

#1752

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

**OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE OHIO STATE HIGHWAY PATROL**

THE EMPLOYER,

AND

**CASE NO: 15-00-021107-0177-04-01
ARBITRATOR: Jerry B. Sellman
DECISION DATED: March 4, 2004
GRIEVANT: Jeffrey Skinner**

**THE OHIO STATE TROOPERS ASSOCIATION,
IUPA/AFL-CIO**

THE UNION.

APPEARANCES:

FOR THE EMPLOYER:

Sgt. Charles J. Linek - Office of Human Resources, Ohio State Highway Patrol, Representing the Employer
Capt. Richard J. Keys - Executive Officer, Technology and Communication Services, Ohio State Highway Patrol, Witness
Carlton Stroop - Electronic Technology Manager, Ohio State Highway Patrol, Witness
Lt. Schaffner - Assistant Commander, District 8, Ohio State Highway Patrol, Witness

FOR THE UNION:

Herschel M. Sigall, Esq. - General Counsel, Ohio State Troopers Association IUPA/AFL-CIO, Representing the Grievant
Elaine N. Silveira - Assistant General Counsel, Ohio State Troopers Association IUPA/AFL-CIO, Representing the Grievant
Jeffrey Skinner - Electronic Technician 3, Ohio State Highway Patrol, Grievant
Michael Chenault - Electronic Technician 3, Ohio State Highway Patrol, Witness
Jeffrey Boatman - Electronic Technician 3, Ohio State Highway Patrol, Witness

I. Nature of the Case:

Suspension and Demotion for Neglect of Duty. This labor arbitration proceeding was conducted pursuant to the provisions of the Collective Bargaining Agreement (hereinafter referred to as the "Agreement") between the Ohio State Troopers Association Unit I (hereinafter referred to as the "Union") and the State of Ohio Department of Public Safety, Division of the Ohio State Highway Patrol (hereinafter referred to as the "Employer"). This proceeding concerns a grievance filed by Jeffrey Skinner (hereinafter referred to as the "Grievant"), an Electronic Technician. The Grievant challenges the Employer's finding of neglect of duty and its subsequent issuance of a five day suspension and demotion. The Employer maintains that the suspension and demotion was proper for it was supported by the results of an Administrative Investigation from which it concluded that the Grievant had neglected his duty as an Electronic Technician 3. The Union and the Employer mutually agreed that the grievance was properly before the Arbitrator. An oral hearing was conducted on January 27, 2004 and the parties submitted post-hearing briefs for the Arbitrator's consideration.

The issue in this proceeding is as follows:

Was the Grievant's demotion and five-day suspension for just cause?
If not, what shall the remedy be?

The applicable provisions in this proceeding are as follows:

COLLECTIVE BARGAINING AGREEMENT

ARTICLE XIX
DISCIPLINARY PROCEDURE

Section 19.01 - Standard

No bargaining unit member shall be reduced in pay or position,

suspended or removed except for just cause.

Section 19.05 - Progressive Discipline

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

1. One or more Verbal Reprimand (with appropriate notation in employee's file);
2. One or more Written Reprimand;
3. One or more day(s) Suspension(s) or a fine not to exceed five (5) days pay, for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining.
4. Demotion or Removal

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

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

II. SUMMARY OF THE TESTIMONY AND POSITION OF THE PARTIES:

The Grievant is an Electronic Technician 3 (ET3) with the Ohio State Highway Patrol. An electronic technician working for the highway patrol is responsible for the maintenance and proper working condition of several different types of electronic equipment. Some of this equipment includes: radio transmitters and receivers, electronic speed measuring devices, blood alcohol computers, video recording equipment, emergency light bars and public address systems. Electronic technicians are classified into two categories; Electronic Technician 2 (ET2) and Electronic Technician 3 (ET3). The difference between an ET2 and ET3 position is that the ET3 position is

tasked with the additional responsibility of supervising the ET2s assigned to the District in which responsibility attaches. The ET3 is responsible for supervising, training and developing subordinate personnel in job duties, technical knowledge and FCC requirements. The ET3 is also responsible for preparing work schedules, assigning tasks and evaluating job performances of subordinates.

