two (42) times while the pool car was physically in the garage. The garage is State owned and every time the Grievant enters the garage monies are not collected, amounting to theft.

The union points out that the employer produced no written policy forbidding the use of parking pass by employees. The Grievant was never informed by the employer that the past practice of using the parking pass had changed or that only employees assigned a parking space could have ingress/egress with the parking pass. Furthermore, no reliable evidence was offered that the Grievant violated any policy or procedure regarding the parking pass. The Grievant admitted using the parking pass in the investigatory interview and did not shield this practice because it was acceptable.

As to the telephone calls, the Grievant worked with Attorney Melanie Braithwaithe ("Braithwaithe") in investigating certain alleged unlawful conduct of an organization called Tee-To-Green ("TTG"). Part of Grievant's responsibility required her to contact investors outside of Ohio to obtain anecdotal data and copies of any documents the investor may have. TTG sold promissory notes to potential investors. The investigation began in 1999 and was ongoing, resulting in TTG filing for a Chapter 11 bankruptcy petition in the State of New York. Attorney William E. Lawson ("Lawson") was appointed trustee for TTG and provided an affidavit (Management Exhibit ("ME") 2) as well as testified via telephone in this matter. The dispute in this area centers upon whether Vaughn (Brown) McMullin and/or Tashia McMullin ("T.McMullin")

who resided in Georgia were investors in TTG prompting the Grievant to stay in contact with the McMullins from 1999 until 2001.

When initially questioned by Brockman, the Grievant was vague regarding the McMullins, but changed her story and admitted that she developed a personal relationship with T.McMullin over time. Between 1999 and March 2001 over fifty (50) calls were made by Grievant who would sometimes call from co-workers' phones without logging each call. On April 2, 2001, Deborah L. Dye-Joyce ("Dye-Joyce"), Commissioner of Commerce, emailed the Grievant inquiring about a call to Vaughn Brown and what business it pertained to. The Grievant denied the call was personal and stated the call involved an investment matter regarding Augrid. The calls to the McMullins stopped after April 3, 2001, however, the home telephone records of the Grievant indicated she made over 150 calls to the McMullins within three (3) months of April 3rd. (ME-8). The evidence of the McMullins' promissory note (JE-10) and the signed letter from T.McMullin lacks authenticity as to the McMullins' participation as investors in TTG, in contrast to Lawson's testimony, who indicated that a search of TTG records failed to indicate that Vaughn (Brown) McMullin was an investor in TTG (ME-2). In light of Grievant's admission that some of the calls were personal, any evidence to the contrary should be discounted.

The union raised two (2) arguments regarding the phone allegations: (1) Dye-Joyce in late April or early May 2001 presented her findings to Brockman, and the employer did nothing until July 2001; and (2) the evidence fails to establish that Grievant's calls to the McMullins were for personal use. The Grievant admitted developing a friendship [3] with T.McMullin and maintains that Dye-Joyce obtained the home telephone records of the Grievant without her consent and its relevancy is questionable (ME-8). The personal relationship developed during the course of the TTG investigation and the **personal** calls made from her home phone is the only evidence of a personal relationship.

[3] The friendship matured to the extent the Grievant allowed T.McMullin to use her home address on an application for employment with the State of Ohio (JE 3F-U)

The last area involves the Grievant's failure to follow a direct order regarding the obtainment of prior approval from her supervisor to attend a meeting on October 2, 2001 involving union business. On September 18, 2001 the employer, via Brockman, implemented a policy which clarified that prior supervisory approval was required for union activities and revoked any past practice which conflicted with the policy. (JE 3F, W) The policy also required that mutual arrangements be made with an employee's immediate supervisor as well as the supervisor of the unit to be visited.

On September 27, 2001, the Grievant requested leave for a series of dates to attend to union business in October/November 2001. The first meeting was scheduled to begin at 10:00 a.m. on October 2, 2001. Matt Fornshell ("Fornshell") on September 28, 2001 required additional information (i.e. nature of meeting, other union representatives attending) prior to his approval. In response to the Grievant's concern that Fornshell was violating Article 25.06 of the CBA, Grievant sent an email to John Downs ("Downs") on September 28th, Labor Relations Administrator seeking clarification and copied Fornshell and Jason Woodrow ("Woodrow"), Labor Relations Representative ("LRO"), among others. Woodrow replied that Fornshell's requests were within the scope of the CBA and asked her to provide the information so her requests could be considered.

