Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio

#1121

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between:	)	Grievance No.
	)	16-11-121015-
Ohio Civil Service Employees Association,	)	1089-01-14
Local 11 AFSCME, AFL-CIO	)	
	)	ARBITRATION
and	)	OPINION AND
	)	AWARD
Ohio Department of Job and Family Services	)	
	)	DATE:
Re: Willie Mathis Termination	)	September 11,
	)	2013

APPEARANCES:
Jamecia Little, Advocate for OCSEA, Local 11 AFSCME; Tiffany Richardson, Advocate for the Department of Job and Family Services; and Victor Dandridge for the Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11 AFSCME. The parties are in disagreement regarding the termination of Willie Mathis, a Software Development Specialist 4 in the SETS support unit of the Ohio Department of Job and Family Services. The Grievant, Mr. Mathis, was terminated on October 12, 2012 regarding alleged pay for time not worked, timekeeping and other matters. The Union states that the termination is not for just cause. Mr. Mathis grieved his termination on October 15, 2012, and the Employer denied the grievance on December 19, 2012. The Union appealed the grievance to arbitration.

The Arbitrator was selected by the parties, pursuant to Article 25 of the collective bargaining agreement, to conduct a hearing and render a binding arbitration award. Three full days of hearing were held on May 10, 2013, June 6, 2013 and June 25, 2013 at the offices of OCSEA in Westerville, Ohio. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. Witnesses were sworn by the Arbitrator. The parties stipulated that the grievance was properly before the Arbitrator.

ISSUE

The parties stipulated to the following issue to be decided by the Arbitrator.

"Did the Ohio Department of Job and Family Services have just cause to remove Willie Mathis? If not, what shall the remedy be?"

WITNESSES

TESTIFYING FOR THE EMPLOYER:
Michael Reynolds, IT Manager
Sylvan Wilson, Assistant Deputy Director, ODJFS
Jennifer Demory, Chief Inspector
Steven Johnson, Chief Investigator, OCI
Steven Heaney, IT Manager (via telephone)

TESTIFYING FOR THE UNION:
Steven Jones, Security Manager
B. J. Hodson, State Trooper, Office of Investigative Services (via telephone)
Kathleen Martin, Management Analyst Supervisor
Jim Benedict, Union Steward and Infrastructure Specialist 3
Willie Mathis, Grievant

RELEVANT PROVISIONS OF AGREEMENT

Article 2 – Non-Discrimination

2.02 – Agreement Rights
No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

Article 13 – Work Week, Schedules and Overtime

13.08 – Call-Back Pay
Employees who are called to report to work and do report outside their regularly scheduled shift will be paid a minimum of four (4) hours at the employees total rate

of pay or actual hours worked (i.e., if actual hours worked exceeds 2.67 hours) at the overtime rate, whichever is greater providing such time does not abut the employee's regular shift. Call-back pay at straight time is excluded from the overtime calculation. Work which is to be performed at the employee's residence shall not be subject to callback pay, but shall be paid at the applicable regular or overtime rate for the time worked.
An employee called back to take care of an emergency shall not be required to work for the entire four (4) hour period by being assigned non-emergency work.

13.12 – Stand-By Pay
An employee is entitled to stand-by pay if he/she is required by the Agency in writing to be on stand-by, that is, to be available for possible call to work. If it is not practical to notify an employee in writing regarding stand-by status, the Employer may utilize oral or telephone means. Stand-by status may be canceled by telephone, providing written notice of such cancellation is provided to the employee within forty-eight (48) hours. An employee entitled to stand-by pay shall receive twenty-five percent (25%) of his/her base rate of pay for each hour he/she is in stand-by status. Stand-by time will be excluded from overtime calculation. Stand-by status shall be distinguished from call-back status by the following: 1) Direct notice of the requirement, as in the preceding; 2) Employee's off duty activities are specifically restricted by the Employer; 3) Employee is given a specific period of time during which he/she must respond to any summons from the Employer with the consequence of discipline for failure to respond/report. Once summoned to report, stand-by pay will continue until the employee reports and actual work is performed, at which time the pay provisions of the call-back section (Section 13.08) will apply and stand-by pay will cease. An employee required to carry a pager while on-call is not in stand-by status unless specifically notified that he/she is to be on stand-by status.

