

**SUSAN GRODY RUBEN, Esq.**  
**Arbitrator and Mediator**  
**30799 Pinetree Road, No. 226**  
**Cleveland, OH 44124**

**IN ARBITRATION PROCEEDINGS PURSUANT TO**  
**COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES**

**In the Matter of**

**OHIO CIVIL SERVICE EMPLOYEES**  
**ASSOCIATION, Local 11, AFSCME**

**and**

**STATE OF OHIO,**  
**BUREAU OF WORKERS**  
**COMPENSATION**

**Case No. 34-06-090121-0006-01-09**  
**Grievant: Robert White**

# 1056

**ARBITRATOR'S**

**OPINION AND AWARD**

RECEIVED / REVIEWED

FEB 11 2010

OCSEA-OFFICE OF  
GENERAL COUNSEL

**This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME ("the Union") and STATE OF OHIO, BUREAU OF WORKERS COMPENSATION ("the Employer" or "BWC"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.**

**Hearing was held September 24, 2009. The Parties stipulated the case was properly before the Arbitrator. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, as well as the introduction of exhibits. Both Parties submitted timely post-hearing briefs.**

**APPEARANCES:**

**On behalf of the Union:**

**LORI J. ELMORE, OCSEA Staff Representative, 390  
Worthington Rd., Westerville, OH 43082.**

**On behalf of the Employer:**

**BRADLEY A. NIELSEN, Labor Relations Officer 3,  
Ohio Bureau of Workers Compensation, 30 W. Spring  
St., L-28, Columbus, OH 43215.**

**STIPULATED ISSUE**

**Did the Ohio Bureau of Workers' Compensation possess just cause to issue Claims Assistant Robert White a ten (10) day suspension? If not, what shall the remedy be?**

**RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT**

**March 1, 2006 - February 28, 2009**

**. . .**

**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....**

**24.02 - Progressive Discipline**

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

- a. One or more oral reprimand(s) (with appropriate notation in employee's file);**
- b. One or more written reprimand(s);**
- c. Working suspension;**
- d. One or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline....**
- e. One or more day(s) suspension(s);**
- f. Reduction of one (1) step; This shall not interfere with the employee's normal step anniversary. Solely at the Employer's discretion, this action shall only be used as an alternative to termination.**
- g. Termination.**

**Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.**

**...**

**...**

**24.04 - Investigatory Interview**

**An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.**

**When employees have a right to and have requested a steward, stewards shall have the right to be informed of the purpose of the interview and to receive a copy of any documents the Employer gives to an employee to keep, during an investigatory meeting....**

...

#### **24.06 - Imposition of Discipline**

...

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

...

#### **24.07 - Prior Disciplinary Actions**

**All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.**

**Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.**

...

...

...

### **FACTS**

**The Grievant is a Claims Assistant in the Columbus Service Office of the Bureau of Workers Compensation ("BWC"). At the time of the instant discipline, he had approximately 18 years of service with the Employer. On January 15, 2009, the Grievant received a 10-day suspension for misconduct relating to timekeeping and cooperating in the internal investigation regarding his timekeeping.**

**The Grievant's active prior disciplinary history consists of a March 19, 2008 Verbal Reprimand for misconduct regarding discourtesy to a co-worker.**

**The memorandum of that Verbal Reprimand provides in pertinent part:**

**This document is to serve as a verbal reprimand issued for violating BWC Progressive Disciplinary Guidelines (Work Rules) for Bargaining Unit Employees:**

**Discourteous and/or rude treatment of a fellow employee or manager.**

**Specifically, on 3/3/2008, Robert engaged in inappropriate behavior in a verbal altercation with Pam Koshar, IMS, regarding an injured worker. Several witnesses have verified that you spoke to Pam in a confrontational manner, which disrupted a meeting being held at the Columbus Service Office.**

**Such conduct is unacceptable for a member of a BWC Columbus Service Office staff.**

**You have admitted to losing your temper, raising your voice and stating that you told Pam Koshar to "shut up." You have also displayed remorse for your actions and offered to apologize to Pam for your behavior.**

**It is hoped that this verbal reprimand will serve to correct your actions. However, be advised that any further incidents of this nature may result in a suspension.**

**The Grievant also had received a 3-day/30-hour fine in September 2008 for misconduct relating to discourtesy to a co-worker. That discipline was reversed by an arbitrator, however, in a Non-Traditional Arbitration (“NTA”) held June 18, 2009.**

**On September 4, 2008, BWC’s then-Director of Employee and Labor Relations sent a memo to all BWC employees regarding timekeeping. The memo provides in pertinent part:**