In reply to Woodrow's email, the Grievant at 2:07 pm. on September 28, 2001 provided answers to Fornshell's questions and questioned whether this policy violated the contract since the union did not have an opportunity to discuss this policy prior to implementation. A grievance was filed by the Grievant over this policy.

At 2:15 p.m. Woodrow responded to the contention regarding whether this was a new policy or not, and did not address the adequacy of Grievant's reply to Fornshell's original questions – Fornshell was copied on all the emails between the Grievant and Woodrow. On October 1, 2001 Steele sent an email addressed to Woodrow and the Grievant and one of his concerns was the union leave policy and its effect. Fornshell was copied on this correspondence as well (Union Exhibit ("UE") D).

On October 2, 2001 the meeting was scheduled to begin at 10:00 a.m. at a site away from the Riffe Tower. The Grievant was at work on the morning of October 2, 2001 and left to go to the meeting at approximately 9:20 a.m. Fornshell, by email, denied the Grievant's request at 8:59 a.m. (JE, 3F-X) on October 2, 2001. The Grievant did not review Fornshell's email prior to leaving Riffe Tower to attend the meeting. In any event, at 10:30 am. Woodrow called Fornshell and advised him that the Grievant's attendance at the meeting was permissible.

As a result of not having prior approval to attend the meeting on October 2 the employer contends that the Grievant violated a direct order and became AWOL from 9:20 a.m. until 10:30 a.m.

The union considers this charge as another example by the employer to "get" the Grievant. The Grievant complied with the policy and at no time was she given a direct order. Moreover, the employer had two (2) days to deny the request (September 28th, October 1) and failed to do so. The employer's silence was in essence a waiver and as a result this charge is groundless.

ISSUE

Was Noel Williams removed for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA
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 any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the 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(i).

DR&C STANDARDS OF EMPLOYEE CONDUCT
RULE 1, RULE 2, RULE 5, RULE 6, RULE 21, RULE 23 & RULE 30

Rule 1: Neglect of duty or inadequate job performance: includes range of misconduct from routine performance problems to endangerment of life, property, public safety.

Rule 2: Insubordination.

Rule 5: Deliberate destruction, damage, and/or theft of state property OR STATE TIME, property of visitors to state facilities, or property of other employees.

Rule 6: Carelessness, abuse or unauthorized use of state or co-workers' property.

Rule 21: Unauthorized Absence without leave (AWOL):
a. Less than one day.
b. One Day.
c. Two consecutive days.

Rule 23: Dishonesty, including but not limited to, falsifying, unauthorized altering or removing any official document and misuse of funds.

Rule 30: Interfering with and/or failing to cooperate in an official investigation or inquiry.

POSITION OF THE PARTIES

POSITION OF THE UNION

Due to the failure to arbitrate this matter for almost a year after formal request by the union the Grievant's rights were violated under Article 25 of the CBA. The tight timeframes contained in Article 25 for discharge grievances are designed for quick resolution due to the dire consequences at stake.

The due process rights of the Grievant were harmed by the delay which was done with malice primarily due to anti-union animus by the employer. But for the union's filing a lawsuit to compel arbitration the employer would have continued its act of malfeasance in processing this matter.

Another procedural defect exists regarding the telephone charges as being untimely. Article 24 requires that charges are initiated in a timely manner. Dye-Joyce became suspicious of the Grievant's telephone usage in December 2000 and audited the phone records in the early part of 2001. Additionally, a "reverse" search on the telephone numbers was conducted which verified that the Grievant's telephone logs were accurate. At the end of April 2001 or early May

2001 Dye-Joyce reported her findings to Brockman who failed to take action on these charges until July 2001.

Regarding the neglect of duty charge, the employer, in its haste to remove the Grievant "...threw together any and everything that may or may not apply..." (Union Post Hearing Brief p. 4) No evidence was presented to support this charge because none existed. The employer's case centers around allegations of misuse of State resources (i.e. credit card, parking pass, telephone) and this charge was simply added to the stack.