The Grievant is one of three electronic technicians assigned to the Wilmington District of the Ohio State Highway Patrol. Prior to October 31, 2002, the Grievant was classified as an Electronic Technician 3. As an ET3, he was the lead worker that supervised and allocated the work of the other two ET2s that reported to him. The Grievant reported directly to S/Lt. Schaffner of the District Staff. S/Lt. Schaffner did not handle technical questions, however, for those questions were handled through the Electronic Technician Manager at General Headquarters in Columbus, Ohio.

The Grievant was demoted from his position as an ET3 effective October 31, 2002. He was charged with a violation of Rule 501.01(C)(10)(b) - Neglect of Duty. In addition to his demotion to an ET2 position, he was also issued a five-day suspension. The Employer determined, based upon an investigation that had been initiated several months previously, the Grievant had failed to perform his job duties as required and failed to notify his supervisors of ongoing radio communication problems.

The investigation of the activities of the Grievant were initiated as a result of field visits in the Grievant's District by the Commander of the Office of Human Resource Management and the Commander of the Office of Information and Technology. During their field visit in May 2002, they became aware of radio coverage problems in the area. The topography of this portion of Ohio is comprised of hilly terrain. There were certain areas within the District where the troopers were unable to maintain adequate contact with the district headquarters.

Initially, two ET3s from other districts were sent to check on radio coverage and vehicle repeaters in the area. They found that a transmitter at the West Union tower was disconnected. Once connected, it was only transmitting 10 watts of power. The 250 watt transmitter should have been operating at a minimum of 100 watts. The technicians corrected the problems they found.

In addition to the visit by these ET3s, three inspection teams were formed to investigate the transmission problems in the area. Their charge was to inspect all of the base radios and several of the mobile radios in the District. In addition to these three inspection teams, numerous employees at each of the posts within the District were also interviewed and the District Radio Shop was evaluated. The inspections and interviews revealed numerous problems including: voter system lights not being installed, vehicle repeaters not aligned properly, low band receivers missing, equipment improperly inventoried at the Radio Shop and a new high band radio at the Lebanon post not installed as directed.

During an inspection of the radio shop in the district, the Electronic Technician Manager found several pieces of equipment in need of repair. Some of the equipment (RADARS and LIDARS) had been in the shop for approximately six months. Twenty-five HT1000 portables (hand-held radios) were found that should have been distributed to the various posts or returned to the Columbus Headquarters for distribution among new troopers. Three Philips Observation Kits were found in the shop. The District headquarters was to have retained one spare and the other two should have been installed at the posts. An inspection of the Federal Communications Commissions records (FCC records) concerning transmitter measurements was found not to be at par with the established requirements.

An inspection of a scale facility in the District revealed numerous problems, including: the

citizens band radio was missing; a new scanner had been installed, but not programmed by electronic technicians; a speaker for the public address system was not functional; and height detectors had not been installed.

Based upon an evaluation of the results of its investigation, the Employer determined that the Grievant did not have the ability to effectively manage the radio shop and properly maintain the equipment in the district. He was demoted and given a five-day suspension.

In an interview with the Grievant's immediate supervisor, S/Lt. Schaffner stated that he had a limited technical knowledge of the operation of the communications systems in the area and he had to rely upon the expertise and information provided to him by the Grievant. He indicated that in monitoring complaints about poor communication and coverage from several of the troopers at posts in the District, he asked the Grievant how those problems could be solved. The Grievant indicated to him that there were continual problems with a tower site failure, because of lightening that had struck the tower, and/or problems with phone lines. Technicians from the inspection team did find a problem with the phone lines at the Higginsport tower and called the phone company about the problem. It was repaired the very next day. Technicians did not find a problem with phone lines at the West Union tower, however.