**Subject: Timekeeping Reminder**

**As discussed during the All-Hands Meeting earlier this afternoon, the Employee and Labor Relations Department has recently dealt with multiple cases of employees reporting their time inaccurately. To prevent other employees from suffering an embarrassing or unfortunate situation, here’s a reminder of BWC’s timekeeping policy and expectations of employees:**

**First and most importantly, please make sure you enter accurate starting, ending, and lunch times in the timekeeping system. Enter the actual time that you arrived at work, the actual time you departed for and returned from lunch, and the actual time you left for the day. Do not round or estimate your time.**

**To ensure accuracy, we recommend that you enter your start time as soon as you arrive at work. Enter your “lunch out” right before you leave and your “lunch in” as soon as you return. Finally, enter your ending time just before you leave for the day.**

**The policy does not require you to enter the time as it occurs, but entering all of the information at one**

**time of the day could lead to inaccurate timekeeping.**

**Please use the "Daily Comments" section to document variations from your usual schedule such as working through lunch, starting your day at a different location tha[n] you usually report to, etc.**

**Finally, our policy does not allow you to use either of your paid 15 minute breaks to shorten the work day. In other words, you cannot come in 15 minutes after your starting time or leave 15 minutes early and claim that as paid work time.**

...

**The BWC's "Hours of Work/Time Accounting Policy" in place at the time of the instant occurrences provides in pertinent part:**

...

**Bureau employees are entitled to a forty-five minute lunch and two (2) fifteen (15) minute breaks. Bureau employees may opt to combine their morning or afternoon break with their lunch period for a total of sixty (60) minutes for lunch provided they properly document their exercise of this option on the daily attendance sheet. Although supervisors and managers may occasionally permit an employee to "flex" his or her lunch period (or some other period of time) to make up for normal work hours, the employee must indicate on his or her sign-in sheet that he or she is "flexing." The supervisor's signature on the actual time sheet will serve as confirmation to the employee and to the Payroll Department that he or she approved the employee's request to "flex."**

...

**The January 15, 2009 suspension letter to the Grievant provides in pertinent part:**

**The Ohio Bureau of Workers' Compensation (BWC) is hereby issuing a ten (10) day suspension.**

**The BWC determined there is just cause for discipline based upon the following violations of the BWC Work Rules for Bargaining Unit Employees: Insubordination: a) Willful disobedience/failure to carry out a direct order; & Dishonesty: f) Willful falsification of an official document.**

**Specifically, from August 1, 2008, through September 30, 2008, you failed to enter accurate time entries in the BWC Tracking System on approximately thirty-three (33) separate occasions. On November 13, 2008, even after receiving a direct order to answer all questions fully and accurately, you failed to answer approximately seven (7) questions during an investigatory interview.**

**Your ten (10) day suspension is recorded and treated as imposed on the following dates:**

**Five (5) day (40 hour) working suspension with pay:  
January 19-24, 2009; &  
Five (5) day (40 hour) suspension without pay:  
January 26-30, 2009.**

**Please report to work as usual on the aforementioned dates of your *working* suspension. This discipline shall remain in your personnel file pursuant to the terms of the OCSEA contract.**

**Please be advised continued violations of the BWC Work Rules for Bargaining Unit Employees shall result in the imposition of more severe disciplinary action, up to and including removal.**



**The January 20, 2009 grievance provides in pertinent part:**

...

**Statement of facts....**

**On January 15<sup>th</sup>, the grievant was issued a 10 day suspension without just cause. Management continues to harass the grievant and treats him disparately.**

**Remedy sought:**

**Remove the discipline from his record. Pay the grievant back for the days missed. Stop the harassment and disparate treatment against the grievant. Make the grievant whole.**

**PARTIES' POSITIONS**

**Employer's Position**

**Dishonesty**

**The BWC charged the Grievant with approximately 33 separate incidents of entering falsified time entries. Most of these times, the Grievant entered a start time prior to the time he actually reported to work. The Grievant also entered falsified lunch out/in entries. Management did not discipline the Grievant for failing to enter his start/end times as he arrived/departed from work; it disciplined him for making false entries.**

**Moreover, even after the September 4, 2008 all-hands meeting and memo regarding accurate timekeeping, the Grievant continued to falsify his entries. An egregious example is September 15, 2008:**

- The Grievant's vehicle enters the BWC parking garage at 7:23am.**
- The Grievant enters a start time of 7:30am, 30 minutes tardy.**
- The Grievant enters the parking garage on foot at 1:40pm.**
- The Grievant's vehicle exits the parking garage at 1:37pm.<sup>1</sup>**
- Lunch out entry of 2:00pm.**
- Lunch in entry of 2:15pm.**
- The Grievant's vehicle re-enters the parking garage at 2:25pm.**
- The Grievant enters a logout time of 5:45pm.**

**Accounting for the time in the manner most beneficial to the Grievant, he took lunch for 52 minutes, though he entered a 15-minute lunch. Employees in the Columbus Service Office are not permitted to work before 7:00am or after 5:45pm; thus, the only time an employee on a 10-hour schedule can**

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<sup>1</sup> As record evidence indicates, there was up to a 4-minute variance between the parking garage timekeeping system and the BWC timekeeping system.