The employer improperly stacked both specific and general charges for the alleged same conduct. Examples being: (A) theft; (B) unauthorized use of property; and (C) dishonesty. Theft carries a disciplinary action from fine to removal for first offense, whereas unauthorized use of state property carries an oral or written reprimand for first offense. In contrast, for dishonesty discipline the first offense ranges from suspension to removal. The failure of the employer to be precise and clarify the alleged conduct is another example that Grievant's due process rights were violated in that notice of her alleged misconduct was not provided.

Regarding the standard of proof, the union indicates that the employer cannot by either a preponderance of the evidence or by a clear and convincing standard demonstrate that "just cause" is present.

The evidence to support the theft of gasoline fails to demonstrate that any witness observed gas being actually pumped into a personal vehicle. In fact, Dutton's affidavit indicates that he didn't see a theft of the gas. The evidence submitted contains variations of the color and vehicle make of the personal car involved and Brockman distorted the facts because he believed the van belonged to someone who was residing with the Grievant. Brockman's report manipulates the facts to suit his needs regarding the color of the van, despite various descriptions by the witnesses who indicated the color was dark green, teal and/or light blue.

Another inconsistency involves how the Grievant was identified by Dutton as the "black lady" he observed sometime in May at the BP station in Jackson Center. John York ("York"), Administrative Assistant, testified that the Grievant was the only African-American person he

was able to trace to that gas station during the relevant time frames (i.e. January 2001 through May 2001). According to York only vehicles 27-324 and 27-350 made purchases at the BP station, and license plates beginning with number 27 were part of his vehicle inventory. However, vehicles number 27-171 and 27-371 made purchases at that BP station during the period cited by Dutton, but the employer failed to conduct an investigation into these **gas** purchases or the driver(s) of the vehicles.

The evidence failed to establish that a policy existed regarding the exact process to verify mileage and gas fill-up by employees of Commerce. Accurate records were not required nor maintained by employees and it was acceptable to leave logs uncompleted. Maggie Hamilton ("Hamilton") testified that the vehicle logs were not always correct and she didn't complete some of the trip tickets, which required an employee to indicate the beginning and ending miles. Another example of inaccuracy of the sign-out logs involves May 16, 2001 when co-worker Karen Francis had the pool car even though it was signed out to the Grievant, who was not working that day.

The assumptions and calculations used by Brockman to conclude that on May 29, 2001 it was impossible for vehicle 27-324 to hold 15.3 gallons of gas are interesting but not reliable. The union argues that the variables outweigh the **algebraic** constants thereby making the outcome suspect. As an example, the average mile per gallon of the ten (10) prior users failed to consider the particular driving styles and habits of each driver. Moreover, the employer failed to offer probative evidence that employees completely filled the gas tank, or a policy required the tanks be completely filled prior to returning to Riffe Tower. Finally, the employer failed to demonstrate that the gas tank capacity was 18 gallons for this particular car model.

The parking pass records are also inaccurate and no evidence was submitted to show that only the Grievant had access to the parking pass. Hamilton testified that she could not leave the garage sometimes because the pass was missing. The practice allowed employees to use the pass and the employer did not put the Grievant on clear notice that this was unacceptable.

The evidence fails to prove that the Grievant used the phones for personal gain. The Grievant in working on the TTG matter contacted the McMullins and a friendship developed. The matter in which Dye-Joyce obtained the Grievant's home telephone records by going through her personal effects was without consent of the grievant and their relevancy should be discounted. The union also argues that the Grievant was treated differently on the basis of her race. The union points to the alleged difficulties encountered by the Grievant in processing matters under the CBA as opposed to her white counterpart, Brown.

The real reason for the Grievant's removal was due to her union activism and Brockman protestations that as Chief of HR, changes in union/management relationship was going to occur. The Grievant was aggressive in pursuing grievances and ULP charges to the chagrin of the employer. Examples of the anti-union animus included the requirement that department heads no longer meet one on one with the union; waited for almost six (6) months to discipline the Grievant (immediately preceding election of the combined new chapter president); and unilateral implementation of the union leave clarification policy. Simply, the Grievant had a strong personality and represented her union members in a manner offensive to the employer.

