#1745

OPINION AND AWARD
Grievance No.: 07-00-00-12-15-301-01-07
The R. Burley Matter

In The Matter of the Arbitration

-between-

The State of Ohio
Department of Commerce

-and-

Ohio Civil Service Employees
Association/AFSCME, Local 11

Arbitrator: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE STATE:

Jason S. Woodrow
Labor Relations Officer
Ohio Department of Commerce
77 South High Street, 23rd Floor
Columbus, Ohio 43266-0544

Kenneth R. Couch, 2nd Chair
Office of Collective Bargaining

Also present:

Richard Selegue
Enforcement Supervisor
Division of Real Estate and
Professional Licensing

Greg McGough
Investigation Supervisor
Division of Real Estate and
Professional Licensing

FOR THE UNION:

William A. Anthony, Jr.
OCSEA Staff Representative
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331

Randolph M. Burley, 2nd Chair
Grievant

Also present:

Randolph M. Burley
Grievant

THE SUSPENSION AND GRIEVANCE:

On December 4, 2000 the Employer notified the Grievant that he was suspended for ten days from his position as an Investigator with the Division of Real Estate and Professional Licensing--a division within the Ohio Department of Commerce. The notice stated:

> The suspension is being given for violation of Policy 201.0
>
> #1. Neglect of duty;
> #2. Insubordination;
> #3. Exercising poor judgment in carrying out and/or following assignments; written policies & procedures; and/or work rules;
> #4. Failure of good behavior;
> #20. Working in excess of schedule hours without required authorization

A timely grievance was filed with a general claim of a violation of the collective bargaining contract and a specific claim of the violation of Articles 2, 5, 24, 25, and 44. The grievance also contained a statement of facts as follows:

> On December 4, 2000, the Grievant was given notice of a ten (10) day suspension. The discipline was imposed without just cause; it was not commensurate with the alleged offenses; it was imposed solely for discipline and not progressive. Additionally, the disciplinary action was at a minimum disparate treatment, if not, discrimination.

THE ISSUE:

The Employer proposed the following issue at the arbitration hearing: "Whether there was just cause to discipline the Grievant; if not, what should the remedy be?" The Union would not accept this statement of the issue, and argued extensively in its brief against the acceptance of this issue by the arbitrator. The Union argued that the acceptance of the "Employer's proposed statement of the issue(s) would essentially be withdrawing all of the Grievant's

claims except one (the just cause claim under Article 24.01 of the contract). The Union claimed that this would constitute a breach of the Union's duty to provide the Grievant with full and competent representation (Union post-hearing brief at 2-3). Finally, it would be an inappropriate exercise of the arbitrator's authority to limit the Grievant as the Employer had proposed.

The arbitrator accepts the Employer's proposed statement of the issue. The statement of the issue in this manner does not constitute a waiver of the Grievant's claims. Furthermore, the record does not disclose an argument by the Employer that this statement of the issue foreclosed any of the claims made by the Union.

Broadly, the Union made several claims that it characterized as "procedural/due process claims." It is common for arbitrators to rule that the "just cause" standard, in and of itself, demands that certain minimal essentials of due process be observed. In addition, a contract may embody broad due process guarantees, as the contract in this case requires a pre-disciplinary meeting in Article 24.04.

The Union made due process challenges to four aspects of this case: (1) the disciplinary process; (2) targeting the Grievant; (3) the punishment; and, (4) the notice of punishment. The Union challenged the manner by which the pre-disciplinary meeting was conducted and the person who presided at the meeting. The Grievant, so claimed the Union, had been subject to disparate and discriminatory treatment. The punishment was not progressive, not commensurate with the offense, and not apportioned to each of the five violations. Finally, the notice of discipline on December 4, 2000 quoted above shows that the discipline was for punishment. This is true because it does not include "some indication of the

specifics for which the discipline was being imposed." (Union post-hearing brief at p. 39).

The opinion below will first discuss the due process claims regarding the disciplinary process. If these claims are established, the severity of the harm to the Grievant could be such that the Employer's case is fatally tainted. The rest of the due process claims will be addressed after analysis of the merits of the Employer's case.

