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ARBITRATION PURSUANT TO COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

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In the Matter of OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11 and STATE OF OHIO DEPARTMENT OF COMMERCE Grievance No. 07-00-20110817-0012-01-07 Grievant: ANTHONY CASTELVETERE

ARBITRATOR'S OPINION AND AWARD

#1103

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, Ohio Civil Service Employees Association, AFSCME Local 11 ("the Union") and State of Ohio Department of Commerce ("the State") under which Susan Grody Ruben was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding

pursuant to the Agreement. Hearing was held May 10, 2012 and May 16, 2012. Timely post-hearing briefs were submitted by both Parties.

APPEARANCES:

On behalf of the Union:

Thomas B. Cochrane, Esq., Associate General Counsel, OCSEA; and John Gersper and Daniel Ely, Staff Representatives, OCSEA.

On behalf of the State:

Andrew Shuman. Office of Human Resources, Department of Commerce.

STIPULATED ISSUE

Was the Grievant, Anthony Castelvetere, terminated for just cause from his position as a Fire Safety Inspector with the Ohio Department of Commerce, Division of State Fire Marshal? If not, what shall the remedy be?

RELEVANT SECTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

(April 15, 2009 – February 29, 2012)

. . .

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 (1) or more oral reprimand(s) (with appropriate notation in employee's file);
b. One (1) or more written reprimand(s);
c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

…

d. One (1) or more day(s) suspension. A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;
e. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, 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.

…

…

24.05 – Pre-Discipline

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination….Prior to the meeting, the employee and his/her representative shall be informed in

writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee prior to the meeting. In the event the4 Employer provides documents on the date of the meeting, the Union may request a continuance not to exceed three (3) days. Such request shall not be unreasonably denied. The Employer representative or designee recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-disciplinary meeting may be delayed until after disposition of the criminal charges.

24.06 – Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after the disposition of the criminal charges.

…

> Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.
>
> An employee may be placed on administrative leave or reassigned while an investigation is being conducted….
>
> …

FACTS

The Grievant worked as a Fire Safety Inspector for the Code Enforcement Bureau ("CEB") of the State Fire Marshall, a division of the Ohio Department of Commerce ("DOC"). He was certified as a fire safety inspector, a professional firefighter, a paramedic, and a hazardous materials incident commander.

The Grievant was employed as a CEB Fire Safety Inspector from April 7, 2003 until his termination on August 12, 2011. The termination letter stated the reasons for the termination were violation of Work Rule No. 1 -- Neglect of Duty (Major) and Work Rule No. 6 -- Dishonesty.

The Grievant's termination stems initially from an anonymous complaint made to the Officer of Inspector General ("OIG") some time in 2008. The complaint alleged the Grievant was conducting personal business on State time. The OIG

referred the matter to the Ohio Highway Patrol ("OHP") for a criminal investigation that began September 18, 2008.

The Grievant was on a military leave of absence from mid-2009 through mid-2010. On June 9, 2010, OHP released its data to DOC, which began its own investigation July 1, 2010. DOC placed the Grievant on paid administrative leave on July 21, 2010. On October 8, 2010, the Richland County Prosecutor indicted the Grievant for three work-related felonies: tampering with records, theft in office, and dereliction of duty.

DOC conducted investigatory interviews with the Grievant on January 7, 2011 and January 27, 2011. DOC completed its investigation March 10, 2011.

In a Grand Jury Indictment dated March 23, 2011, four work-related misdemeanors were added to the charges against the Grievant: three counts of dereliction of duty, and unauthorized use of a motor vehicle.

In a Common Pleas Court Admission of Guilt Judgment Entry dated May 16, 2011, the Grievant pled guilty to two misdemeanors – dereliction of duty (ORC § 2921.44(E))[1] and

[1] ORC § 2921.44(E) provides:

unauthorized use of a motor vehicle (ORC § 2913.03((A))[2]. The Admission of Guilt, which the Grievant signed, provides in pertinent part:

> ...
>
> I understand the MAXIMUM sentence is a basic jail term of 9 months of which zero is mandatory. I am not eligible for judicial release during the mandatory imprisonment. The maximum fine possible is $1,750 of which zero is mandatory. Restitution and other financial costs could be imposed in my case. ...
>
> ...
> I understand the nature of these charges and the possible defenses I might have. I am satisfied with my attorney's advice and competence. I am not now under the influence of drugs or alcohol. No threats have been made to me. No promises have been made to me as part of this plea agreement except: the State of Ohio recommends a maximum fine of $1,750, plus $3,000 in restitution to the State Fire Marshal's Office plus court costs as a sentence.
> ...
>
> By pleading guilty I admit committing the offense. By pleading no contest I understand the court will decide my guilt based upon a statement by the prosecutor in the indictment or otherwise about the evidence which would have been presented at trial on the offenses for which I was charged....I enter this plea voluntarily.

> No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office, or recklessly do any act expressly forbidden by law with respect to the public servant's office.

[2] ORC § 2913.03(A) provides:

> No person shall knowingly use or operate an aircraft, motor vehicle, motorcycle, motorboat, or other motor-propelled vehicle without the consent of the owner or person authorized to give consent.

In a Sentencing Entry dated May 16, 2011, the court

sentenced the Grievant to a $1,750 fine, restitution of $3,000 to

the State Fire Marshal, plus court costs and fees.

The Notice of Pre-Discipline Meeting, dated June 22, 2011, provides in

pertinent part:

> The purpose of this Memorandum is to give you notice that you may be disciplined for violation of Department Work Rules. The potential level of discipline is removal based on the following charges. You have allegedly violated Department Work Rules set forth in Policy 201.1 of the Policy and Procedures Manual:
>
> #1 – Neglect of Duty (Major)
> #6 – Dishonesty
>
> From the period of September 2008 through June 2009, on multiple occasions, you neglected your duty as a Fire Safety Inspector by failing to adequately report fire code violations, including life safety violations; you falsified your daily activity records, claiming hours you did not work and were not authorized for leave; and you falsified timesheets by submitting for hours you did not work. These violations are documented in the attached report of investigation.
>
> ...

The Pre-Disciplinary Meeting took place June 27, 2011.

The Pre-Disciplinary Report, dated August 10, 2011, provides in

pertinent part:

Castelvetere has been on administrative leave since 7/21/2010, pending the outcome of criminal charges and the Department's administrative investigation. Castelvetere has no active discipline on his record. It is alleged that Castelvetere violated the following Department work rules:

#1 – Neglect of Duty (Major)
#6 – Dishonesty

It is alleged that from the period of September 2008 through June 2009, on multiple occasions, Castelvetere neglected his duty as a Fire Safety Inspector by failing to adequately report fire code violations, including life safety violations; Castelvetere falsified his daily activity records, claiming hours he did not work and was not authorized for leave; and he falsified timesheets by submitting for hours he did not work.

...

Findings and Discussion

Castelvetere was charged with neglect of duty for failing to properly complete instructions, inspection reports and follow-up inspections. He was charged with dishonesty for improperly recording inspection times, failing to properly record his hours worked, and receiving pay for hours not worked. He based his defense on what he claimed were standard practices for completing inspections and recording work hours. In order for these claims to be standard practice, he must show that they are mutually agreed to and wide spread. Castelvetere produced some inspection reports where one inspector and his former supervisor, Carrocci, did not include start and end times on their inspection reports. However, this does not constitute a widespread practice. Castelvetere nullifies his position when he acknowledged this practice was also [the] basis of his misdemeanor convictions. Castelvetere

therefore invalidates his argument and erodes his credibility….