POSITION OF THE EMPLOYER

The employer acted in good faith in interpreting Article 25.02 in not scheduling the arbitration while OHP's criminal investigation was open. The language of Article 25.02 permits the tolling under these circumstances. Moreover, the union waived this procedural argument by agreeing to certain joint stipulations prior to the arbitration.

The Grievant, as a paralegal, was involved with investigators regarding improprieties of securities and conduct involving allegations of fraud and theft. The Grievant worked in a confidential capacity with various attorneys and was aware that any conduct involving dishonesty was unacceptable.

The Grievant was removed on December 12, 2001 for theft; unauthorized use of state property; dishonesty; and failing to cooperate in an investigation. Her removal was not based

upon race and/or anti-union sentiment. The theft allegation is the most serious offense, regarding the Grievant's misuse of a credit card, telephone charges and parking pass.

The Grievant had a credit card to purchase gasoline for a "pool" vehicle when required. On July 29, 2001 the Grievant purchased 15.307 gallons of gasoline for pool car number 27-324 and returned the car on July 30, 2001. The last gasoline purchased for car 27-324 occurred on April 29, 2001 by Ken Roberts ("Roberts") (JX-14). Roberts filled up the tank at 9616 miles and returned the car with the odometer reading at 9676 miles. The odometer read 9700 when the Grievant purchased the 15.307 gallons of gas on July 29, 2001. The vehicle had travel 84 miles from Roberts', to the Grievant's fill up. Based upon an analysis of the fuel consumption of car 27-324 covering fourteen (14) previous fuel purchases, the vehicle average approximately 24.7 miles per gallon ("mpg"). Therefore, if only 84 miles had been driven between fill ups only three (3) gallons of gas was needed on July 29th for the tank. [4] The car could only physically hold three (3) gallons of gas and no reasonable explanation was provided as to the other twelve (12) gallons. The facts are clear that the Grievant purchased 15 gallons of gas for a vehicle that could only accommodate three (3) gallons.

The Grievant also attempted to cover up her wrongdoings by either omitting required information on the vehicle log (i.e. starting/ending miles, total miles traveled) or adding incorrect information on the vehicle log, (i.e. the gas receipts were lost by the Grievant regarding the May 29, 2001 purchase). Furthermore, the Voyager records indicated that gas was purchased at 9:44 p.m. on May 29, 2001 (JX-1). The Grievant would have no legitimate business reason to drive the pool car at 9:44 p.m., highlighting the devious conduct of the Grievant.

Dutton indicated that in late May of 2001 two black ladies, one driving a white Taurus with a Department of Commerce decal and the other vehicle, a van, were both fueled from the same pump. The employer interviewed Dutton and Brockman commenced the investigation. The station is located in Lewis Center, Ohio about one (1) mile from Grievant's home.

[4] The tank size whether 18 gallons or greater is immaterial based upon the service logs that establishes only 84 miles were driven from Roberts' fill up to the Grievant.

Another example of gas theft occurred on September 12, 2002 when 19.37 gallons was purchased for car number 27-350. Pool car 27-350 was a Ford Taurus, identical to the car used on May 29, 2001 by the Grievant. The purchase of 19.37 gallons for a vehicle with a fuel tank capacity of 18 gallons indicates that some, if not all, of the gas was pumped into another vehicle. This gas was also purchased at Green Meadow BP station. The records were incomplete to perform a similar analysis regarding this purchase. Additionally, the January 16, 2001 incident referenced in York's letter of July 16, 2001 (JX 3-F, A) was not part of this proceeding due to inadequate records as well.

Regarding the parking pass, the Grievant would sign out a pool car, keep the logbooks, keys and parking pass for a number of days without using the car. The pool car has an assigned space in the Riffe garage and any time the parking pass is used for personal use a parking space otherwise available for a paying customer becomes unavailable. This type of use allows an employee to illegally park their vehicle without paying any money to the parking garage, which is operated by the State of Ohio. Between July and August of 2001 the parking pass report indicated forty-two (42) illegal uses occurred while the parking pass was in the Grievant's possession (JX 3F, tab N, JX 3F, tab O). Each entry and exit constitutes theft and the Grievant did not have consent. The argument by the Grievant was that it was past practice to use the parking pass for "pool cars" and personal vehicles is ludicrous. Simply, if pool cars are separated from the parking pass the ability to leave the garage would end. A past practice did exist that if an employee had an **assigned space**, the employee may use that space after work hours as well as the weekend. However, no past practice exists that allows personal use of the pool car-parking pass and no evidence was offered to support this theory.