The Grievant also made claims that the Employer violated four provisions of the contract in addition to the provision requiring just cause for the discipline of the Grievant in Article 24. The four other alleged violations included Article 2 NON-DISCRIMINATION, Article 5 MANAGEMENT RIGHTS, Article 25 GRIEVANCE PROCEDURE, and Article 43.03 Mid-Term Contractual Changes. These claims are also subsumed under the standard of just cause. This standard permits an inquiry into whether the Employer violated the contract in the process of disciplining the Grievant.

RELEVANT CONTRACT PROVISIONS:

The particular contract provisions that are the basis of the Union's claim of contract violations by the Employer will be set forth and discussed in the text of the opinion. The following, however, are the provisions of the disciplinary policy issued or revised in January 2000 that were cited by the Employer as the basis for the ten-day suspension of the Grievant.

Policy: 201.0	***DISCIPLINARY POLICY***	***Page 2 Of 5***

PROGRESSIVE DISCIPLINARY POLICY

Violations of Department Work Rules and

Corresponding Disciplinary Measures

VIOLATIONS		RECOMMENDED DISCIPLINARY ACTION			
		1st Offense	2nd Offense	3rd Offense	4th Offense
1.	Neglect of duty or inadequate job performance: includes range of misconduct from routine performance problems to endangerment of life, property, public safety	Severity of discipline depends on nature of offense.			
2.	Insubordination	Severity of discipline depends on nature of offense.			
3.	Exercising poor judgment in carrying out and/or following assignments; written policies & procedures; and/or work rules	Oral Reprimand	Written Reprimand	Suspension	Removal
4.	Failure of Good Behavior	Severity of discipline depends on nature of offense			

. . .

Policy: 201.0 ***DISCIPLINARY POLICY*** ***Page 4 Of 5***

20.	Failure to notify supervisor of absence within ½ hour of start time; working in excess of scheduled hours without required authorization	Oral Reprimand	Written Reprimand	Suspension	Removal

. . .

On February 2, 2000, the Department of Commerce Labor-Management Committee corrected Policy 201.0, violation #4 on Page 2 of 5. The correction stated:

> 4: (Now reads) Failure of Good Behavior, BEHAVIOR NOT ALREADY SPECIFIED WITHIN THE POLICY MANUAL (emphasis in text of correction)

OPINION:

1.) Due Process Claims Concerning the Disciplinary Process

One due process challenge was directed to the person who conducted the pre-disciplinary meeting on November 16, 2000. This same person represented the Employer as the Agency Head designee in the third step grievance meeting under Article 25. The same person then conducted the pre-disciplinary meeting under Article 24 as the Appointing Authority's designee. In addition, the same person represented the Employer as Agency Head designee in another step 3 meeting held sometime in November concerning a different suspension against the Grievant. Lastly, this same person prepared the pre-disciplinary meeting notice and included in it allegations of violations that had not been recommended by the Grievant's supervisor. This person is, therefore, the "Grievant's Primary Accuser, Judge and Employer Representative in relation to these charges." (Union post-hearing brief at 5).

This challenge is directed to the fact that the same person served in different capacities in the disciplinary process leading to the suspension of the Grievant. The claim is that these capacities conflict. This challenge is not based on a claim of personal animus against the Grievant.

There is no conflict in the same person acting as Agency Head designee at the step 3 meeting, and Appointing Authority designee at the pre-disciplinary meeting. While the Grievant did refer to the step 3 meeting as an imperfect "appeal," this is a step in a process that the contract calls "the exclusive method of resolving

grievances." (Article 25.01 (A)). The steps of the grievance process are not appeals. Rather they are efforts to resolve the grievance by a settlement agreement. The significant difference in the three steps of the grievance process is the escalating levels within management hierarchy who participate. Step 1 begins with the immediate supervisor of the Grievant; step 2 moves to the intermediate administrator; and step 3--the step challenged by the Grievant in this case--is at the level of Agency Head or designee.