…Wambo also documented performance issues dating back earlier than 2008, where Castelvetere neglect[ed] to fully perform his duties. When it was alleged he failed to document an out of service generator, Castelvetere said no one had inspected it since he had been going there, so he assumed it was not required. Castelvetere could not verify that it was not hooked into the emergency system. This is a serious oversight because the generator could be tied to the life safety systems of the school. Wambo also evidenced a failure [to] conduct thorough inspections at the Mt. Vernon Developmental Center over a four year period. Castelvetere spent an average of 4.9 hours inspecting the facility and found no violations. In his absence, another inspector found 89 violations during an 18 hour inspection. A Center maintenance employee stated that Castelvetere was not very thorough, yet Castelvetere claimed he only inspected the rooms he had on his list. He also claimed the other inspectors were being nitpicky. Neither response explains why there was not a thorough inspection of the entire facility each year. [Then-Chief of Code Enforcement] Wambo's report included statements from other facility owners who commented on Castelvetere's lack of thoroughness. Exhibit #20, from a hotel owner (Harcourt Motel), states Castelvetere did not advise him that motel laws needed to be posted or monthly smoke detector testing is required. Exhibit #30, from a facility employee, states there were 10 new violations in 2010 that Castelvetere had never informed them of in past inspections. She claimed Castelvetere's inspections were brief and mostly socializing. Exhibit #36 is a letter from September 2007, from the Mt. Vernon Assistant Fire Chief to the East Elementary Principal, listing 15 violations that needed correction, including a blocked alarm pull, obstructed egresses, and an alarm system requiring outside monitoring. These violations were not

noted by Castelvetere in March 2007 when he did his inspection; in fact no violations were noted. A review of these facilities was conducted by Ken Johnson, who found there were additional issues with Castelvetere's inspections. Exhibit #51 lists Casdtelvetere's reviews over a three year period compared to the most recent review by another inspector. It also included comments from Robert Rambo who stated Castelvetere tried to sell him a vacation package (Exhibit #55). Exhibit #52 is a three year review that indicated violations had not been written (no hotel laws in guest rooms, electrical room not marked, smoke detectors not checked monthly). Prior to Castelvetere's 2008 inspection, the rooms were painted and the hotel laws signs were not reposted. Exhibit #53 documents a three year review of Castelvetere's inspections compared to a more recent inspection by a different inspector. The interview with the facility states that Castelvetere copied previous year reports, never checked emergency lighting, spent less than 30 minutes on an inspection, did not inspect the lower level, and has never been to the electrical room. The facility mentioned five specific items that had not changed in over a year, but were cited in the most recent inspection as violations. Exhibit #54 reviews Castelvetere's reports for three years compared to another inspector the following year. Johnson found that there were 8 items that were not written up by Castelvetere. A statement from the hotel operator was also included (Exhibit #56). Other neglect of duty includes failure to follow up on re-inspections. Castelvetere gave East Knox Elementary five days to fix fire alarm issues and instead of returning, he stated he took the word of the alarm technician that the issue had been resolved. Even though Castelvetere came back after 25 days, it is the responsibility of the state inspector, not a technician, to verify compliance with fire code, especially when life safety systems such as fire alarms are involved.

Conclusion and Recommendation

It is not necessary to rebut all of Castelvetere's responses as they are self-serving and shades of the actual evidence. The overwhelming evidence discussed above and included in the report of investigation (COM 10-14), Exhibits #1-#66, and the OHP reports demonstrates that Castelvetere has failed to protect the public and has violated that trust which both the Department and the public confide in him. He took advantage of his position as a field employee to conduct business other than inspections and when he did do inspections, he failed to do them in a manner which would safeguard the public. Further, he recorded inaccurate times on his AR-1's and inspection documents in order to claim a full day's work. Shifting responsibility to previous supervisors for his training and alleging permission to flex his time do not give him the right to neglect his responsibilities to the public. His uncooperative responses during the administrative interview may not be dishonest, but it does damage his credibility. The guilty plea to misdemeanor charges of dereliction of duty and unauthorized use of a motor vehicle cannot be overlooked either. Castelvetere admitted to violating the public trust when he pled guilty and paid $3000 in restitution to the Department. Due to the nature of his position and the independence that Fire Safety Inspectors have on a daily basis, Castelvetere has shown he is unfit to remain in his position and it is recommended that he be removed from his position and his employment be terminated.

...

The termination letter is dated August 11, 2011. It provides in pertinent part:

Effective Friday, August 12, 2011, you are hereby removed from your position of Fire Safety Inspector with

the Division of State Fire Marshal. This removal is based upon violations of the following Department Work Rule(s) as set forth in Policy 201.1 of the Department's Policy and Procedures Manual:

#1 – Neglect of Duty (Major)
#6 – Dishonesty

...

The grievance is dated August 14, 2011. It alleges violation of Article 24, specifically, "Discipline does not commensurate [sic] the offense; Due process."

The Step 3 Response, dated October 13, 2011, provides in pertinent part:

...

Background

In 2008 an anonymous complaint was made to the Officer of Inspector General alleging that Grievant was conducting personal business while on state time which prompted a criminal investigation by the Ohio Highway Patrol (OHP). In October 2010 felony charges including fraud, theft in office, dereliction of duty, and unauthorized use of a motor vehicle were issued. In May 2011 Grievant pled to two misdemeanor violations, dereliction of duty and unauthorized use of a motor vehicle, plus paid $3,000 in restitution to the Department. Meanwhile the Bureau reviewed inspection reports that Grievant completed from 2005 through 2009. The Bureau found multiple instances of reports lacking accurate starting and ending times; facilities with unreported violations; failure to follow-up timely on fire alarm violations; adjusted work hours

unreported on Grievant's timesheet; falsified work logs compared to the GPS records obtained from the OHP; and use of Grievant's state vehicle without authorization by the Bureau. Grievant was removed from his position for neglect of duty and dishonesty. A grievance was filed on August 17, 2011 alleging violations of Article 24.

Union Position

The grievance alleged the discipline was not commensurate with the offense and did not follow due process. The Union stated that the charges of neglect of duty and dishonesty need clarification in reference to Grievant's specific actions. In addition, inspection errors that were referred to in the Pre-Disciplinary Packet were not proven. As an example the Grievant mentioned the school with the inactive generator issue. Fire alarm panels have battery backups, so this is not an issue, but it was represented as an issue in the Pre-Disciplinary Packet. Further, Grievant added that the GPS reports did not match the investigator's time lines. Also, the video from the McDonald's restaurant was not Grievant, it was his nephew. Grievant claimed that 90% of the time the OHP was following his nephew, not Grievant. The Union stated that Grievant has more than twenty years of service with the state and there was no prior discipline during his tenure. The Union also stated that discipline was predetermined because the Director of Commerce made a public statement after Grievant's criminal case concluded that implied the decision to remove Grievant was already decided. The Union acknowledged Grievant's actions warrant discipline but the discipline should be at the suspension level. Management should consider a one day suspension but no more than a five day suspension. The Union based this assessment on previous arbitration cases.

Response

The conclusion of the Pre-Disciplinary Report dated August 10, 2011 said the overwhelming evidence that was discussed and included in the Report of Investigation (COM 10-14), Exhibits #1-#66, and the OHP reports demonstrates the Grievant has failed to protect the public and has violated that trust which both the Department and the public confide in him. The guilty plea to misdemeanor charges of dereliction of duty and unauthorized use of a motor vehicle along with paying the Department $3,000 in restitution aggravates the violations. During the Step 3 meeting the Grievant did not provide any additional evidence to refute Grievant's removal. The Union did not submit any arbitration decisions that would justify a lesser penalty for the proven violations. For the above reasons there is just cause for removal and there is no violation of the collective bargaining agreement. Grievance DENIED.

...

POSITIONS OF THE PARTIES

State Position

The State had just cause to terminate the Grievant's employment. Six certified fire safety inspectors testified how the Grievant neglected his responsibilities as a fire safety inspector and failed to ensure public safety. Coworkers testified they found violations where the Grievant had found none. These coworkers faced disgruntled facility operators who were surprised to know

violations had existed at their facilities for years without mention or correction by the Grievant.

The facility operators testified the Grievant would briefly look over the records, take a quick walk through the facility, maybe open a door or two, and then leave. Years of the Grievant's inspection reports show no violations, no times arrived and departed, just enough information to show the Grievant was there. Facility operators testified the Grievant did not spend as much time at their facilities as he indicated on his activity reports. The Grievant's most blatant lie occurred when he recorded his 2008 visit to the Children's Resource Center took place from 2:30p – 4:00p. The facility operator testified she worked until 2:00p that day.