**flex/make up time is during the 45-minute allotted lunch period. With an actual lunch period of 52 minutes, it is apparent the Grievant did not flex/make up for his 30-minute tardy the morning of September 15.**

**The Union called 3 co-workers to testify regarding the Grievant's supervisor's liberal approach toward arriving late. These co-workers also testified, however, they were required to make up this time during that day.<sup>2</sup>**

**Insubordination**

**The BWC charged the Grievant with failure to answer approximately 7 investigatory interview questions fully and accurately. The Grievant cited a self-created "personal question" exception to providing answers in an investigation. For example, in response to the basic question regarding on which floor he parked in the BWC parking garage, the Grievant said, "Same as before; it's personal and I am not answering."**

**The Grievant's failure to answer the work-related investigatory interview questions impeded and delayed the Employer's ability to conduct the administrative investigation regarding the Grievant's timekeeping practices.**

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<sup>2</sup> 2 of the 3 co-workers regularly made up their time; records show the third did not. The third co-worker's records will be further investigated; she shall face administrative consequences if it is determined she entered falsified time entries.

**The Grievant testified he was familiar with investigatory interviews. Moreover, at the beginning of his investigatory interview, his interviewers read him the investigatory interview “cover sheet” which tells employees they are being directly ordered to answer the questions fully and accurately.**

**The Disciplinary Grid and Progressive Discipline**

**With approximately 15 hours of falsified time entries over a 2-month period, the Grievant’s time discrepancies represent one of the more egregious timekeeping cases at the BWC. The Grievant also had an active verbal reprimand in his record. Thus, this is the Grievant’s second offense.**

**The Disciplinary Grid dictates a removal for a second violation of Insubordination, and a determination based on severity for any Dishonesty violation. Based on the numerous, repeated, and extreme examples of falsified time entries, coupled with insubordination during the investigative interview, the Grievant’s conduct warranted a removal. Only because of the Grievant’s 18 years of service did the Employer provide the Grievant with a quasi-last chance agreement through the issuance of a 10-day suspension.**

**The Grievant possessed an active verbal reprimand for displaying inappropriate conduct toward a supervisor. Moving from a verbal reprimand to a 10-day suspension is progressive discipline. Article 24.02 of the Agreement states “discipline shall be commensurate with the offense.” The**

**Grievant's inappropriate conduct did not involve a few instances of discrepancies of a minute or two. The Grievant willfully entered falsified time, even after receiving direction from BWC to enter accurate time into the Timekeeping System. The Grievant's 10-day suspension is commensurate with his offense.**

**Similarly Situated Employees**

**The Employer provided 4 examples of BWC employees who engaged in misconduct similar to the Grievant's who each received 10-day suspensions or removal. None of these 4 employees had active disciplines in their record at the time the 10-day suspensions and removal were issued.**

**The Grievant also is guilty of insubordination, a charge not present in the cases of the 3 other employees who received 10-day suspensions. The Union did not present any evidence of similarly situated employees who received discipline of less than a 10-day suspension.**

**Union's Position**

**Dishonesty**

**In BWC/OCSEA (Dubose), Case No. 34-03-2008-01-15-01-09, Arbitrator Pincus held the employer must have clear and convincing evidence to sustain a willful falsification discipline. In that case, the Union showed it**

was a consistent practice at BWC for employees to flex by using their break times. The instant case is bound by Dubose. Arbitrator Pincus reversed Ms. Dubose's removal.

There is no BWC policy requiring employees to sign in as soon as arrive/leave for the day. The policy only recommends doing so. Furthermore, the Grievant's supervisor approved the Grievant's timekeeping entries. Additionally, the Union proved there are inconsistencies and inaccuracies in the different tracking methods used to capture an employee's time. For example, if a group of employees enter a secure area at one time, only one employee swipes his or her badge, but all are granted access.

Supervisors are permitted pursuant to BWC policy to use discretion when applying the timekeeping policy. The Grievant's supervisor, as well as other supervisors, used this discretion. The Grievant and his co-workers were permitted to work through their breaks in order to make up time. The Grievant's supervisor was concerned only that her employees worked 40 hours during the week.