Most of the problems encountered by the inspection teams centered on misalignment or incorrect adjustment of equipment. In particular, pyramid repeaters (mobile radio extenders) in the patrol cars were misaligned and voter systems (these are used to determine the best in-coming signal to send to the dispatch console) needed adjustment. There were complaints of continued problems with numerous attempts to repair equipment. The Employer did not consider the radio shop to be properly maintained. The Grievant allowed numerous pieces of electronic equipment to remain in

the radio shop for an extended period of time. The shop had nine spare pyramid repeaters, but of the nine, only two were functional. The remainder had either not been repaired or screws and other hardware had been removed. The shop had twenty-five spare Motorola HT-1000 units. Of these 25 portables, 15 were portables sent to the District in February to be assigned to each post and also to serve as spare portables for SWAT officers. Those units had been sent to the District in February and were still in the radio shop as of July.

The Federal Communications Commission and the Division require transmitter measurements of base station, mobile, portable and RADAR transmitters. The records for portable and RADAR transmitters were in good condition, but the base station and mobile transmitter records had been neglected. No more than 10% of those records could be found.

At the conclusion of the investigation, the Employer determined that the Grievant had failed to follow direct orders on a number of occasions. In November 2001, the Grievant was instructed to install a high band radio at the Lebanon post within the District. During inspections in June 2002, it was discovered that the high band radio had not been installed. The Employer instructed the Grievant to install it at the Lebanon post, because they did not have an FCC license to utilize the tower site at a location where the Grievant preferred to install it, at the Justice Center. A low band radio had been installed at the Justice Center and the Grievant believed it made sense to install the high band radio there. It could not be installed until a license was issued by the FCC. The Grievant stated that he delayed installing the high band radio at the Lebanon location for he believed that it would not be long before a license could be received at the Justice Center and there was no need to install it at one location and then later move it.

During the inspection of the radio shop in the Summer of 2002, the Grievant's supervisor instructed him to purchase a new Telecommunications Device for the Deaf (TDD). Upon a subsequent inspection, it was determined that the TDD device had not been purchased as instructed. The Employer maintained that the device should have been purchased immediately; the Grievant explained that he believed he could get it cheaper and faster from another source, because the local Radio Shack did not have the device they required in stock.

The Grievant was also instructed to install ORION radio control heads in each patrol car. Per procedure, the buttons on these control heads were to be formatted uniformly on every car across the state. It was important that there be consistent placement of these buttons in each car due to officer safety. Not every trooper is assigned his/her personal patrol car or drives the same car every day. As a result, it was imperative that emergency buttons be in same place in every car. During the investigation, it was determined that the orange emergency buttons were placed randomly and not consistently in the same location. To the extent that there were not enough regular buttons to be placed on the control head, the Grievant was instructed to use a label maker to accomplish the task. Rather than using the label maker, to designate the location of certain buttons, the Grievant had delayed completion of the task indicating that the buttons were on order.

One of the complaints in the District was that height detectors were not installed at one of the scale houses. Height detectors are used at the scale house to determine if trucks are properly operating within the state of Ohio. In investigating this complaint, the Grievant indicated that the Ohio Department of Transportation had unhooked the wiring and he could not repair them immediately, because new poles had to be erected in order to install them. The detectors would not work on the eaves of the existing building. The Employer believed that these should have been

installed in a much shorter period of time.

Based upon interviews, the Employer determined that the Grievant lacked the organizational skills needed in an ET3 position. The Grievant's immediate supervisor, S/Lt. Schaffner, testified that he had explained to the Grievant on a number of occasions that he needed to work on his organization skills. S/Lt. Schaffner assisted one of the ET2's in the development of a tracking sheet as a tool for the ET's use. The form was created to track the amount of repair the electronic technicians were performing. The idea behind the tracking document was to show the amount of work being done in an attempt to justify additional manpower for the radio shop. Eventually, in order to keep up with the work load in the District, S/Lt. Schaffner had to personally assign duties to the technicians and schedule their work. The Grievant had to remain in the shop while the two other electronic technicians were assigned to the posts, because he was the most experienced in being able to repair and handle most of the problems that came in to the shop. S/Lt. Schaffner did not believe that it was his duty to micro-manage the Grievant, but that the Grievant should have been able to handle these organizational skills in the ET3 position.