In each of the Grievant's six inspections of the Children's Resource Center, he marked on the inspection report "No Violations." Coworker Vance found 16 violations when he inspected the Children's Resource Center in 2010.

CEB witnesses testified the Grievant's territory was no larger than any other fire safety inspector. The Union suggests the complaints about the Grievant's inspection work were limited,

which suggests the State and the public should accept a certain amount of negligence from fire safety inspectors. That is not true.

The Grievant's testimony failed to address the neglect of duty and dishonesty evidenced in the inspection reports. He attempted to pass responsibility to the fire alarm and sprinkler alarm companies, saying he is not a certified sprinkler technician. The reverse of that argument works against the Grievant – those technicians are not certified fire safety inspectors; the Grievant should not rely on anyone else to do the work he is entrusted to complete.

The Grievant generalized the fire code as weak; he dismissed it as being a maintenance code. That is not the opinion of the other six certified fire safety inspectors who testified. They were all very clear on how the Grievant neglected his duty. The Grievant testified the Mt. Vernon school issues were due to clutter from teachers returning from break. He did not offer, however, any explanation for more permanent violations such as problems with exit doors and egress lighting.

The Grievant testified that during his inspections he may just fix something and note it on his inspection report. CEB witnesses testified violations must be noted on the inspection report in order to determine if there are repeat violations. This is just one example of the Grievant's lackadaisical attitude toward safety and code.

The Union failed to provide a case with any substantive merit, so it attacked the procedures the State used to carry out the termination. The Union failed to support these objections, as it failed to evidence a breach of the Agreement or show harm to the Grievant.

The Union alleges the State delayed too long in carrying out the termination. DOC started its investigation in late June 2010. The Grievant was on military leave and not available until late 2010. DOC conducted two investigatory interviews with the Grievant in January 2011 and made a report in March 2011.

During the period of DOC's investigation, it was informed there might be a plea deal on the Grievant's criminal charges. In accordance with Article 24.05, DOC chose to delay the pre-disciplinary meeting until after the disposition of the criminal

charges. The guilty plea was recorded May 16, 2011, and DOC waited to receive a certified copy from the court.

On June 22, 2011, the pre-disciplinary meeting notice was given to the Grievant and the Union. The Union requested a continuance which was granted, and then asked for additional time to allow for the Staff Representative to be present due to scheduled vacation by the Chapter President. In total, the time between the date DOC received the certified plea and the date of the initial notice of the pre-disciplinary meeting was less than 30 days.

If the Union is also arguing the response to the pre-disciplinary meeting was improperly delayed, this, too, was done in accordance with the Agreement. Article 24.06 allows the Agency Head 60 days from the date of the pre-disciplinary meeting to deliver notice of the disciplinary decision to the employee and the Union. The meeting was held July 1, 2011. The notice of termination was delivered August 12, 2011. This is well within the 60 days allowed per the Agreement. Also, the Union has failed to show how any delay harmed the Grievant; he was on paid administrative leave.

The Union alleges the State must provide a specific list of charges against the Grievant in the notice of discipline. At the hearings, the Union referenced arbitration rulings to support its claim. Up until the time of the Parties' submission of post-hearing briefs, the Union has not identified any cases that support its position. The State cannot rebut evidence not submitted at the hearing, and objects to inclusion of such evidence or rulings by the Union in its post-hearing brief.

In any event, the Agreement does not contain explicit language requiring the State to include the reasons for the discipline in the disciplinary notice. Article 24.06 provides a decision must be delivered; it does not discuss the content of that decision. The contract language that discusses a list of charges is Article 24.05 – Pre-Discipline. It states the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline.

The instant Notice of Pre-Disciplinary Meeting clearly stated the potential level of discipline was removal, and the reasons for the discipline were Neglect of Duty and Dishonesty, with a brief

explanation of the specifics. It would be unreasonable for the Union to expect a full recitation of the evidence in the investigation report and attached exhibits. The Union is attempting to improperly apply the pre-disciplinary notice standard to the decision on the recommended disciplinary action. Also, they have failed to show any harm to the Grievant.

The Union also has attacked the disciplinary grid. The grid was created in 2005. The Union is correct the Agreement no longer allows for a 10-day suspension. However, the grid provides the penalty for a first offense of Neglect of Duty (Major) ranges from a 10-day suspension to removal. Had the Grievant received a 10-day suspension, the Union might have an argument. However, because the penalty for a first offense of Neglect of Duty (Major) allows for removal, which is what occurred, it is not a procedural defect for the State to have used the 2005 grid. It is the State's burden to show why it went to removal and not a lesser penalty. The grid also allows for removal on the dishonesty charge. Again, it becomes the State's burden to prove a dishonesty charge merits removal.

The evidence justifies removal because the Grievant endangered life, property, and public safety. Moreover, the Grievant's criminal conviction is an aggravating factor that forces the State to select removal.

In sum, the Grievant was a highly trained and certified employee capable of performing the duties of a fire safety inspector. He is a highly skilled individual who has made safety his career. Yes, his actions did not reflect a commitment to safety or the public.

The Grievant's inspection reports indicate no violations, yet testimony from the Grievant's coworkers and the facility operators show there were not only simple issues such as signage, electric sockets, ceiling tiles, and cluttered storage areas, but major issues such as alarm system connections, egress lighting, door locks on egresses, and a tree blocking an egress. The Grievant takes the position, "that's not how I was trained"; "that's not in the fire code"; and "I fixed it on the spot." That is unacceptable. CEB Fire Safety Inspectors are expected to do better than that; CEB witness testimony supports this. Each of the CEB witnesses was trained to do the same work as the Grievant and follow the

same fire code as the Grievant. Yet, the Grievant is the only one who did not find fire code violations during his inspections. It should be noted there was no reason to question the Grievant's reports until other inspectors found violations at facilities previously inspected by the Grievant.

Due to the nature of the Fire Safety Inspector position, and the independence they have on a daily basis, the Grievant has shown he is unfit to return to his position. His actions were further aggravated by his criminal conviction. The Grievant admitted to three counts of dereliction of duty with $3,000 in restitution to the Agency. While the State is not privy to the content of those three counts, the State has shown at least three major patterns of dereliction on the Grievant's part.

Fire Safety Inspector Richard Vance described at the hearing the awesome responsibility these inspectors have:

> We're put in a position of authority when we go out. We have to represent the State Fire Marshall's Office, the State of Ohio. These folks are our customers. I will tell you that I've done this long enough that when we walk in these buildings, people are glad we're there. They don't have a problem having the violations. They really don't. Most of them will say, "Thank you. I appreciate you finding this." Because you know what? I've always – and I'll live and die by this. Someday it could be any one of us in these facilities or our family members, and

> we hope that somebody is out there protecting us, or our brother firefighters are in these buildings; and if you don't have enough care that you're going to do your job and protect us, it's sad.

On behalf of the State and of the public whose trust the Grievant violated, the decision to remove the Grievant should be upheld and the grievance denied.

Union Position

The State did not have just cause to terminate the Grievant's employment. The case against the Grievant fails on both procedure and substance.

Procedurally, the State did not provide an adequate discipline notice, including an explanation of the reasons for the discipline. Also, the disciplinary grid used does not comply with the Agreement. Finally, the State neglected to initiate the discipline process for an unconscionably long time.

Substantively, neither of the rule violations the Grievant is alleged to have committed survives scrutiny. The Grievant did not violate the rule against neglecting his duties. He conducted all his inspections correctly. Even if he had not conducted all his

inspections correctly, the comparatively few problems the State identified fall far short of justifying termination.

The Grievant also did not violate the rule against dishonesty. He accounted for each and every incident in which he allegedly falsified his reports. He did his job in the manner he had been trained. The supposed errors and omissions in the Grievant's reports were common among all CEB staff. The evidence shows the Grievant never acted with the intent to deceive anyone.

The Grievant is a military reservist and was called to active duty for a year beginning June 14, 2009. He has been deployed many times over the years. Routinely, other inspectors have been assigned to cover for the Grievant during his absences. None of those inspectors had ever expressed concerns about the Grievant's work.