#### **Insubordination**

The questions asked during the investigatory interview were without meaning, unclear, and without focus, which may have led to ambiguous responses by the Grievant. The Grievant provided a response to all the

questions.

Management did not give the Grievant a direct order to answer the questions more specifically, which would appear to be a "setup," given the severity of an insubordination charge. Management accepted the Grievant's answers as proper. Management had the opportunity to stress the direct order; it did not. Management had a duty to inform the Grievant, an 18-year employee, of the consequences of not properly answering a question. Moreover, record evidence indicates the investigatory interview "cover sheet," which instructs employees they have a duty to answer, was not read to the Grievant at the beginning of his investigatory interview. Management has thus failed to establish support for the insubordination charge.

#### **The Disciplinary Grid and Progressive Discipline**

A first offense for insubordination receives, according to the BWC Disciplinary Grid, a suspension or removal. But the 10-day suspension given the Grievant was not progressive nor corrective. Rather, it was given solely for punishment, and is, therefore, too extreme a penalty.

#### **Disparate Treatment**

Record evidence shows three employees on the Grievant's team, as well as the supervisor herself, signed into the timekeeping system in the same way the Grievant did. I.e., they sometimes recorded their time after

the fact and used the “Comment” section rarely or never. None of them were disciplined at all.

### **Due Process**

Article 24.04 states “stewards shall have the right to be informed of the purpose of the [investigatory] interview. Article 24.02 states:

**Disciplinary action shall be initiated as soon as reasonably possible consistent with the other requirements of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer’s decision to begin the process.**

**The Employer followed neither of these provisions, thus depriving the Grievant of his due process rights under the Agreement.**

### **OPINION**

**This matter involves two separate series of events: 1) the Grievant’s alleged false timekeeping entries; and 2) the Grievant’s lack of cooperation in the investigatory interview regarding the timekeeping entries.**

### **Timekeeping Entries**

**The Grievant was charged with Dishonesty – Willful falsification of an official document. Specifically, he was charged with making false timekeeping entries. The Employer determined many of the Grievant’s timekeeping entries were false based on record evidence the Grievant:**



- On numerous occasions, entered a start time of 7:00am despite there being an electronic record of the car the Grievant drove to work entering the BWC garage well after 7:00am.**
- Entering lunch out/in times substantially shorter than the out/in records of the BWC garage.**

**The Grievant testified his supervisor permitted her team to enter a uniform start time, regardless of actual start time, with the understanding employees would make up the time, generally by shortening their 45-minute lunch period. The record supports the Grievant's contention in this regard.**

**The Grievant alleges, consistent with his supervisor's approach, he regularly made up his "tardy minutes" from the morning by shortening his lunch period. The record does not support the Grievant in this regard. The garage lunch out/in badge-swipe readings often show a far longer period of time than the Grievant's lunch out/in manual entries. Indeed, even if the Grievant worked through his 15-minute breaks on those days, some of the numbers still do not add up to the Grievant's paid hours. This is clear and convincing evidence the Grievant did not flex/make up for many of his "tardy minutes." Cf. Dubose.**

## **The Investigatory Interview**

**The Grievant was charged with Insubordination – Willful disobedience/failure to carry out a direct order for refusing to answer some of the questions posed to him in his investigatory interview. Examples of the Grievant’s uncooperativeness in his November 13, 2008 investigatory interview are:**

**Q. Do you go to lunch alone? If not who do you go to lunch with?**

**A. That’s personal, my employer does not need to know my personal business.**

...

**Q. Do you park your car in the BWC attached garage?**

**A. I don’t have to comment on that – just like the ones before, that’s personal.**

...

**Q. What floor do you typically park on?**

**A. Same as before; it’s personal; I’m not answering.**

...

**Q. Do you take the elevator or the stairs when entering/exiting the parking garage?**

**A. I’m not answering that; it’s personal.**

...

**Q. How long does it take you to walk from the parking garage, across the street, to get to your work location...?**

**A. I wouldn't know.**

...