In addition, the pre-disciplinary meeting is not an adjudicatory hearing. It is characterized on five occasions in the second paragraph of Article 24.04 as "a meeting." Consequently, the person against whom this due process challenge was directed was not acting as a judge of the Grievant in the grievance process under Article 25 or the pre-disciplinary meeting under Article 24.

The record shows that the person against whom the due process challenge was raised serves as the labor relations officer in the office of human resources of the Department of Commerce. His duties require that he regularly act as the designee of the Appointing Authority for pre-disciplinary meetings under Article 24, and as Agency Head designee in step 3 grievance meetings under Article 25. In addition to the fact that these capacities do not conflict when applied to the same discipline, the contract does not require that different persons act in these two capacities with respect to the same discipline.

The Union also challenged the fact that the labor relations officer changed the recommendation for discipline for insubordination made by the Grievant's supervisor, and added four

additional charges. The record shows, however, that the labor relations officer has the duty to evaluate information that comes to his or her office in the form of recommended discipline by supervisors. The labor relations officer must make the judgment as to whether the information qualifies for any discipline; and, if so, under which violation of the disciplinary policy. It is customary for the labor relations officer, acting as the Appointing Authority's designee in Article 24, to include charges in addition to those recommended by supervisors.

The Union also raised a due process challenge to the manner by which the pre-disciplinary meeting on January 16 was conducted. The Grievant was not allowed to bring his own witnesses; nor was the Grievant permitted to ask questions beyond the scope of the statement by the Employer's witnesses. Again, the Union is attempting to characterize the pre-disciplinary meeting as an adjudicatory hearing. It does not include the panoply of fundamental rights to an accused in an adjudicatory hearing.

Lastly, the Union claimed that the notice of the pre-disciplinary hearing was inadequate and the Union's request for documents did not receive sufficient response. The record does not support these challenges. The notice did contain the factual foundation for the charges against the Grievant.[1/] With respect to

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[1/] The Union did argue the absence of specification in the pre-disciplinary notice as to what constituted "failure of Good Behavior"--a fourth charge against the Grievant. There is no need to respond to this element of the due process claim of the Union because this charge against the Grievant was rejected as set forth in the text below. This charge against the Grievant failed to comply with the February 2000 amendment of the Disciplinary Policy.

documents, there was no particularized dispute presented at the arbitration on the production of documents. Quite to the contrary, a considerable amount of time at the arbitration hearing over four days was devoted to the Union's marshalling documents in several boxes for presentation as exhibits.

2.) The Merits

a.) Neglect of Duty

The Grievant is one of three investigators who investigate files and records of employers who employ security guards and private investigators. One of the purposes of the investigation is to make certain that individuals carrying weapons have the requisite authority under State law.

The Grievant would make appointments with the private employers to conduct the investigation at the site of the private employer. Following the investigation, the Grievant would then file an examination report. In addition, the Grievant, as an overtime eligible employee, was required to file time sheets on a biweekly basis with the time sheet completed in accord with the Time Sheet Policy for the Division of Real Estate & Professional Licensing.

There were factual elements to the Employer's case against the Grievant under this charge. First, five examination reports were not submitted. Second, the time sheet for the pay period ending September 23, 2000 was not submitted. Finally, an acceptable time sheet for the pay period ending November 4, 2000 was not submitted. Other time sheets did not comply with the Time Sheet Policy.

There is no doubt in this record that the Employer had just cause to discipline the Grievant for the failure to submit examination reports. The facts show that the supervisor was extraordinarily patient with the Grievant, providing constant reminders to produce the examination reports. The Grievant had a clear understanding of his assignment to produce these reports. Finally, the failure to file the examination reports on the five inspections was a failure to perform an essential part of the Grievant's duties.

An example is the failure of the Grievant to submit an examination report for his examination of the Pinkerton office in Dayton, Ohio. The Pinkerton examination occurred on September 8, 2000. The record begins by showing that the supervisor communicated four times to the Grievant to schedule this examination. The Grievant finally scheduled the examination on September 6 to occur on Friday, September 8, at 9:30 a.m.