Pursuant to its normal practice when an employee is charged with a crime, CEB placed the Grievant on administrative leave on July 21, 2010. CEB appears to have done nothing else on the Grievant's case until at least November 2010, when it received a copy of OHP's Report of Investigation. At this point, CEB was in possession of nearly all the evidence it later used against the

Grievant, but it did not discipline him. The CEB took no action until March 10, 2011, when Chief Wambo completed his Report of Investigation. The Union was not given a copy of the 534-page document, however, until June 24, 2011, three days before the disciplinary meeting was scheduled.

Management forwarded its Pre-Disciplinary Report to DOC Director David Goodman on August 10, 2011. The Pre-Disciplinary Report failed to say clearly which portions of Chief Wambo's Report of Investigation the State was relying upon in reaching its decision to recommend removal. On August 11, 2011, DOC Director Goodman disciplined the Grievant for violating Work Rules No. 1 – Neglect of Duty (Major), and No. 6 – Dishonesty. Director Goodman provided no other information in the discharge notice, did not say which allegations supported the removal, or which documents he reviewed to make his decision.

The Grievant was terminated pursuant to a disciplinary grid DOC implemented during the term of the Parties' 2003-2006 collective bargaining agreement. When the Parties negotiated the 2006-2009 collective bargaining agreement, they changed the provision specifying the penalties that must be contained in the

grid. DOC, however, failed to update its grid to comply with the 2006-2009 collective bargaining agreement. The 2006-2009 language was carried over into the 2009-2012 Agreement, so the grid was still out of compliance with the Agreement when the Grievant was terminated.

The Grievant was not given valid notice of the reasons for his termination. The Parties have long agreed management must provide the Union with a clear and concise statement of the reasons an employee is being disciplined. This requirement arises from the Due Process Clause of the U.S. Constitution, which entitles a public employee "to oral or written notice of disciplinary charges against him, and an explanation of the employer's evidence…." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985).

The Agreement contains three provisions reflecting the Loudermill requirements. First and foremost, Article 24.01 provides discipline may not be imposed without just cause and that the burden of proving just cause lies with the State. It is well-established the concept of just cause "requires that employees being disciplined or discharged are entitled to be given

notice of the charges against them and a meaningful opportunity to be heard." The Common Law of the Workplace: The Views of Arbitrators § 6.13 (Theodore J. St. Antoine, ed., 1998).

Second, Article 24.05 requires the State to inform "the employee and his/her representative in writing of the reasons for the contemplated discipline and the possible form of discipline." The information must be provided prior to the Pre-Disciplinary Meeting; this is generally taken to mean the information must be included with the Pre-Disciplinary Notice, although the Agreement does not say so explicitly. The Agreement is explicit, however, that the Pre-Disciplinary Notice must identify management's witnesses and all documents it may use to support the discipline.

Third, pursuant to Article 24.06, management must communicate "[t]he decision on the recommended disciplinary action" no more than 60 days after the Pre-Disciplinary Meeting. If management decides to impose any discipline, the employee and the Union "shall be notified in writing." This provision does not say management must state the reasons it made the decision to impose discipline, but it cannot be interpreted any other way, since prior to being informed of management's decision, the

Union will only have been provided with the reasons that *may* be used in the "contemplated" discipline. Until the notice of discipline issues, the Union cannot be certain what the employee is being disciplined for.

The instant termination letter is inadequate because it does not even hint at what allegations supported the decision. Citing a rule without explaining how the Grievant violated it is inadequate notice. See, e.g., DYS & OCSEA, Case No. 35-03-(89-08-10)-0047-01-03 (1990) (Raymond Samuels, Jr., grievant) at p. 14 of 15 (Arb. Pincus) ("Samuels").

Moreover, neither the Pre-Disciplinary Report nor the Report of Investigation constitutes adequate notice. By its own terms, the Pre-Disciplinary Report does not amount to notice of discipline because it was submitted to Director Goodman for his consideration. Additionally, it does not address the Union's arguments. Since it makes no attempt to rebut all the Union's arguments, and says it is only a recommendation, the Union cannot know by reading it what allegations and evidence form the basis of the Director's decision to remove the Grievant.

Furthermore, the Pre-Disciplinary Report refers to Chief Wambo's Report of Investigation; it does not stand on its own.

Nor does the 534-page Report of Investigation constitute adequate notice. The report itself it 25 pages long, mostly single-spaced, 10-point text. The closest it comes to clearly stating why the Grievant faced discipline is the "Conclusion" appearing on pages 21-22 of the document, and a three-page "Allegations Summary" Chief Wambo seemingly prepared after he finished his report, but before the Pre-Disciplinary Meeting. The Union had no way of knowing which of the listed allegations were linked with which rule violation, so, as a disciplinary notice, it is inadequate.

Most importantly, Chief Wambo's report and the Pre-Disciplinary Notice preceded the removal. So even if they were clear and concise, they would not be considered notice of the discipline because the decision to discipline had not yet been made when they were drafted.

This case bears a substantial similarity to DMRDD & OCSEA, Case No. G87-0001 (B) (1988) (Juliette Dunning, grievant) (Arb. Pincus) ("Dunning"), in which an employee's removal order failed to state all the reasons she was being fired. In order to

determine the basis of the discipline, the grievant and the Union were required to parse an Administrative Conference Report and an Abuse Committee Report. The arbitrator held the basis for the discipline must be stated concisely in the discipline notice itself:

> The various documents referred to by the Employer did not provide the Grievant with adequate notice for the reasons for the contemplated discipline. The employer, moreover, expected the Grievant to integrate a variety of documents and conclude, with sufficient specificity, the reasons for her removal.

Dunning, at 24. In exactly the same way, DOC expects the Grievant and the Union to glean the basis of his discipline from hundreds of pages of documents it gave them in July, August, and September 2010.

Record evidence includes a 2010 written reprimand and a 2011 written reprimand to employees other than the Grievant that clearly state the rule those employees violated and how they violated it. These two disciplines are perfect examples of what Article 24.06 requires. The reader is not required to refer to any other documents to understand why the employee is being disciplined. Loudermill holds the employer's notice must provide an "explanation." What the Union got in the instant matter was 500 pages of obfuscation.

Regarding the improper disciplinary grid, Union Chief Steward testified the Union had objected on several occasions prior to the Grievant's discipline that the grid violated the Agreement. Specifically, the penalties in the grid have been superseded by more recently-negotiated collective bargaining agreements. It is not possible to know what DOC would have done to the Grievant under a grid that complied with the current Agreement. There is good reason to believe, however, the discipline would have been different. The penalty for a first offense of Work Rule No. 1 – Neglect of Duty (Major) is either a 10-day suspension or removal. The current language of Article 24.02(D), however, does not allow a suspension greater than 5 days. This suggests the Grievant would not have been removed if the grid were up to date.

An argument could be made that even if the grid were valid, the outcome of the Grievant's case would be the same because he was terminated. The grievance should still be granted, however. If this were a single slip-up, unlikely to be repeated, perhaps it could be overlooked. But the Union has been telling DOC for years the grid needs to be changed. A ruling from the Arbitrator

overturning the Grievant's removal due to an outdated grid would certainly get DOC's attention.

Regarding the timeliness of the removal, the State's unconscionable delay in disciplining the Grievant merits overturning the removal. The Parties have long agreed discipline must be issued "as soon as reasonably possible" and that an unnecessary delay is reason in and of itself to vacate a discipline.

Management must initiate discipline as soon as it has enough information to act. The meaning of the Article 24.02 timeliness requirement has been arbitrated by the Parties no fewer than 24 times. The Parties first arbitrated this issue in OSHP & OCSEA, Case No. G-87-1140 (1988) (Ronald E Vincent, grievant) (Arb. Helling) ("Vincent"). The arbitrator ruled a 41-day delay in issuing a written reprimand was not unreasonable, but a suspension issued 3-months after the event (for the same misconduct) was. The arbitrator ordered the suspension rescinded.