13.16 – Time Clocks
The Employer shall not add time clocks, unless the Union has been served notice and the Agency has engaged in discussions with the Union. During the term of this Agreement, upon request of either party, the parties agree to establish a joint Labor/Management Committee for the purpose of examining the impact of an automated State payroll system upon this Agreement and developing recommendations for the implementation of such a system.

Article 24- Discipline

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

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 notification 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.

If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

d. One (1) or more day(s) suspension(s). 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.

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

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;

2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

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. Employees who are interviewed or testify during an investigation have no right to a private attorney, Ohio Revised Code (ORC) 9.84 notwithstanding.

24.05 – Pre-Discipline

An employee has a right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. An employee who is charged, or his/her representative, may make a written request for one (1) continuance of up to forty-eight (48) hours. Such continuance shall not be unreasonably denied. A continuance may be longer than forty-eight (48) hours if mutually agreed to by the parties but in no case longer than sixty (60) days. In the event an employee refuses or fails to attend a pre-disciplinary meeting, the steward and/or representative shall represent in the matter at hand. Where the affected employee is on disability, or applying for disability, and is unable or unwilling to attend the meeting, he/she shall be offered the right to participate by telephone. The call shall be initiated via speakerphone in the presence of the steward and Employer representative or designee. Failure of the employee to respond to the offer or phone call shall result in the meeting proceeding without his/her presence. Any action resulting from said meeting shall not be challengeable on the basis of the employee's absence or lack of participation. 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 be provided to the Union and the employee prior to the meeting. In the event the 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-disciplinary 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-disciplinary 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 disposition of the criminal charges.
The employee and/or Union representative may submit a written presentation to the Agency Head or Acting Agency Head.
If a final decision is made to impose any discipline, including oral and written reprimands, the employee, if available, and Union shall be notified in writing. The OCSEA Chapter President shall notify the Agency Head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.
Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.
The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.
An employee may be placed on administrative leave or reassigned while an investigation is being conducted except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

GRIEVANCE

The grievance of Willie Mathis reads as follows

Mr. Mathis was terminated without just cause, the entry kiosks were used as timeclocks, and he was punished based on allegations that were ignored for other employees and cannot possibly be applied equally to all employees because of the lack of entry kiosks in other state buildings.
Remedy sought: Return Mr. Mathis to full employment without prejudice with backpay, benefits and interest.

The Union amended the grievance of Willie Mathis on November 15, 2012 as follows.

The Ohio Department of Job and Family Services conducted an investigation from March 2009 through October 2012. This extended beyond an Ohio State Highway Patrol and Franklin County criminal investigation. Their investigation could not substantiate that any criminal charges be filed. The report by ODJFS reflects inconsistencies in day to day operations by sections and departments. ODJFS management routinely permitted an alternative work schedule that was greater than flex time which also violates work policies and rules. This established past practice was supported by management and followed by an entire section for years. Tools used to measure and report time was not accurate and had multiple flaws. All charges in the report produced by the Office of Chief Inspector was predicated on false assumptions (the kiosk, call logs, class schedules and emails) and all evidence given to OCI was deliberately excluded.
I was forced to work for a manager (Doug Ledden) whose views are documented in an OCI report where he allegedly said he wanted the President elect killed and when other blacks rioted he could kill some more. Even though he was reportedly disciplined this created a very hostile work environment. He continues as a manager and to have people report to him.
Mr. Mathis was removed without just cause.
Remedy Sought: Return Mr. Mathis to full employment, restore all financial losses, leave, back pay, benefits and interest without prejudice.

The Office of Chief Inspector should modify or remove this report and the ODJFS CIO should apologize for slandering Mr. Mathis and attacking Mr. Mathis character.
Mr. Mathis should also be compensated for the following:
Working out of class for 8 years.
Paid for all days he was contacted by phone or other means while he was on vacation leave, sick leave and cost savings days.
Paid for all phone calls made to him after work hours as verified on the call logs.
Paid for all time he was called back into work and not allowed to report time in TimeKeep.
Paid for stand-by pay for the 8 years he was required to be on call.
When returned to work he would like to be placed into the IMS DBA area because this job was withheld from him due to this investigation.