Subsequent to the demotion of the Grievant, S/Lt. Schaffner testified that the philosophy of the repair shop had changed from reactive to proactive. While on some days, he may have called Electronic Technology Manager Stroop twelve times a day with questions, innovative solutions were developed and the shop was much more efficient.

The Grievant testified that, based upon the number of problems and repairs that needed to be addressed in the District, he was doing the best he could with the personnel and training that he had. He believed that many of the deficiencies cited by the Employer in its investigation were the result of too much work to be done in too little time. In addition, while he did receive some training

by various equipment vendors, that training was limited.

The Union presented the testimony of an ET3 who had taken the ET3 position in District 9, which position the Grievant occupied prior to transferring to District 8.¹ After two years and eleven months, the ET3 requested a voluntary demotion, because he was overwhelmed with the job. The amount of stress created by the job was more than he could handle. The Employer acknowledged this voluntary demotion, but indicated that he was the only ET3 in the state, of whom they had knowledge, that requested a demotion. The Employer believed that District 6 and District 3 were busier than District 8, but admitted that District 8 was the third busiest District in the state.

When the Grievant commenced operations at District 8, he found an understaffed operation functioning in an old garage and struggling to keep up with increasing demands upon an outmoded infrastructure and outdated physical plant. All of the Post Commanders within the District would call upon him for an immediate response to problems. He was required to serve many masters.

The investigation into the communication issues in District 8 took place in June and July, 2002. In the Fall of 2001, an Annual Evaluation of the Grievant was completed. In the Evaluation, his immediate supervisor indicated that he either met or exceeded the Employer's expectations. His Annual Performance Evaluation contained the following notes:

1. "Jeff has a very good working knowledge...cares about the quality of work he performs and that of the other techs....is a dedicated, hard working employee."

¹The Grievant had worked for a number of years as an ET2 until such time that he was transferred to District 9 and promoted to an ET3. On the strength of his performance at District 9, the Grievant was offered the "lead man" position at District 8, when a very long-term ET3 retired from that slot.

2. "Jeff works diligently to prioritize assignments and handle short notice requests which occur regularly."
3. "Jeff is definitely a team player, looking often at the big picture. He gets along with all District employees."
4. "Jeff is capable of relaying clear, concise information, whether written or spoken."
5. "Jeff operates all equipment properly. He does not waste or damage materials, tools, or equipment."
6. "Jeff is aware of the needs of the District and the constant changing of his workload. He should strive to continue to improve relations with all DHQ facilities."
7. "Jeff is aware of the importance of safety and ensures that procedures are followed regarding issues in the radio shop."

The Grievant's entire department record contains only a single verbal reprimand, which was issued in April of 2002 for arriving at work ten minutes late.

In his testimony, the Grievant admitted that there was room for improvement. He believed he was doing his best, however, based upon the work load and not only his training, but the training of those under him. During the Grievant's tenure in District 8, he has had a number of life experiences that had an impact upon his job. First, he had to contend with his dying father who was ill with cancer. He had marital problems which ended in divorce eighteen months later. He was involved in an automobile accident that incapacitated him for weeks. He was diagnosed with clinical depression for which he has been treating with adjusting medication and counseling. He was also forced to work with a weakened support staff for one of his ET2s was affected by recurring and debilitating Krones Disease that effected his ability to work. Notwithstanding these problems, however, the Grievant believed that the conditions in his District had improved, since he arrived.