**The Employer considers these responses to be insubordinate, in that at the beginning of the investigatory interview, the "cover sheet" was read to the Grievant. The cover sheet provides in pertinent part:**

**This meeting is an investigatory interview. That simply means that the purpose of this meeting is to gather facts regarding a situation that has come to out attention. Another aspect of investigatory interviews is that what you say could lead to discipline. As in any investigation conducted by the Bureau, we expect our employees to answer honestly and fully. Because of the serious nature of investigatory interviews, we must issue you a direct order to answer these questions fully and accurately. Do you understand the direct order?**

**Do you understand this meeting could lead to discipline?**

**Do you have any requests at this time?**

**I, \_\_\_\_\_, acknowledge that I have been advised of the disciplinary nature of this meeting and that I have been given a direct order to answer the questions honestly and accurately. I understand that I could be subject to further discipline if I fail to comply with that direct order. (If employee refuses to sign, please sign and make notation below)**

**The Union alleges the Employer has not proved the cover sheet was read to the Grievant. The Union bases this contention largely on the fact the two supervisors taking notes during the investigatory interview did not indicate the Grievant responded in any way to the three questions on the cover sheet, as was supervisors' usual practice. The Grievant's supervisor, however, notated on the cover sheet "Employee did not want to sign." This, to the Arbitrator, shows the cover sheet was presented to the Grievant.**

**In any event, the Grievant testified he was familiar with the investigatory interview process. He knew he had a duty to cooperate. His answers to some of the questions show he did not cooperate. Rather, he took it upon himself to declare a "it's personal" exception whenever there was a question whose answer could incriminate him. The Grievant's failure to fully answer all the questions – all of which were work-related on the subject of the Grievant's timekeeping practices – constitutes insubordination for which the Grievant was warned at the beginning of the investigation.**

**The Disciplinary Grid and Progressive Discipline**

**The Disciplinary Grid provides for Suspension/Removal for a first offense of Insubordination – Willful disobedience/failure to carry out a direct order. For Dishonesty – Willful falsification of an official document, the Disciplinary Grid states "Determination based upon the severity of the error**

or accident.” The Grievant received a 10-day suspension.

At the time the Grievant was given the 10-day suspension, he had two active disciplines: 1) a Verbal Reprimand for Failure of Good Behavior – Discourteous and/or rude treatment of a fellow employee or manager; and 2) a 3-day/30-hour fine, also for Failure of Good Behavior – Discourteous and/or rude treatment of a fellow employee or manager.

By the time of the instant arbitration hearing, however, the Grievant’s 3-day/30-hour fine had been reversed in an NTA. This raises the question of whether the 10-day suspension is still appropriate, insofar as progressive discipline is concerned.

It is noteworthy record evidence shows the Employer would have removed the Grievant, but for his seniority. A removal would have been an option pursuant to the Disciplinary Grid.

The Union accurately points out the Grievant’s supervisor was lax in her administration of timekeeping. However, this laxness related largely to the fact she permitted and expected employees to flex or make up for their time when they were tardy.

The Grievant’s false timekeeping entries are due to his failure to make up for time when he was tardy. He made numerous entries of abbreviated lunch periods to give the appearance he was making up for his tardies. The

**garage records, however, convincingly show he took substantially longer lunches than he recorded. See Dubose.**

**Such false entries are not akin to an occasional, inaccurate, de minimis entry. Rather, the Grievant's numerous false entries betrayed his basic obligation to work the hours for which he was paid. Moreover, he betrayed the trust his supervisor put in her employees to be honest about their flex time.**

**Given the basic and important nature of what the Grievant failed to do – to accurately record his time – as well as his uncooperative behavior during his investigatory interview, it is not unreasonable from a progressive discipline point of reference for the 10-day suspension to stand, even though the 3-day fine had been reversed by the time of the arbitration hearing.**

#### **Similarly Situated Employees**

**The Union presented evidence showing other employees often entered their time into the system on a non-contemporaneous basis, and were not disciplined. Non-contemporaneous entries, however, are not a disciplinary offense. Nor were non-contemporaneous entries ultimately the basis for the Grievant's 10-day suspension. Rather, he was disciplined because he made false entries into the timekeeping system.**

**Moreover, the Employer presented evidence showing 4 other BWC employees received 10-day suspensions or were removed for actions similar to the Grievant's.**

**Due Process**

**Article 24.04 provides "stewards shall have the right to be informed of the purpose of the [investigatory] interview." See Dubose. The record indicates the Union representative who was called to the Grievant's investigatory interview was not informed of the purpose of the interview.**

**The Employer has a contractual duty to respond to a Union representative's questions about the purpose of an investigatory interview. This duty must not be ignored if the Employer wishes for its disciplines to be upheld. Ignoring this contractual duty can be the basis of a due process violation.**

**Under the specific facts of this grievance, however, the Arbitrator finds no prejudice to have been caused to the Grievant. Indeed, it was the Grievant's own dishonest conduct, coupled with his failure to cooperate in his investigatory interview that is completely responsible for his discipline.**

**AWARD**

**For the reasons set out above, the grievance is denied.**

**DATED: December 13, 2009**

  
\_\_\_\_\_  
**Susan Grody Ruben, Esq.**  
**Arbitrator**