BACKGROUND

Willie Mathis was an employee of the Ohio Department of Job and Family Services for ten years and had provided outside vendor services to the Department for two years prior to his full time employment. At the time of his termination, he held the position of Software Development Specialist 4 and was assigned to the SETS Unit. Mr. Mathis, the Grievant, had no active discipline in his personnel file at the time of his termination from employment, and he had never been disciplined during his tenure at ODJFS. His performance evaluations had been satisfactory and, in some cases, exemplary. In addition to his regular day shift, the Grievant was often contacted and worked during non-shift hours including weekends regarding issues of programing and technology. The Grievant served as an acting manager from time to time. His primary work location was the 4200 Building on E. Fifth Street in Columbus, Ohio. In late August 2009, the Ohio Inspector General received an anonymous complaint regarding six employees in the SETS Unit including the Grievant (Jt. Exb., Complaint). The complaint alleged that the employees were being

paid for time not worked during their regular shifts. The ODJFS Office of the Chief Inspector (OCI) initiated an investigation of five of the six employees to determine if they had engaged in theft of time around September 17, 2009. One of the six employees retired. OCI initially investigated the Grievant's work time from March 2009 through September 2009. The Grievant was interviewed by Kathleen Martin, an inspector from OCI, on March 31, 2010.

On October 4, 2010 OCI requested that the Ohio State Highway Patrol take over the investigation of the Grievant as alleged theft of time could result in criminal prosecution. A number of State Troopers were assigned to the investigation including Trooper B. J. Hodson. During the course of the investigation, conducted by the Highway Patrol, the Franklin County Prosecutor's Office was contacted for review of the information which had been gathered. The Prosecutor's Office indicated that "this case would be difficult of prosecute because the supervisors were signing off on all of the payroll they were accused of falsifying" (Union Exb. 52, pg. 6). The Prosecutor's office declined prosecution of the Grievant and others, and the Highway Patrol closed its investigation of the matter. Trooper Hodson testified at hearing that she thought the Grievant may not have falsified his time.

The Employer resumed its own investigation of the Grievant and the other involved employees. The review of time records had been expanded to April 2010. The investigation was focused on the Grievant's time records and kiosk card swipes from March 2009 to April 2010. A second investigatory interview of the Grievant was conducted by OCI Investigator Steve Johnson on April 4, 2012. OCI completed its investigation on April 30, 2012, and its report was submitted to ODJFS labor

relations. Sylvan Wilson, Assistant Deputy Director, requested on June 11, 2012 that a pre-discipline hearing be convened.

The OCI investigation focused on card swipes at the kiosk at the 4200 Building where the Grievant was employed. Although not a time keeping system, the kiosk recorded the comings and goings of employees and visitors based on a card swiping system. During the course of the investigation, OCI created a detailed spreadsheet which cataloged the daily swipes of the Grievant through the kiosk at the 4200 Building from pay period beginning on March 29, 2009 and ending on April 9, 2010 (Jt. Exb. C). The spreadsheet includes the time when the Grievant swiped as he entered the building; the time when he left in the middle of the day (lunch); the time he returned from lunch; the time he left for the day in the afternoon; some Saturdays and Sundays when required to work outside the normal shift; daily total of hours in the building based on kiosk swipes; and time reported in TimeKeep by the Grievant for pay purposes. The kiosk card swipes indicated that the Grievant spent less than eight hours at his work location in the 4200 Building on numerous occasions although he consistently registered eight hour work days in the payroll system. Numerous swipes indicated late entry at the start of the work day; excessively long lunch periods; and early exit from the building, all this on days the Grievant claimed eight hours of work and pay. During the one year period investigated, the Employer initially determined that the Grievant claimed 422 hours and 52 minutes of pay for time he did not work. After the Grievant accounted for a number of hours, based on training and other activities, during the pre-disciplinary hearing and during hearing at arbitration, the number was reduced to 377 hours

and 45 minutes. It was determined further that the swipe mechanism was not always recording information in a correct manner. The initial investigation was conducted by Kathleen Martin, who obtained six months of data, and Steven Johnson completed the investigation after obtaining the additional six months of data.