The audit and investigation into the technology and communications services in District 8 was the first comprehensive audit and investigation of any District in the state of Ohio. This investigation was initiated not by complaints from the District, but as a result of observations resulting from field visits to the District by the Commander of the Office of Human Resource Management for the Ohio State Highway Patrol.

The Position of the Employer

The Employer maintains that it had just cause to suspend the Grievant and demote him from an ET3 to an ET2 position. It believes that the administrative investigation conducted by it demonstrated that the Grievant could not handle the responsibilities of an Electronic Technician 3. The evidence reveals that he was incapable of allocating the duties associated with the position to those subordinate to him. It asserts that the Grievant would complete tasks only if they were completed his way, utilizing his time line. The only parameters to his time lines were that he would get to them when he was good and ready. Even when his supervisors provide direction, he ignores the direction and later rationalizes the reason for not following through with their instruction.

The Employer believes that the Grievant has misled his supervisors. He indicated to them that he installed the high band radio at Lebanon, when he did not. He indicated that it was telephone lines that caused problems with receivers, when they should have been corrected quickly. He misled the District staff about the buttons that were supposedly on order for the ORION radios.

The Employer asserts that the Grievant's position as an ET3 requires a great deal of responsibility and trust. The life line between the trooper on the road and the dispatcher at the post is the communication equipment. The Grievant's failure to insure the proper functioning of communication equipment placed the lives of troopers in District 8 in jeopardy.

The Grievant has been lax in maintaining FCC radio records, a Federal requirement. He has not properly trained the ET2's assigned to the District. Perhaps most importantly, he has failed to advise the District Staff of the problems he was encountering and all the work that was not getting accomplished. The Grievant, as an ET3, was in a lead position and was responsible for the training and guiding of the ET2's assigned to the District.

The Employer argues that it has shown that the Grievant is incapable of working as a lead worker. He has been sent to training on a number of different times, but he continues to handle electronic equipment issues his way, except the way as instructed. It believes that his statements during the investigation and during the arbitration show that he is incapable of being rehabilitated by progressive discipline in order to function as an effective lead worker. It believes that it has presented substantial evidence to support the discipline rendered in this case.

The Position of the Union

The Union argues that neither the suspension nor the demotion is justified in this case. The Grievant has never been reprimanded for his job performance and, as such, cannot under the principles of progressive discipline be subject to this type of penalty. His department record contains only a verbal reprimand issued in April of 2002 for arriving at work ten minutes late. His last Annual Performance Evaluation shows that he either met or exceeded all of the Employer's expectations.

While the unprecedented audit did uncover a number of deficiencies, there exists no basis upon which to compare the deficiencies in District 8 with deficiencies in others. Because audits have not been conducted in any other district, it cannot be determined if problems are greater, less or the same in the other districts. The investigation was not initiated because there were more complaints

coming out of District 8 than any other districts; it was initiated because of a chance field visit by the Commander.

During the "District 8 Investigation," a number of individuals employed by the Patrol in the District were asked to respond to questions as to how well the radio shop met their needs. While there certainly were a number of complaints by individuals in those interviews, many indicated that the radio shop did meet their needs. They believed that the radio shop had improved greatly over the past, that the radio techs were accessible for emergency repairs, that the quality of repair was good and that the radio staff presented an organized and professional image. In sum, the Union argues that the Grievant, based upon the volume of work for the limited staff, was doing his job.

The Union cautions that the arbitrator must be mindful of the nature of the investigation itself. It points out that there were no audits previously performed on this or any other District shop. There had been no previous accounting and second guessing of priorities. While it was the Grievant that took the brunt of the responsibilities for deficiencies, the arbitrator should not forget that the manager of the electronic technician shops at Patrol Headquarters should have some responsibility for the condition of the shops and the shortcomings that exist.