The record then shows that the supervisor communicated to the Grievant on the afternoon of September 8 to produce the examination report on the following Monday, September 11, no later than 10:00 a.m. Instead of producing the examination report, the Grievant sent the original notes of his examination to his supervisor at 10:00 a.m. These materials were returned to him eleven minutes later with another order to submit the report with notations on the report of what additional work needs to be completed for the examination.

On September 25, 2000, again, the supervisor reminded the Grievant that his examination report was due. In the face of

relentless, unexplained failure to submit the Pinkerton examination report, the supervisor again requested that the Grievant submit the Pinkerton report and four other overdue examination reports on October 20, 2000. The deadline was then extended to November 6, 2000.

The Union's brief acknowledged that examination reports had not been submitted by the Grievant. "While it is true that 'finished' examination reports had not been submitted by the Grievant, it is not true that they were not submitted due to the Grievant's neglecting his duty." (Union post-hearing brief at 14). The Union noted that materials had been submitted by the Grievant on September 11 to the supervisor, and faulted the supervisor for not reviewing the materials during the eleven minutes in which he possessed the materials. The fact is, the Grievant was ordered on September 11 to submit an examination report with the notation on what additional work needed to be completed for the examination.

The Union also claimed that there was a "computer backlog" in the office, and that the assignments to the Grievant were unreasonable. These matters were offered to explain the failure to submit the examination reports. These exculpatory claims do not have any foundation in this record. First, these matters were not raised by the Grievant in response to the supervisor's continual reminders to the Grievant to produce the examination reports. In addition, there is nothing in the record to connect factually any computer problems with the unexplained failure by the Grievant to produce the reports.

Finally, this neglect of duty constitutes a failure by the Grievant to perform an essential element of his job. His job was to assure that the private industry of security and investigations complied with State laws. On the basis of examination reports by investigators, the State determines what actions should be taken.

With respect to the time sheets, the Employer failed to make its case for neglect of duty by the Grievant in completing time sheets inconsistent with the applicable policy. The pre-disciplinary report recommending the ten-day suspension noted that, "Burley has decided not to fill in the hours works column, but he has decided to add a column on his time sheet that is labeled 'Total Hours Claimed'." Indeed, three exhibits in the record show that the Grievant did exactly as stated in the pre-disciplinary report.

The State fails in this part of its case because there was no "hours worked column." Rather, the time sheets submitted by the Grievant had a column entitled, "Total Hours Paid." The Grievant did not enter any hours under this column, but added a separate column, entitled "Total Hours Claimed."

Finally, the Time Sheet Policy made part of the record included an exhibit "A". This exhibit was a time sheet and it did not have a column entitled "Total Hours Paid." Rather, the time sheet appended to the Time Sheet Policy had a column entitled "Total Hours."

The record includes a substantial number of time sheets by other employees. Many of them show blocks that were not completed as required by the Time Sheet Policy, and a few had editorial

comments placed just above their signatures. Consequently, the Employer's case for neglect of duty against the Grievant on the basis of incorrectly completed time sheets fails. The record clearly shows that disciplining the Grievant for neglect of duty in these incorrectly completed time sheets would constitute disparate treatment of the Grievant. This would also apply to the time sheet for the period ending November 4, 2000 because the Time Sheet Policy was silent on how to complete a time sheet for a period that the employee is on suspension.

Finally, there was a factual foundation for the Employer's charge of neglect of duty in failing to submit his time sheet for September 27, 2000. The record shows many requests by the supervisor for the production of this time sheet, and the Grievant acknowledged that he did not submit until November 16, 2000--the day of the pre-disciplinary meeting. In summary, therefore, the Employer substantiated its case against the Grievant for neglect of duty in his failure to submit examination reports on five examinations conducted by the Grievant five different dates beginning September 8 and ending September 27, 2000. The Employer's case of neglect of duty by the Grievant in failing to submit his September 27, 2000 time sheet is also acknowledged. The Employer did, however, fail to substantiate its case for neglect of duty concerning the incorrectly completed time sheets.

b.) Insubordination

The Employer's charge is that the Grievant disobeyed an order by one of his supervisors to leave the Pinkerton Dayton office by 3:15 p.m. on September 8, 2000. Indeed, the parties stipulated the

following fact at the arbitration hearing: "On September 8, 2000 the Grievant had not departed the Pinkerton Dayton office by 3:15 p.m."