The Article 24.02 timeliness requirement was most recently arbitrated in Tiffin Developmental Center & OCSEA, Case No. 24-13-(03-30-10)-0010-01-04 (2011) (Jennifer Daniel, grievant) (Arb.

Allen) ("Daniel"), which involved a 4-month delay in issuing a removal. The Union argued management had all the information it needed a few days after the incident, as demonstrated by the fact it reported the matter to the Board of Nursing within 2 weeks. The arbitrator agreed with the Union. Management had provided no explanation for the delay. "The Union has an interest and an obligation to protect its members and Article 24.02 is there for a reason." Daniel at p. 54. The arbitrator reinstated the grievant with full backpay and benefits.

What constitutes "as soon as reasonably possible," as Vincent and Daniel make clear, turns on when the employer has enough information to take disciplinary action against the employee. This is also the prevailing view generally in collective bargaining jurisprudence. See, e.g., State of New Mexico, 128 LA 1812 (Sheiber, 2011).

A case could be made that DOC could have proceeded against the Grievant in July 2010. The Richland County Prosecutor told management on June 9, 2010 "he had no issues with them conducting an Administrative Investigation" on the Grievant. OHP had by that time given DOC the GPS surveillance

information on the Grievant, and CEB management had by that time looked at the Grievant's work at a number of facilities and conducted several interviews.

A case also could be made that DOC could have initiated discipline in November 2010, when it received OHP's Report of Investigation. Even giving DOC the benefit of the doubt, the last possible date it should have taken action is March 10, 2011, when Chief Wambo finished his investigation.

DOC did not discipline the Grievant until August 11, 2011, however, 5 months later. In Vincent and in Daniel, the disciplines were overturned because of management's inexplicable delay of 3 months and 4 months, respectively. By this standard, the discipline against the Grievant must be overturned unless management had a good reason for the delay.

Management had no excuse for waiting until August 2011 to discipline the Grievant. Articles 24.05 and 24.06 carve out exceptions to the Article 24.02 timeliness requirement when a criminal investigation is underway. Those exceptions are inapplicable here, however, because they apply only to the Pre-Disciplinary Meeting. In contrast, Article 24.02 pertains to the

initiation of the disciplinary action. There is no contract language excusing DOC's months-long delay in doing that. The fact the prosecutor asked DOC to keep the investigation secret is irrelevant. The Agreement identifies valid reasons for delay; doing a favor for the prosecutor is not one of them.

Even if there were contract language permitting a delay in the initiation of disciplinary action, the tolling of the time limit pursuant to Articles 24.05 and 24.06 is permissible only where the employee's criminal guilt is the sole basis for the discipline. DYS & OCSEA, Case No. 35-07-(91-07-30)-0034-01-03 (1992) (Luther Jones, grievant) (Arb. Cohen) ("Jones"). DOC has never said the Grievant was disciplined due to his misdemeanor pleas, so this exception is inapplicable.

"Initiating discipline" means issuing the notice of discipline. It may be possible to say the State can comply with Article 24.02 simply by beginning the first steps of its investigation. Perhaps DOC initiated action against the Grievant on July 10, 2010, the day he was placed on administrative leave.

There are four reasons this expansive reading of Article 24.02 should be rejected. First, the Parties' arbitration awards

do not support it. Almost all of the 24 Article 24.02 Awards treat "initiating discipline" to mean actually issuing the notice of discipline. Only one award – over 20 years old – interprets "initiating discipline" to be a point earlier in the process. DYS & OCSEA, Case No. G87-1008 (Paul Nixon, grievant) (Arb. Michael) (management initiates discipline when it begins completing an incident report) ("Nixon"). Later awards in the same agency (e.g., Jones) have gone the other way, so whether Nixon has force and effect today is at best an open question. In another case, the arbitrator held conducting the investigation does not count as initiating discipline for purposes of Article 24.02. DRC & OCSEA, Case No. 27-05-021492-200-01-03 & 27-05-062592-01-03 (1993) (B. Carter & M. Seward, grievants) (Arb. Graham).

Second, a broad reading of Article 24.02 would allow the exception to swallow the rule. If placing an employee on leave, or conducting an investigatory interview, or any other step preliminary to actually disciplining the employee constitutes "initiating" discipline, management could wait years until issuing a Pre-Disciplinary Notice.

Third, taking “initiating discipline” to mean issuing the notice of discipline provides a bright line that can be easily applied.

Fourth, understanding “initiating discipline” to mean issuing the notice of discipline is the best harmonization of Articles 24.02, 24.05, and 24.06.

The procedural defects in this case are so egregious, it is easy to forget the Union’s most important argument of all: the Grievant did nothing wrong. The Union discredited the evidence management placed in the record.

On the assumption discipline can be based only upon matters appearing in the Pre-Disciplinary Report or Chief Wambo’s Allegations Summary, the Union took each allegation appearing there and assigned it to one of the two rule violations cited against the Grievant. This yielded the following outline:

Rule no. 1 – Neglect of Duty (Major)

1. Failure to properly complete or follow-up on inspections

2. Conducting personal business on State time

Rule no. 6 – Dishonesty

1. Improperly recording inspections times/hours worked on the following dates:

[11 dates from October 28, 2008 through April 17, 2009]

2. Receiving pay for hours not worked

The Pre-Disciplinary Notice also said the Grievant was insubordinate in the investigatory interviews, but management took the position in the hearing that this was not part of the final discipline.[3]

Before addressing the rule violations, a gaping hole in DOC's proofs must be noted. It undermines management's case because it demonstrates management never gave fair consideration to the Union's arguments, a straight-up violation of just cause. The Union objected during the grievance procedure that DOC had made up its mind to fire the Grievant well before the discipline process got underway. The fact Director Goodman issued his decision one day after receiving Human Resources Director Andrew Shuman's Pre-Disciplinary Report is a dead give-away. The Report itself is lengthy and dense, and it referred throughout to Chief Wambo's 534-page Report of Investigation. To apprise himself of the case against the Grievant, Director

[3] The State also appears to have ventured away from the Rule No. 6 – Dishonesty charge. It was addressed minimally at the hearing and in the State's post-hearing brief. The Arbitrator's analysis will focus on the Neglect of Duty charge, as did the State. Accordingly, the Arbitrator will not set out in detail the Union's contentions regarding the Dishonesty charge.

Goodman would have had to read both documents. He could not possibly have done that in one day.

Discipline has been overturned in the past in part because it came only one day after the Pre-Disciplinary Meeting. In DYS & OCSEA, Case No. 35-03-(08-02-89)-41-01-03 (1990) (Randy Garrett, grievant) (Arb. Smith) ("Garrett"), management caught the employee sleeping on the job on May 1, 1989, waited until June 21, 1989 to hold the Pre-Disciplinary Meeting, and then issued the removal on June 22, 1989. The arbitrator concluded "the speed and lack of speed with which the Employer acted raise doubts as to whether the Grievant received due process," and reinstated the grievant in part on that basis.

Regarding the Grievant's alleged neglect of duty, the record is clear no single incident, or even a series of incidents in which the Grievant supposedly missed something during an inspection, would be grounds for discipline. As a CEB witness testified, "Everybody makes a mistake once in a while." It becomes a problem only if a consistent pattern of errors and omissions develops.

DOC did not explain how the Grievant's comparatively few errors constituted a pattern. Nor did DOC present evidence on exactly what the Grievant did that led it to believe he was beyond redemption and not amenable to rehabilitation by means of progressive discipline. In contrast, the Union's evidence made it clear the Grievant's inspections were not deficient in any way, and definitely did not amount to a pattern of wrongdoing.

Management presented testimony about several facilities at which the Grievant supposedly failed to perform his duties correctly. The Grievant presented strong, credible testimony rebutting all of the State's accusations. The Arbitrator will either believe him, or she will not.

Seven of the State's accusations need to be addressed specifically:

1. Mt. Vernon High School

DOC alleged the Grievant failed to note an inactive generator. The Grievant testified the State code did not require him to inspect the generator because the school had a battery backup system. Even if the generator had to be inspected, that was the responsibility of a certified alarm system inspection

company, not the State Fire Marshal. Mt. Vernon Fire Chief Menapace admitted to Chief Steward Schneider that he was acting beyond the scope of the State fire code when requiring the school to fix the generator.