Based upon all of these circumstances, the Union argues that the Grievant did not deserve either the demotion or the suspension. An application of progressive discipline principles requires that verbal and or written reprimands be given before a suspension is issued. The Grievant was not afforded the opportunity to effect any of the changes, which the Patrol deemed necessary after its investigation. If the Grievant is to suffer any discipline, it must be discipline consistent with the concept of putting the Grievant on notice that he must adjust his conduct to meet the Employer's standards. The Union asks that the Grievant be restored to his former classification and made whole

for any losses incurred as a result of his suspension and demotion, including back pay, benefits and all seniority rights that might attach to the restoration to an ET3.

III. DISCUSSION AND OPINION:

The central issue to be determined in this case is whether the Employer had "just cause" to suspend and demote the Grievant. The parties' Agreement, not unlike many others, does not specifically define "just cause." There are a number of arbitration decisions that have developed a well-established and commonly accepted test for determining just cause. One of those is *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966). The criteria set forth in that case, and followed by many Arbitrators, consists of several elements: 1) whether the Employer promulgated policies prohibiting the Grievant's conduct; 2) whether the Employer communicated those policies to employees including the potential consequences for violation of the policies; 3) whether the Employer's policies reasonably related to the orderly, efficient, and safe operation of the Employer's business; 4) whether the Employer completed a proper investigation, which included interviewing the Grievant; 5) whether, based upon the investigation, the Employer obtained substantial evidence that the Grievant had engaged in the prohibited conduct; 6) whether the Employer applied its policies in a nondiscriminatory manner; and 7) whether the Employer imposed an appropriate penalty. The current thinking in determining the level of discipline appropriate in each case is that discipline should be imposed in gradually increasing degrees, except in cases involving the most extreme breaches of the fundamental understanding. This Arbitrator has found that when determining whether or not just cause for disciplinary action exists, it is a minimum requirement of the Employer to demonstrate that clear and convincing evidence exists to substantiate the Employer's position. In rendering a decision herein, the Arbitrator must apply these criteria to the facts of this case to

determine whether the Employer's burden of proof has been met.

There is little question that neglect of duty is an offense, the commission of which, is sufficient to subject an employee to discipline by an Employer. It is fundamentally the obligation to perform the duties of a job that gives rise to the employment relationship itself. In regard to the offense charged in this instance, all of the above criteria can be answered in the positive, with the exception of two important elements: whether the Grievant engaged in the prohibited conduct and whether the discipline was an appropriate penalty. The Arbitrator does not believe that the Employer demonstrated with clear and convincing evidence that the Grievant neglected the duties assigned him or that the discipline of suspension and demotion is an appropriate remedy under the Employer's own progressive disciplinary principles.

The evidence in this proceeding demonstrates that there were a number of problems and deficiencies relating to the maintenance of electronic equipment and telecommunication devices in District 8. The Grievant, as an Electronic Technician 3, was responsible for the modification, installation, repairing, maintenance and testing of all electronic equipment for patrol posts and vehicles in the District. While the evidence clearly demonstrates that, as a result of the investigation which took place in June and July of 2002, there were numerous deficiencies in electronic equipment, the totality of the evidence is not conclusive that the Grievant so neglected his duty that he should be subjected to the discipline meted out by the Employer. The Arbitrator finds this to be true, *a fortiori*, in light of the Employer's own progressive disciplinary rules.

The Grievant has been an employee of the Ohio State Highway Patrol for fourteen years. In 1989, he was hired in as an Electronic Technician 2. He was transferred to District 9 where he became an Electronic Technician 3 with basically the same duties as an Electronic Technician 2, but

with a leadership role. Having apparently performed well in that District, he was transferred to District 8, which was admittedly plagued with a number of problems, including a shortage of staff. Although he has performed duties as an Electronic Technician 3 in District 8 since April 3, 2000, the evidence does not reveal any discussions, annual reviews or discipline of any nature relative to a lack of job performance.