The Union made three arguments in rebuttal. First, "before addressing the merit of this allegation, we would like to point out that nowhere in the Employer's disciplinary notice does it expressly state that the above-stated allegation (failure to depart by 3:15 p.m.) was the basis of its disciplinary action. This position is unsupported. The notice of the pre-disciplinary meeting included the statement, "On September 8, 2000 you were instructed by (a supervisor) to leave the Pinkerton Security Company located in Dayton, Ohio, by 3:15 p.m." The notice continues by noting that the Grievant continued to work. There is no room in this record to claim that the Grievant was not on notice the factual foundation of the charge against him for insubordination.

The remaining two claims by the Union are that the order was unclear, and that it was unreasonable. The lack of clarity was based upon the fact that his supervisor advised the Grievant to finish what was relevant to the examination, and that this advice was given at approximately 3:10 p.m. This, according to the Union, created an ambiguity on whether the Grievant did indeed have a duty to leave at 3:15 p.m. This ambiguity is not reasonably based because it does not comport with the context in which the order by the supervisor was given to the Grievant.

The Grievant initiated the telephone conversation with his supervisor. He telephoned because of a policy requiring

authorization to work overtime. He told the supervisor that he would not be able to complete the examination without staying at the site for an extended period of time. The supervisor refused to approve the overtime--a refusal that led to the order to depart the site by 3:15 p.m. in order to include the travel time to home or office without overtime.

The single purpose, therefore, of the Grievant's telephone call to his supervisor was to obtain permission to work beyond 5:00 p.m. This permission was denied, thereby establishing the reality of the supervisor's order to leave by 3:15 p.m. to avoid the payment of overtime. Consequently, the order by the supervisor to the Grievant was clear, and the Grievant knowingly breached this order.

The Union also claimed that the order was unreasonable. One of the general purposes of an inspection by an investigator is to assist the private employers in complying with the Ohio Revised Code. The Grievant testified that he remained at the site after 3:15 p.m. to assist the private employer in obtaining answers to questions about compliance. He also testified that he was prompted to remain at the site to assist the private employer because of a written reprimand to another investigator and oral reprimands to others.

While the Grievant remained after 3:15 p.m. in furtherance of one of the purposes of an investigation, the Grievant is not in a position to determine what orders by supervisors are to be followed or to be disregarded. In addition, the written reprimand and oral reprimands dealt with an investigator using intimidating and

harassing conduct with the private employer. These reprimands do not justify in any way the failure by the Grievant to comply with the order of his supervisor.

The Employer did have just cause to discipline the Grievant for insubordination. Since the Grievant had initiated a request for overtime, the order to depart at 3:15 p.m. to avoid overtime was clear and reasonable. There was no justification for the failure of the Grievant to comply with the order.

c.) Exercising Poor Judgment in Carrying Out and/or Following Assignments; Written Policies and Procedures

The Employer based this charge on a repetition of the Employer's claim that the Grievant incorrectly completed time sheets under the Time Sheet Policy. The second basis for the Employer's charge is that the Grievant failed to follow the written policy on overtime.

The Employer's position is that the incorrect completion of time sheets under the Time Sheet Policy constituted not only a neglect of duty but also an exercise of poor judgment in carrying out the Time Sheet Policy. For the same reasons stated above in the analysis of the charge of neglect of duty, the Employer's case for exercising poor judgment in complying with the Time Sheet Policy also fails. The Employer then pointed to a time sheet for the week of September 3, 2000 and claimed that the Grievant exercised poor judgment in following the overtime policy. The exercise of poor judgment was, according to the Employer, working in excess of his scheduled hours without obtaining authorization for the overtime.