The Grievant admitted the limited use of the parking pass, but no effort was made to reimburse the State. The Grievant's conduct by using the parking pass for personal use is theft and dishonest.

Regarding the use of the telephone, beginning in 1999 and continuing through March of 2001, the Grievant without business justification made more than fifty (50) telephone calls to the

McMullins. The legitimacy of the McMullins as investors in the TTG Investigation is not supported by the promissory notes (M-2) and McMullin's affidavit (JX 9). The U.S. Bankruptcy Trustee's (William E. Lawson) testimony questions why the Grievant was calling McMullin at all. Finally, a lot of the calls were made from a co-worker's workstation, who was on leave when over a dozen calls were made by the Grievant to the McMullins.

During the investigatory interview and on April 13, 2001 the Grievant sent an e-mail denying that any of the calls were for personal use. (M-6). At the arbitration hearing the Grievant admitted that some of the calls had been for personal use to McMullin. The Grievant also allowed T.McMullin to use the Grievant's home address as her residence in filing an application for employment with the State of Ohio, knowing that T.McMullin was not a resident of Ohio (JT 3F, U). The evidence fails to establish that the McMullins were investors in the TTG matter and the admission by the Grievant of the personal relationship, demonstrates she used the telephone to steal from the state.

The final conduct of the Grievant supporting removal involved her failure to follow a policy issued on September 18, 2001 regarding union leave. The policy required that prior permission be obtained by the union steward regarding grievance matters under the CBA. The Grievant requested in writing, to attend to union business on various dates in October of 2001, from her supervisor Fornshell. Fornshell requested that the Grievant provide more specific information to him prior to authorization. On October 2, 2001 at 10:00 a.m., the first scheduled meeting, the Grievant did not provide specific information to Fornshell but instead went around Fornshell to Downs in an effort to circumvent Fornshell's authority. At 9:20 a.m. Williams left her work station to attend the meeting. At no time prior to October 2, 2001 did the Grievant receive prior approval to attend the meeting from Fornshell. Around 10:30 a.m. Woodrow called Fornshell and advised him that the Grievant's presence at the meeting was authorized. The subsequent charge of insubordination and AWOL from 9:20 a.m. until 10:30 a.m. on October 2, 2001 resulted from these events.

At the arbitration the Grievant recanted previous statements regarding personal use of the telephone and parking pass, without authorization, for only a few times. She also admitted that she allowed T.McMullin to use her home address on the job application knowing that T.McMullin did not reside in Ohio.

The evidence indicates a theft of the gasoline occurred and the "what if" defenses advanced by the union fails to refute the evidence that on both occasions it was impossible for the Grievant to have put either 15.3 or 19.37 gallons of gasoline in the pool car. For all the reasons stated above the Grievant's removal for violating policy 201.0 sections listed infra must stand.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the Department of Commerce burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of all the testimony, exhibits and post hearing briefs of both parties, I find that the grievance is granted. My reasons are as follows:

It is undisputed that on December 12, 2001 a grievance was filed and proceeded in accord with Article 25.02 time limits in processing this matter. On January 28, 2002, Herman Whitter, OCSEA Attorney, waived the right to mediate this grievance and sought that this matter

be scheduled for arbitration. (JE-20) On March 15, 2002 and July 15, 2002 the union requested arbitration and pursuant to the parties negotiated agreement it was mandatory for the arbitration involving discharge grievances to occur within sixty (60) days of the request unless "...grievances involving **criminal charges of an on duty actions of the employee**, grievants who are unable to attend due to a disability or grievances that involve an unfair labor practice charge, **may** exceed the time limits prescribed herein." Article 25.02 (emphasis added). The employer refused to schedule this matter for arbitration based upon the fact that the criminal investigation by OHP which commenced in August 2001, was pending, and Section 25.02 did no require arbitration while the criminal investigation was open.