One must conclude that not only for more than two years in District 8, but since he has performed duties as an Electronic Technician in the fourteen years that he has been with the Ohio State Highway Patrol, he has responded to thousands of service requests and has performed maintenance and repair on thousands of pieces of equipment. While he received technical training from the manufacturers of the various equipment, and had attended at least one class to enhance his organizational skills, the evidence does not demonstrate that any other training program exists within the Patrol to assist either ET2s or ET3s in the performance of their duties. When the arbitrator evaluates the performance of the Grievant in light of this background, it is impossible to conclude that the Grievant neglected his duty to the extent that the subject discipline was warranted without any benchmark with which to determine the level of duty that the Grievant was expected to achieve.

The Arbitrator is mindful that the ET3's position requires a great deal of responsibility and trust. He recognizes that the lifeline between the trooper on the road and the dispatcher at the post is the communication equipment. An ET3's failure to insure the proper functioning of the communication equipment will place the lives of troopers in jeopardy. With this in mind, however, a reasonable person would expect troopers in the field to be lodging complaints with their district commander, if they believed that the level of their safety was being jeopardized as a result of the failure of the communications system. While there were obvious notations of dissatisfaction by

personnel in District 8 over the years, the evidence does not demonstrate that those complaints were any different in District 8 compared to any other District in the state. If the problems that existed in District Eight were either greater than or significantly different than other Districts, perhaps the level of performance would be viewed differently. The Arbitrator is left without any evidence to demonstrate this and he must evaluate the totality of the evidence as presented to him.

The investigation which took place in District 8 was not a result of complaints by the District Commander, complaints by troopers in the field or complaints by Electronic Technician supervisory staff at District Headquarters. It was initiated as a result of a field visit where inquiries were made as to why there were so many dead spots in the hilly terrain in District. In addition to sending two ET3s to the District to assist with some of the initial problems, three teams from various districts along with personnel from the Information and Technology Section were sent to the District to evaluate these problems. Under the microscope of these three select teams, a number of deficiencies were discovered. Prior to this audit there apparently was no proactive methodology of supervision used by the Employer.

Under the parties' Collective Bargaining Agreement, the Employer has the exclusive and inherent right and authority to manage and operate its facilities and programs. Included in that right is the authority to determine what is considered to be an acceptable level of performance by its employees. In this instance, the Employer has determined that the level of performance by the Grievant is unacceptable. The arbitrator has no authority, nor does he intend to infringe upon nor diminish that right. The ability to discipline an employee under this inherent right, however, is not unfettered. It is subject to the principles of progressive discipline set forth in Article 19, Section 19.05 of the parties' Agreement. Therein, the Employer has agreed that disciplinary action shall

commence with one or more verbal reprimands prior to proceeding to written reprimands, suspensions and demotion or removal. In this case, the Arbitrator does not find that the offense is one which would permit the Employer to avoid these progressive steps.

The Employer determined that the radio shop was in disarray. Various communication items, including RADARS, LIDARS and a telecommunication device for the deaf (TDD), were not repaired, maintained and/or distributed among the various posts and/or sent to Patrol Headquarters for repair as it believed should have been done. The Employer, however, presented no evidence to demonstrate what standards were used as a benchmark of acceptability, or at least at a minimum, that it had made it's position known to the employee that the shop's condition was substandard or unacceptable. While the investigation revealed that a number of hand-held radios were found in the shop and should have been sent out to various posts or returned to Columbus for distribution among new troopers, there was no evidence to demonstrate that the failure to do so was such a breach of the Grievant's duties that he should be demoted for that action.

The Employer's investigation revealed that there were several pieces of equipment that weren't properly adjusted. In particular, it was determined that the voter system in some instances was not properly adjusted and voter system lights were not installed at several of the posts. In addition, it was discovered that several of the pyramid repeaters on the portable radios were not adjusted properly. Evidence demonstrates, however, that many of the adjustments that were needed were minor as opposed to major in nature.