There is a fatal difficulty in the Employer's theory with respect to this charge. Working in excess of schedule hours without required authorization is set forth as a separate violation under the disciplinary policy. Indeed, this violation constituted the fifth and final charge against the Employer, and is discussed below.

The Employer's theory, therefore, is that an employee who fails to obtain required authorization for overtime violates two separate provisions of the disciplinary policy. This failure constitutes an exercise of poor judgment in complying with the overtime policy, and, in addition, constitutes a violation of a separate provision for working in excess of scheduled hours without required authorization. This is an unreasonable interpretation of the meaning of the phrase "exercising poor judgment." Whatever that phrase means, it is unreasonable to interpret it as encompassing another provision separately set forth in the disciplinary policy, or the Time Sheet Policy.

In summary, the Employer did not have just cause to discipline the Grievant for violating that provision of the disciplinary policy prohibiting the exercise of poor judgment in carrying out and/or following the overtime policy, or the Time Sheet Policy.

d.) Failure of Good Behavior

The Employer claimed that the following behavior constitutes a violation of the provision prohibiting employees from failing to behave in a good manner.

> The Grievant consistently failed to turn in work assignments on time. The Grievant repeatedly misrepresented his work hours on time sheets. The Grievant, on more than one occasion, did not do what he

was instructed to do. (Employer post-hearing brief at 13).

In response, the Union pointed to the revision of the disciplinary policy in February of 2000 to exclude from this violation behavior that is already specified within the disciplinary policy. In other words, the disciplinary policy was amended to avoid this provision becoming a catch-all provision encompassing all other provisions in the disciplinary policy.

The Employer acknowledged that the Union's argument based upon the amendment to the disciplinary policy "would be correct." (Id. at 13). However, the Employer relied upon Section 124.34 of the Ohio Revised Code, which prohibits public employees from engaging in "any other failure of good behavior . . ." According to the Employer, this language is generalized in order to cover all acts of poor behavior.

The fatal difficulty for the Employer is the fact that the Grievant in this case is covered by a collective bargaining agreement. As such, the terms of the collective bargaining agreement, including the disciplinary policy with this amendment, prevails over the statute. Indeed, the disciplinary policy issued by the Employer and applied in this case state that Section 124.03 of the Ohio Revised Code is the statute that governs the discipline of employees not under a collective bargaining agreement.

In summary, the amendment to the disciplinary policy applies in this case. Since the actual foundation for the charge of failure of good behavior is otherwise covered by other provisions of the disciplinary policy, there is no just cause to discipline

the Grievant under the independent provision dealing with failure of good behavior.

e.) Working in Excess of Schedule Hours Without Required Authorization

The factual foundation for this charge centers on the time sheet submitted by the Grievant for the week that included the visit to Pinkerton at the Dayton site. The factual foundation for the charge is that the particular start and end times for the week indicate that the Grievant worked forty hours and fifty-three minutes, and the time sheet does not document the drive time from Pinkerton in Dayton to Columbus.

There is no question that the time sheet did not comply with the particular requirements of the Time Sheet Policy. The time sheet is ambiguous and not clearly completed. On the other hand, the time sheet contained a clearly stated claim for only eight hours for each day of the week, totaling forty hours for the week beginning September 3 and ending September 9, 2000. Indeed, the total number of hours on a daily basis and the total number of hours for the week are inserted by the Grievant under a handwritten column that he entitled "Total Hours Claimed." As the Employer noted, in the pre-disciplinary meeting report, the Grievant did not enter any hours under the column with the printed heading "Total Hours Paid."

In summary, it is obvious that the Grievant did not complete the time sheet consistent with the Time Sheet Policy. On the other hand, as explained in the opinion above, the printed time sheet supplied to the Grievant for the entry of his hours was not

consistent in terms of column headings with Exhibit "A" attached to the Time Sheet Policy.

The Employer did not have just cause to discipline the Grievant for working in excess of schedule hours without required authorization. While the time sheet was unclear and ambiguous, the time sheet clearly shows that the Grievant was not claiming hours beyond that which he was scheduled.