2. Mt. Vernon Developmental Center

According to DOC, the Grievant's inspection here was flawed for a number of reasons. It claimed he failed to note an improperly-protected fuel storage tank. The Grievant testified he had discussed the tank several times with his previous supervisor and a previous Fire Marshal; they told him nothing needed to be done about the tank because it was behind a building and therefore not vulnerable to being hit by a vehicle.

Management alleged the Grievant did not note a problem with the Center's sprinkler system and backflow preventers. The Grievant testified the State fire code does not address sprinklers, and the system is the responsibility of a certified sprinkler company. Building Maintenance Superintendent Jeffrey Ike corroborated the Grievant's testimony.

DOC claimed the Grievant's performance at the Center was generally slipshod because he did not devote enough time to his

inspections there. The fact that Fire Safety Inspector Vance required more time than the Grievant to inspect the Center is not surprising because it was Vance's first time at the Center. Also, Mt. Vernon Fire Chief Menapace accompanied Vance on the inspection. Chief Menapace had previously expressed dissatisfaction with the State's inspections. He was in the process of implementing a local fire code that was stricter than the State code. With Menapace looking over Vance's shoulders, it is hardly surprising Vance found many violations. It is impossible to say the circumstances of Vance's inspection were even remotely similar to the Grievant's. The fact Vance found 60 or 70 supposed violations does not mean the Grievant should have found them, too.

3. Harcourt Motel

DOC's evidence here is weak at best. The Grievant provided a perfectly plausible explanation for the alleged missing signage. He also testified management's evidence is incomplete because it did not include a citation he wrote on the hotel.

4. Children's Resource Center

Management presented evidence the Grievant failed to note the kitchen hood system was extremely greasy. The Grievant testified there is no way to determine the condition of the hood without dismantling it, which he was not permitted to do. The State offered no explanation how Vance determined the system needed cleaning.

Management also claimed the Grievant failed to cite the Center for failing to label an electrical room. The Grievant testified the State fire code does not require such a label.

5. Park Place Group Home

Program Director Richard Rambo testified the Grievant once tried to sell him a vacation package for nearly an hour. The Grievant disagreed and said the conversation took about two minutes. Rambo's account seems unlikely. If the Grievant had wasted an hour of the man's time, especially if he had not actually asked for the information, he knew how to contact the Fire Marshal to complain. That he did not do so strongly suggests the Grievant's account is closer to the truth than his.

6. Autumn Healthcare

Management alleged the Grievant failed to report an exit was blocked by a tree. Autumn Healthcare is not mentioned in the Pre-Disciplinary Report, however, so the State should not be permitted now to support the Grievant's discipline with this alleged transgression. Moreover, if a tree were truly blocking an exit, the Department of Health would have caught it. Also, inspectors carry cameras to document such problems. The absence in the record of a photograph of the tree strongly suggests no such tree exists.

7. Blandensburg School

Management made a general claim the Grievant failed to follow up on faulty fire alarms. The Grievant testified that after assessing the situation, he instructed the school's maintenance staff to put the building on a 24-hour fire watch. Then, working with the school principal, the Grievant arranged for an alarm technician to make repairs. When the Grievant next had some time available, he reinspected the school to ensure everything was fixed. Unfortunately, the alarm problem hit the newspaper, and the article made it seem it was the Grievant's fault. Fire

Marshal Bell concluded, however, the Grievant had done nothing wrong.

* * *

The Grievant's handful of errant inspections in one community does not justify termination for two reasons. First, the Grievant's few allegedly faulty inspections are statistically insignificant. The Grievant performed from 575 to 700 inspections each year and worked with more than 80 local fire chiefs. Management examined 6.5 years of the Grievant's work, i.e., thousands of inspections. Yet management has pointed to only 9 faciities where the quality of the Grievant's work was supposedly questionable, and one assistant fire chief who was displeased with him. Management's position is that the Grievant deserved to be terminated because his work exhibited a pattern of wrongdoing. The figures, however, do not lie. There is not a pattern of wrongdoing.

Second, discipline might be appropriate if the Grievant exhibited a pattern of poor performance. The pattern here, however, is all the alleged wrongdoing occurred in Mt. Vernon. This strongly suggests the source of the problem is Chief

Menapace, who had a pattern of holding people to extremely high standards. While that could be a reason for DOC to verbally counsel the Grievant, or even to assign Mt. Vernon to another inspector, it does not show the Grievant was doing anything for which he deserved to be terminated.

The Union has a counter-narrative – Chief Menapace wanted to run the State's inspector out of town. He testified, "It's our community, and we wanted to move forward and inspect our own stuff." Chief Menapace knew he was holding his community's facilities to a higher standard than that established by the State fire code. He figured he was within his rights to do so under Ohio's home rule law.

Regarding the charge that the Grievant conducted personal business on State time, it is ironic that the issue that gave rise to this entire case – the allegation the Grievant conducted business for his wife's uniform sales company on State time in a State vehicle – has dropped off the radar. This allegation was not mentioned in the Pre-Disciplinary Report or Chief Wambo's Allegations Summary.

The resolution of the Grievant's criminal charges is not relevant and does not bar his reinstatement. First, DOC did not discipline the Grievant for being convicted of a crime. Second, the Grievant's record has been expunged, so his plea no longer has any force and effect. Third, the criminal case was influenced by a number of factors unrelated to the discipline and grievance. The Common Law of the Workplace notes arbitrators hesitate to uphold discipline on the basis of a plea; the Grievant's case illustrates why. The Grievant testified he and his attorney weighed the costs and risks of various courses of action and decided the plea deal was his best option. It is therefore impossible to say the misdemeanor plea is dispositive of anything in the arbitration. Fourth, denying the Grievant a make-whole remedy when his record is expunged imposes a penalty beyond the scope of the Agreement.

> The fact that an individual has committed a crime, even a felony for which he has been imprisoned, does not necessarily require that he be forever barred from public employment. Our criminal justice system aims at rehabilitation and, indeed, there are fortunately, numerous accounts of convicts who have been successfully rehabilitated and achieved redemption.

Franklin County [Ohio] Commissioners, 125 LA 1622, 1630 (Alan Miles Ruben, 2009). The Grievant's criminal record – or lack thereof – has no bearing on the outcome of this arbitration.

The Grievant should be reinstated, given full backpay with interest, restoration or all vacation and leaves, full pension credits, and full credit for time away for purposes of determining FMLA eligibility. The Arbitrator should retain jurisdiction for 60 days to ensure compliance with the Award.

OPINION

The State bears the burden of proving it had just cause for terminating the Grievant's employment. Essentially, the State must prove the Grievant neglected his duties and that termination is the appropriate discipline for that neglect. The Union contends the State lacked just cause for both procedural and substantive reasons.

Procedural Issues

The Union has three procedural complaints against the State's handling of the Grievant's discipline. First, the Union contends the State violated Article 24 when it did not provide adequate notice of the removal, including an explanation of the

reasons for the removal. Second, the Union contends the State violated Article 24 by using an out-of-date disciplinary grid. Third, the Union contends the State violated Article 24 by not disciplining the Grievant in a timely manner.

The Union offered several prior arbitration awards between the Parties to support its procedural complaints. These awards are discussed below.[4]

Notice

In Samuels, supra, the arbitrator held a Removal Letter "raise[d] serious notice concerns" because it charged the grievant with violating "Directive B-19," "yet, the Employer relied extensively on Directive B-38 and its Work Rule 9(A)." "Such modifications are especially perplexing in light of the severely different penalties attached to both policies." Id., at pp. 13-14 of 15. The instant case does not involve a notice problem based on different penalties in different policies cited.