While the Grievant acknowledged the deficiencies cited above, he indicated that many of these deficiencies occurred as a result of a lack of staff to keep up with the volume of work. As an Electronic Technician 3, he made the decision as to the priority of the completion of the work. As

a result of that, some items were done prior to others and some work was not performed within the time-frame as either anticipated or desired by those seeking maintenance and repairs. In regard to installing the new height detectors at the locals scales, it was clear from the testimony of the Grievant that such work was not considered of the same priority as other repairs and maintenance required in the District. The Employer need not accept nor tolerate below standard performance. In order to apply a level of discipline for what it considers to be substandard or a neglect of duty, the Employer must have a basis for determining the standard, either by way of comparison or policy or procedure. Not only did the Employer fail to present evidence concerning the level of performance by other busy Districts in the state, it did not present sufficient evidence to demonstrate that, based upon the work load in District 8, the "neglect of duty" "was such that either a demotion or a five-day suspension was justified. As argued by the Union's advocate, "yet when (one) totals up the inventory of items out of place, the equipment kept too long and jobs not immediately completed, the list looks impressive. The first answer of course is that he has totaled up the list of errors and omissions and not of the myriad of items, areas, concerns, completions, innovative solutions, renovations, updating, successes of what was acknowledged to be an overtaxed and clearly undertrained staff of ET's." This factor may have been deemed to have been irrelevant by the Employer, because those are duties which the Grievant was employed to fulfill. However, under the principles of progressive discipline, an employee cannot be expected to improve on his or her work performance unless informed that the level of that performance is inadequate. Here, the evidence does not reflect any notification to the Grievant.

Based solely upon the type of inadequacies found, the workload of the Grievant and the lack of any notification of substandard work performance, the appropriate remedy under the principles

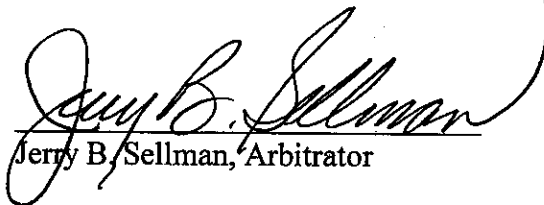
of progressive discipline should be a verbal reprimand. In considering the appropriate remedy in this case, however, the Arbitrator must consider the totality of the actions or inactions of the Grievant.

The incident concerning the TDD device is a questionable failure to follow an order. It is plausible that the Grievant's explanation relative to the shipping date of the device, as well as the cost of the device, prompted him to order it from another source is correct. There is no excuse, however, to fail to install a high band radio at the Lebanon post when instructed to do so and then inform an immediate superior that such installation had taken place when it had not. Even if the Grievant's judgment relative to where it should be placed was ultimately deemed to be the best decision, he should have communicated that to his superiors who had the right to make the final decision. This insubordination is unacceptable. The Grievant was aware of the importance of complying with FCC reporting requirements. His failure to fulfill those requirements was inexcusable. As a result of this action, and in light of the totality of all of the circumstances in this case, including the Grievant's work record, the appropriate remedy in this proceeding should be a written reprimand. Based upon lack of notification to the Grievant of an unacceptable work performance level, the imposition of any suspension or demotion is not supported with just cause.

IV. AWARD

For foregoing reasons and conclusions, the Grievance is sustained in part and denied in part. It is sustained to the extent that the discipline of suspension and demotion in this proceeding is inappropriate for the offense committed, when considered in light of all the facts and circumstances of the record. It is denied to the extent that the Employer has demonstrated just cause to discipline the employee for failure to carry out an order to install a high band radio, falsely communicating to his superiors that work had been completed when it was not and failing to maintain FCC records as

a requirement of the job. The Arbitrator therefor reduces the five-day suspension and demotion to a written reprimand to be contained in the Grievant's employment record. The Grievant is entitled to be made whole for any past-due compensation and/or benefits as a result of his demotion and suspension and he is to be reinstated to the position of Electronic Technician 3.


Jerry B. Sellman, Arbitrator