3.) The Union's Contract Claims

As noted above, the Union made claims that the Employer violated five provisions of the contract leading to the discipline of the Grievant. First claimed is that the Employer discriminated against the Grievant under Article 2.01 on the basis of race, sex, and age. The Union sought to support this claim by pointing to the absence of any evidence by the Employer that it had even-handedly enforced the policies against the Grievant as measured by the Employer's treatment of the Grievant's co-workers. "There was no evidence presented to show that the Employer had even-handedly enforced the policies against the Grievant's co-workers as it had against the Grievant." (Union post-hearing brief at 37). Indeed, the Union extracted an admission from the Employer that it did not present evidence at the pre-disciplinary meeting that policies were evenly applied among all of the employees.

The approach by the Union on presenting this alleged contract breach by the Employer of disparate treatment of the employees is misguided. It was up to the Union to show by evidence that the Grievant was not treated in an even-handed manner.

The Union did supply several exhibits of the discipline of other employees. A review of these exhibits does not suggest any separation of employees based upon sex, race or age for purposes of discipline.

The second contract provision alleged to have been breached by the Employer was the Management Rights clause in Article 5. The theory of the Union is that management rights were exercised in manner that abridged other specific articles and sections in the agreement. This is a correct statement of a portion of Article 5. Indeed, a substantial part of the opinion above deals with the question of whether the Grievant had just cause under Article 24 when it exercised its right to discipline. On the other hand, if the Employer exercises management rights in a manner that abridges other articles or sections in the contract, the result is not an independent violation of Article 5; it is a violation of the other articles or sections.

The next article thought to be violated by the Employer was Article 24. Much of the discussion of the opinion above deals with whether there was the required just cause under Article 24.01 for discipline of the Grievant for each of the five charges. In another section of this opinion below, the claims that Article 24 was further violated because the discipline was not progressive and was for punishment, will be discussed.

In respect to possible violations of Article 25, the discussion above rejected the claim that the Employer failed to make available records requested by the Union. In addition, the above discussion rejects the assertion that the step 3 grievance

meeting was an appeal. In fact, according to the contract, the step 3 meeting, as part of the grievance process, was an effort to settle the grievance at the level of the Agency Head or Designee.

Lastly, there was a claim that the Employer violated Article 44.03 in not discussing the Time Sheet Policy with the Union. In light of the findings on the merits above in connection with incorrect completion of time sheets, it is unnecessary to respond to this claim that the Time Sheet Policy was invalidly issued.

4.) The Sanction of Ten-Day Suspension

We have discussed the due process claims by the Union concerning the disciplinary process leading to the decision to suspend the Grievant for ten days. In addition, we have discussed the due process claim that the Grievant was targeted and disparately treated. Now we turn to the due process claims by the Union concerning the amount of punishment and the notice of punishment. We finally determine whether the ten-day suspension is reasonable.

The first claim is that the punishment of ten days suspension was not "commensurate with the offense." The factual basis for this claim is that the Employer did not reveal the actual punishment assessed for each of the five violations, and the failure to disclose is unfair to the Grievant. In other words, the Union is claiming that the Employer had a duty to set a quantum of discipline for each charge of the Grievant's alleged misconduct. This is necessary in order to determine whether the discipline imposed was appropriate and commensurate with the Grievant's offenses.

There is no such contractual duty upon an employer in bringing a number of disciplinary charges against the Grievant to apportion punishment for each of the offenses. There is no such duty stated in Article 24. On the other hand, there is a duty on the part of an employer to comply with the disciplinary grid that is stated in its disciplinary policy made known to the employees. In addition, once the matter is heard in arbitration, the "just cause" standard requires the arbitrator to assess the punishment so as to avoid an arbitrary sanction that is not bottomed in any rational basis. Both of these matters will be considered below on the question whether the ten-day suspension is reasonable.

The next due process claim centers on the notice provided by the Employer on December 4, 2000 of the ten-day suspension in this case. It is the position of the Union that this notice shows that the discipline was for punishment, and, therefore, unfair and a violation of Article 24's requirement of progression in assessing discipline.