In Dunning, supra, the arbitrator held in 1988 that "referr[ing]" to "various documents" "did not provide the Grievant

[4] In its Post-Hearing Brief, the State objected to the Arbitrator considering any evidence and rulings not made part of the record. The Arbitrator agrees she should not consider any evidence not made part of the record. Prior rulings between the Parties are a different matter, however. That is a matter of advocacy, and it is appropriate for the Arbitrator to consider prior awards between the Parties presented as part of the Parties' Post-Hearing Briefs.

with adequate notice for the reasons for the contemplated discipline." Id., at 24. This Arbitrator is perplexed by this holding because the Order of Removal did contain the reasons for the discipline:

> The Order of Removal contained the following particulars:
>
> > The reason for this action is that you have been guilty of Resident abuse in the following particulars, to wit: As or about 9/17/86, you verbally harrassed (sic) a resident while she was doing the dishes, used Behavior Modifications threats that were not approved for said resident, and put her into an abuse headlock-type hold, when said resident rebelled.

Id., at 12. Dunning may have turned more on the fact that it, like Samuels, supra, involved a lack of notice regarding penalty. In Dunning, "[t]he penalty…was promulgated under a policy…more stringent than the one in effect at the time of the…incident." Dunning, at 19.

The Arbitrator finds that though the Union's points regarding the shortcomings in the State's notice are valid, the State provided sufficient notice regarding the charges against the Grievant. While the State's notice of discipline to the Grievant and the Union is hardly a model of clarity, the Arbitrator finds the

State did not deny due process to the Grievant with regard to notice.

The Disciplinary Grid

The Union is correct that the State must update the disciplinary grid to make it consistent with the current Agreement. Under the facts of this case, however – i.e., that the penalty of removal for a first offense of neglect of duty (major) in the out-of-date grid is not inconsistent with the current Agreement – the State's use of the out-of-date grid did not materially affect the due process afforded the Grievant.

Timeliness

Vincent, supra, which held a three-month delay in meting out a suspension is unreasonable, is inapposite because it turns on the fact the employee had already received a written reprimand three months previously for the same incident. Such "double jeopardy" is not present in the instant matter.

In Daniel, supra, "[t]he Employer offered no evidence as to its delay other than to say the Grievant was kept on Administrative Leave." The arbitrator pointed out, "[t]he CBA is silent as to this as a reason for delay." The arbitrator contrasted

that with the fact that "[t]he CBA does have reasons for delay i.e. criminal investigation." Daniel, accordingly, is inapposite, given that the record establishes some of the delay in the instant matter was due to a criminal investigation.

In Jones, supra, the arbitrator found a 9-month delay between when the State became aware of an employee's off-duty arrest and when the State terminated that employee was not a violation of Article 24.05 because:

> [t]he language of Article 24.05 indicates that the parties intended that a final decision on recommended disciplinary action is to be made no later than forty-five (45) days after the conclusion of the pre-discipline meeting. However, this requirement is not applicable in criminal cases where the State decides not to make a decision on the discipline until after disposition of the criminal charges. Thus, Article 24.05 recognizes that the disposition of criminal charges might weigh heavily in determining the discipline to be issued by the State. Moreover, Article 24.05 recognizes that the issuance of discipline after the disposition of the criminal charges is supported by valid considerations. For example, on the one hand, a delay in imposing discipline is useful to the Grievant who may invoke the fifth amendment where the conduct in question results in both the proposed discipline and the criminal charges. On the other hand, the presumption of innocence will stay the imposition of discipline by the State until the disposition of the criminal charges.

Id., at 8. (Emphasis added.) Though in the instant matter, "DOC has never said the Grievant was disciplined due to his

misdemeanor pleas," his criminal charges related to the same facts for which he was terminated. The State's decision to delay initiation of the Grievant's discipline until after the disposition of his criminal charges is expressly permitted by current Article 24.05, which provides in pertinent part:

> At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-disciplinary meeting may be delayed until after disposition of the criminal charges.

While the events leading up toward the Grievant's removal certainly took place over a long period of time, much of the length of the period was due to the Grievant's military leave of absence and the criminal investigation. Accordingly, the Arbitrator finds the extraordinary length of time it took to reach removal did not deny due process to the Grievant by the terms of the Agreement.

In Garrett, supra, the arbitrator noted a "removal order...dated the day after the pre-disciplinary hearing is strongly suggestive of prejudice." Id., at 10. She reduced a discharge to a 10-day suspension, however, chiefly "because the Notice of Investigation specifies violation of Directive B-19 and the Grievant was never specifically informed that the incident subjected him to discipline more severe than that meted out under B-19, discharge

is inappropriate." Id.. This Arbitrator does not find it inherently suspect for a removal order to be issued very shortly after a pre-disciplinary hearing report. Even in this case, which involved voluminous documentation, presumably the DOC Director was somewhat familiar with the situation prior to it reaching his desk for decision. Such familiarity does not indicate prejudice or pre-determination; rather, it reflects a working knowledge of what is going on in the Agency. The Pre-Disciplinary Hearing Report recommended removal based on the Hearing Officer's conclusion that the evidence produced by the Grievant at the Pre-Disciplinary Meeting did not materially contradict what the State's investigation had shown. The Director's next-day approval of the recommendation to remove the Grievant is neither surprising nor suspect.

Substantive Issues

Neglect of Duty

The record evidence of the Grievant's gross neglect of his important duties is illustrated by the testimony of two facility operators whose properties the Grievant inspected as part of his regular duties.

Children's Resource Center

The Grievant's contact person at the Children's Resource Center[5] testified the Grievant spent only a half hour annually at her facility and never cited it for any violations:

Q. How are you familiar with Tony Castelvetere?

A. Tony was our fire inspector I want to say starting about 2005 until 2010, '09 or '10. I think 2009. I think Richard did the 2010, Richard Vance.

Q. Could you tell me a little bit about the inspections when Tony would come to your facility? What were they like?

A. Tony would come into the facility. I think he was comfortable with our office. He would come in, usually come see me, ask for the prior inspection book. We'd walk around for a few minutes, because I would have keys to open the doors to where he needed to go and fill out the report. I'd sign it, and that would be it.

Q. About how long did that take?

A. Sometimes, you know – it just depended. Sometimes at most I think he was there for maybe a half hour.[6]

Q. Did he ever find any violations of the fire code when he was there?

A. Not that I recall. Past inspections, I think there were zero violations the whole time that I had

[5] Children's Resource Center is a residential facility for abused, neglected, and delinquent children ages 10 to 18.

[6] The Grievant wrote on his 2008 inspection report of Children's Resource Center that he inspected the facility from 2:30p to 4:00p. The facility contact person testified she worked only until 2:00p that day.

worked with Tony. From probably 2005 to 2009, I don't think there were any violations.

Fire Safety Inspector Richard Vance performed the annual inspection at Children's Resource Center in 2010 because the Grievant was on a military leave of absence.

Q. Then what happened when Richard Vance came to inspect your facility?

A. When Richard came and inspected our facility, we had 16 violations, I believe.

Q. Do you recall what some of those things were?

A. We didn't have a lot of things labeled, and the electrical panel system wasn't labeled. We had things stored in there. We never had –

Q. Things stored where?

A. In the electrical – it was like a – kind of like a closet area, and the electrical panel was in there, but we would store whatever in there, just various items.[7]

...

Q. What were some of the other things [Richard Vance] found?

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[7] The Grievant testified the electrical subpanel did not need to be labeled pursuant to the Fire Code. He did not offer an explanation why he had not cited the facility for clutter in the area of the electrical subpanel.

A. Our kitchenette system had never been cleaned....The kitchen hood had never been cleaned before.[8]

Q. How long had that kitchen been there?

A. Since '98.

...

Q. How long did Vance take to inspect the facility?

A. Probably a couple hours.

Q. Were there any other items that you were cited for [by Vance]?

A. Besides the hood system, we didn't have the electrical panel labeled. We didn't have the tornado area labeled. We didn't have the...vents for the dryer cleaned.

...

Q. So how did you feel after you found out that Vance had found all these violations? What was your reaction?

A. I was angry that we didn't know what we should have been doing. I mean if there was things that needed to be done, we should have known to do them, that the kitchen hood system I an extreme

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[8] The Grievant testified it would have been impossible to inspect the kitchen hood without dismantling it, which he was not permitted to do:

> [Y]ou can't tell if those are very dirty. You would have to rip out all of the panels in those systems to be able to look in there; and when you do that, you have the possibility of breaking the linkage which will set off the system, and we are not allowed to touch any equipment.