Ultimately to compel arbitration the union filed an action in state court wherein an agreement was reached to present the procedural dispute to Arbitrator Murphy. Arbitrator Murphy analyzed Article 25.02 and concluded that the exception relied upon by the employer (i.e. grievances involving criminal charges) in extending the sixty (60) day deadline did not include matters involving criminal investigation. Arbitrator Murphy's interpretation, and I concur, of Article 25.02 requires that there must be a formal criminal action pending against the employee in order to defer the sixty (60) day deadline. The language simply does not allow the interpretation suggested by the employer. A criminal investigation of the Grievant's actions by the OHP is not sufficient, nor intended by the plain meaning of the language to trigger this section.

If the parties intended for criminal investigations to toll the sixty (60) days requirement specific language analogous to Article 24.05 which distinguished between "criminal charges" and "criminal investigations" must be present. Simply, "...[had] the parties intended to avoid the strict timeline for the scheduling of the arbitration of a discharged grievance in the case of a criminal investigation, the parties displayed in their contract their knowledge to make such an exception." Arbitrator Murphy, 07-00-(011214)-0361-01-04, December 16, 2002, p. 6.

The Arbitrator cannot modify or add terms to the agreement. The employer's application of Section 25.02 would require the Arbitrator to add the words "criminal investigations" to

existing language that is already clear and unambiguous. The failure by the employer to schedule the hearing, albeit based upon a good faith but mistaken belief, cannot serve as the basis to override contract language.

Thus, in the absence of demonstrable criminal charges existing against the Grievant at the time the arbitration requests were made – the employer violated Article 25.02 by delaying this matter. The repeated requests over an extended timeframe and the unilateral decision by the employer to defer this matter required the granting of this grievance. Due to the employer's failure to schedule this matter while a criminal investigation was open was a violation of the contract, in that formal proceedings are required (i.e. indictment, information or criminal charges) to operate as a waiver of the sixty (60) day strict timeline.

The employer contends that the union waived this procedural issue by entering into a joint stipulation which indicated that this grievance is properly before the Arbitrator for resolution. "Waivers of contractual commitment cannot be lightly entered. Only when the evidence clearly establishes mutual intent to by-pass the negotiated mandates should a waiver be recognized." See, Parent v. Mental Health, OCB Award #607 (Arbitrator Johnson, p. 12) – I agree.

A ruling that boilerplate language constitutes a waiver in this matter is inconsistent with the mutuality necessary for a finding. The evidence supports the union's disagreement at every turn over the failure of Commerce to schedule this matter for hearing. The facts do not support a finding that a mutual agreement existed regarding the waiver of the procedural requirements of Section 25.02.

Due to the above conclusions, the individual charges will not be analyzed as to the sufficiency of evidence to support the "just cause" standard or the plethora of defenses cited by the union. This award is granted due to the procedural defect cited above and not on the substantive charges. The unfortunate consequence, is this award will be viewed as a win by the Grievant and it should not. The overall conduct of the Grievant is not addressed, herein, but serious concerns were evident in the evidence presented by the employer and if continued unabated the end result will include future disciplinary action(s) by the employer.

Regarding remedy, the Grievant's removal occurred approximately eighteen (18) months ago. Due to the employer's good faith doubt as to Section 25.02 and equity principles the Grievant shall be entitled to back pay for nine (9) months only. The Grievant shall provide the employer with proof of all interim earnings realized during the proceeding eighteen (18) months. One-half (1/2) of the total of Grievant's interim earnings shall be deducted from the back pay award. The Grievant shall be entitled to her service and/or departmental seniority back to December 12, 2001.

AWARD

Grievance granted and reinstatement shall occur within seven (7) calendar days. The Grievant shall receive nine (9) months of back pay, less one-half (1/2) of all interim earnings realized since her removal. Jurisdiction over the implementation of the grievance shall be retained for sixty (60) days by the Arbitrator.

Respectfully submitted this 5th day of June, 2003.

Dwight A. Washington, Esq., Arbitrator