> If the Employer's disciplinary measures were intended for any purpose other than punishment, the December 4, 2000 disciplinary notice would have included some indication of the specifics for which the discipline was being imposed. It did not. (Union post-hearing brief at 39).

This argument has a specious quality but does not reflect the manner in which the disciplinary process occurred. It is true that the notice listed the disciplinary rules alleged to have been violated by the Grievant, but did not set forth the Grievant's behavior constituting the violation. The difficulty is that the Union's claim presumes that nothing preceded the Employer's notice

of the ten-day suspension. A notice of a pre-disciplinary meeting was given to the Grievant on November 13, 2000 with substantial recitation of the factual foundation for each of the charges.[2/] This was followed by the pre-disciplinary meeting on November 16, to which the Grievant's contribution was recorded in an exhibit in the record. This was followed by the issuance of a pre-disciplinary report dispatched to the Grievant's Union representative.

We turn now to the questions of whether the ten-day suspension was consistent with the grid set forth in the disciplinary policy. We also consider whether the ten-day suspension is without rational foundation in light of the offenses, prior disciplinary record, and any mitigatory matters.

The Employer found the Grievant to have violated five provisions on the disciplinary policy. It is reasonable to assume that the Employer took into account all five offenses when assessing the ten-day suspension. This opinion, however, found no just cause for the findings of three charges: (1) Working in excess of scheduled hours without required authorization; (2) Exercising poor judgment in carrying out and/or following written policies & procedures; (3) Failure of good behavior. The first two of these three charges found not to be based on just cause would carry only an oral reprimand for first offense. The third of these

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[2/] See footnote 1. at p. 7 supra concerning the charge of failure of good behavior.

charges requires that "severity of discipline depends on nature of offense." The question then becomes whether the dismissal of this third charge cuts against the justification for a ten-day suspension, which can only be based on the charges for which just cause was found: (1) Neglect of duty; (2) Insubordination.

Neglect of duty and Insubordination require that "Severity of discipline depends upon nature of offense. As noted above in this Opinion, the Grievant's failure to submit five examination reports[3/] was a serious lapse in an essential element of his job as an investigator of private security employers. His examination reports were necessary for an assessment of whether participants in the private security industry were complying with State laws, particularly one dealing with the possession of weapons. As noted in the Opinion above, there was no mitigatory reasons for this neglect of duty. In a similar way, the insubordination by the Grievant was the failure to comply with a clear order of his supervisor. There was no justification for his decision not to comply.

[3/] According to the Grievant, he submitted the five finished examination reports on December 6, 2000. This is long after the due date for these reports, which was set at different dates with the last date of November 6, 2000. In any event, the five finished examination reports were submitted after the pre-disciplinary hearing on November 16 and after the notice of the assessment of a ten-day suspension on December 4, 2000.

Finally, the assessment of the ten-day suspension must be weighed by considering the Grievant's prior disciplinary record and any mitigatory matters. With the absence of the latter, the prior disciplinary record looms large in deciding whether the ten-day suspension was without rational foundation.

As noted above, it is reasonable to assume that the Employer took into account all five offenses when assessing the ten-day suspension. While three were found to have not been based on just cause, the Employer did have just cause to discipline the Grievant for neglect of duty and insubordination. This prior disciplinary record in the year 2000 included an oral and a written reprimand, a one day fine, and a five day suspension reduced to a two day suspension by an arbitral award. The key element in his prior disciplinary record, however, is a ten-day suspension issued on October 13, 2000 reduced to an eight-day suspension by an arbitral award. The key fact, however, is that the arbitrator in considering this previous ten-day suspension found that the Employer had just cause to discipline the Grievant for Insubordination.

Since the ten-day suspension assessed in this case is in part based upon an act of insubordination that occurred approximately one month after a previous act of insubordination by the Grievant, the ten- day suspension in this case is reasonable and not arbitrary.

AWARD:

The grievance is denied.

Date: January 20, 2004

John J. Murphy
Arbitrator