The facility contact, however, testified Vance determined the kitchen hood was dangerously greasy just by looking at it.

fire hazard; and if something were to happen to the children and it would burn because of that, I feel that they would look at the facility, maybe look at the inspections. There was no violations. So who's to blame for the facility burning down? And we didn't know it needed to be cleaned. We were never informed. It was highly frustrating for me to find no violations for three or four years to 16 in one event, very frustrating.

Q. Do you have any personal issues with Tony?

A. No, I don't. I don't have any personal issues with Tony....It was upsetting from one to the other, but personally, no, I don't.[9]

<u>Mt. Vernon Developmental Center</u>

The facility contact for the Mt. Vernon Developmental Center testified the Grievant spent 4 to 4.5 hours doing his facility's annual inspection. The Grievant found usually found 8 to 15

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[9] The Grievant testified the facility contact person may have been biased against him:

Q. Do you have any reason to doubt [the facility contact person] when she said she has nothing against you personally?

A. Well, she doesn't but her husband does.

Q. Why is that?

A. Her husband's mother used to babysit me and my brothers, and they did not get along very well.

Q. In fact, you teased him?

A. We were kids. It's things that we did – sometimes things that we did when we were kids were not good. I was probably the most respectful out of my family. I think it was more my brothers than it was me, because my brothers were all fighters, and I wasn't.

The Arbitrator found the facility contact person's testimony to be completely credible. The Grievant's suggestion of possible bias based on what his brothers did to the witness's husband decades ago is tenuous.

violations. The facility consisted of 300,000 square feet in 13 buildings situated on 310 acres. He testified when Richard Vance did the 2010 inspection, he spent 2.5 days, and found almost 90 violations:

> Q. What did you observe when Richard Vance inspected your facility?
>
> A. A much more intensive inspection, building floor unit, going on the unit, going to door to door. Every one of our utility and equipment areas, tunnels, penthouse, attic spaces.
>
> Q. Were those things Tony checked when he came through?
>
> A. Partial.
>
> Q. Which ones didn't he check?
>
> A. His inspections seemed to be more area typicals, and we would get parts of the buildings, but not at door to door in every nook and cranny of the building, so to speak.
>
> ...
>
> Q. What did [Vance] find?
>
> A. Signage, more egress issues, aisleways that were blocked with shelving units. We had to go through and mark all of our electrical panel boxes, sprinkler risers, ending up relocating some sprinkler heads because of proximity to air vents, and we had repeated issues with those sort of things.

Q. What was your reaction when Vance found all that?

A. Actually, I was almost appalled, because I was floored, and then I had a major task to try to correct things. It didn't bode well with my superintendent as well. We started in on corrections and we ran into the next year and seen similar things, but most of it was just because were kind of hitting a learning curve as to what he was really expecting as far as signage and such.

Q. How long had those issues that he noted as violations, how long had they existed?

A. They had been there in the 20 years of my tenure at the time.

Q. So these weren't new things that happened overnight?

A. No, they were decades.

Q. And these things, you know, are these things a big deal, clear aisleways and signage?

A. Yes, they are, not only with the fact that we have the individuals on our campus, a lot of them have ambulation issues. A lot of our folks are in wheelchairs, so you need wide egresses. Yes, they are, they are very important.

Q. Do you know what could happen if you didn't clear out those aisleways?

A. Well, in the event that you did have a fire, you are going to have problems with both getting firemen in, hoses and other equipment, plus you're going to have the issues with getting folks out as well.

Q. After Vance's inspection, did you have any situations like that?

A. We did have one issue almost immediately after one of the inspections that we were to clear out some shelves that were actually bolted to a wall in a warehouse area, and we had one of our staff get injured. He had cracked his forehead on a two-wheeler when he was loading some stuff up, big guy. He went to load him up on the gurney; and as were taking him out with the EMTs and myself assisting, we were going out through the area, through the door that we had unblocked from the previous survey. So that we wouldn't have been able to get through if it hadn't been for that.

Q. So this is one of the areas that Vance had asked you to clean up?

A. Yes.

The Union suggests Vance's inspection of the Mt. Vernon Developmental Center took more time because it was his first time there. While this could explain the Grievant being able to inspect the facility in perhaps half as much time as Vance, it does not explain why the Grievant spent only one fifth the time Vance spent (1/2 day v. 2-1/2 days). The Union also suggests Vance spent more time and found more violations because he was accompanied at the facility by the local Fire Chief. This begs the question. The Grievant's position required him to be out in the

field, unsupervised. The State needs to be able to trust him to do his job carefully, whether an observer is there or not.

The Arbitrator finds the examination of these two facilities alone demonstrates the Grievant was untrustworthy and seriously neglectful in fulfilling his work obligations. The Union suggests evidence of the Grievant's wrongdoing is statistically insignificant. The Arbitrator disagrees due to the nature of the Grievant's work. A Fire Safety Inspector cannot take a lackadaisical approach to his work ever because lives are at stake.

Appropriateness of Removal

The Union contends progressive discipline should have been used, that the Grievant's failings do not merit removal. The Arbitrator disagrees. The Grievant's job is performed independently. The State has lost trust in the Grievant's work ethic. A suspension would be insufficient because the State would have no way of knowing in the future, without extremely close supervision of the Grievant, if he had become a trustworthy employee who performed thorough inspections. The Grievant is an adult, and he is a highly trained safety professional. The State should not have to babysit him to ensure he is doing his job.

With regard to what role the Grievant's guilty plea to his work-related criminal misdemeanors should play:

> Typically, the results of proceedings in other forums do not preclude an independent determination by arbitrators of the issues even if the arbitrators allow the admission into evidence of the results of such proceedings.
>
> Since the parties have chosen arbitration as the means of resolving their dispute, it is a process independent of such other proceedings as unemployment or workers' compensation hearings, criminal trials (even if a conviction occurs), and NLRB or court litigation, even if the decisions in those proceedings arise out of actions related to the issue of the arbitration.
>
> Some arbitrators receive evidence of guilty pleas as admissions by the grievant of all of the elements of the crime; others will temper the impact of such pleas when there is testimony that the plea was entered as part of a bargain for a minimal sentence, that the grievant could not afford the defense of contesting the criminal charge, or the like.....

The Common Law of the Workplace – The Views of Arbitrators, 2nd edition, St. Antoine, editor, (BNA/NAA, 2005) at § 1.90, p. 52.[10]

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[10] Cf., "Discipline, Discharge, External Law and Procedure," in Arbitration 1995 – New Challenges and Expanding Responsibilities – Proceedings of the Forty-Eighth Annual Meeting of the National Academy of Arbitrators, (BNA/NAA, 1996), statement of Judge Harry Edwards at p. 232:

> Why does your plea matter? The underlying basis for your plea is irrelevant if you've conceded the wrongdoing.

Also cf., Jones, supra, at 6:

> Clearly, the Grievant's plea of guilty constitutes a confession of guilt to the criminal offense....I have attributed great weight to the Grievant's plea of guilty. Indeed, the Grievant's confession of guilt, is an admission against interest.

This Arbitrator finds the Grievant's guilty plea to his work-related misdemeanor charges to be an aggravating factor to the analysis of his wrongdoing, but not dispositive of that wrongdoing. Testimony in the instant arbitration independently establishes just cause for the termination. While the Union did an extremely thorough job in presenting its case, ultimately, it was the Grievant's own serious wrongdoing that provided the just cause under which he was removed.

AWARD

For the reasons stated above, the grievance is denied with regard to the Grievant.

With regard to the Union, the State is ordered to update the DOC disciplinary grid by October 1, 2012 to make the grid consistent with the current Agreement.

With regard to the disciplinary grid only, the Arbitrator retains jurisdiction through and until November 1, 2012.

August 31, 2012

Susan Grody Ruben
Arbitrator