The Employer conducted a pre-disciplinary hearing on August 16, 2012 (Jt. Exb. Pre-D Packet). The request for the pre-disciplinary hearing had been submitted by Sylvan Wilson, Assistant Deputy Director, on June 11, 2012. The Grievant had been charged with two violations of policy as follows.

F 1 Failure to carry out and/or follow directions, assignments, written polices, procedures, and/or work rules.

F 11 Purposeful, careless, or unauthorized use or abuse of state equipment, property, state paid time, or the property of another.

Following the pre-disciplinary hearing, the employment of the Grievant was terminated on October 12, 2012 by letter signed by Michael B. Colbert, Director of the Ohio Department of Job and Family Services. The termination was grieved by the Union; the Employer denied the grievance; and the matter was appealed to arbitration.

POSITION OF THE EMPLOYER

The Employer states that the termination of the Grievant was for just cause and that management met the "seven tests for just cause." The Employer states that it is the responsibility of each employee to adhere to policies and rules and to properly account for time actually worked in an accurate manner. The Grievant's

supervisor reminded him, prior to the investigation, that he must account for hours worked in an accurate manner. The Employer states that the Union challenged the credentials and classification of the investigators, but management has the right to assign personnel it deems qualified. The Employer states further that the Union's challenge to the same management representative conducting the pre-disciplinary hearing, grievance hearing, mediation and arbitration is unfounded as the collective bargaining agreement does not impose any such limitation.

The Employer states that the Union's suggestion that the Grievant worked a substantial number of hours outside the 4200 Building and therefore did not swipe in and out at the kiosk, is not supported by any proof. The Employer states that kiosk card swipes were generally accurate. While there may have been some errors in the system, the Grievant was credited with time worked when it was determined the kiosk was providing inaccurate information. The Employer argues that, during the course of the hearing at arbitration, the Union did not produce evidence or testimony to support the Grievant's position that he actually worked the hours in question on the spreadsheet. The Union argues that the Grievant's hard drive was replaced during the investigation thereby preventing him from providing a defense to the allegations. But the Grievant had access to his "C drive" prior to the pre-disciplinary hearing. The Employer argues that the Grievant has no defense for unworked hours as illustrated by the spreadsheet.

Although the prosecutor and Ohio State Highway Patrol chose to not pursue criminal prosecution for theft to time, the standard utilized in an administrative discipline is significantly different from that of a criminal charge. The Employer

argues that it has met the standards of just cause and has proven that the termination of the Grievant was for just cause.

The Employer states that, after all evidence and argument presented at hearing, the Grievant is unable to account for 378 hours for which he was paid. This amount of time is egregious, and it qualifies for termination of employment. The Employer argues that the Grievant accepted pay for hours he did not work, and at nearly $48.00 per hour, he received over $18,000.00 for which he provided no service to the Department. The Employer requests that the grievance of the Union be denied in its entirety.

POSITION OF THE UNION

The Union argues that the Grievant was terminated without just cause. The Union argues further that the Employer failed in its obligation to adhere to the "seven tests of just cause." The Employer's case is inconsistent, and there is an overall lack of evidence.

The Grievant, and other employees, record their standard schedules and time in the TimeKeep system. The standard schedule is the approved schedule employees are expected to follow. Nevertheless, the Grievant, due to the nature of his responsibilities, was often required to work outside of his approved schedule based on the on-call nature of his level of responsibility. The Union states that the Grievant was instructed, at a time prior to the investigation, to record only eight hours in a day regardless of the time actually worked due to overtime pay restrictions. Employees were told to flex their time when working beyond the

standard eight hour shift. Work time recorded in TimeKeep was not an accurate reflection of time actually worked. The Union argues that at no time during his employment was the Grievant put on notice by supervision that discipline would be the result of TimeKeep not being an accurate reflection of hours worked including start and end times.

The Union states that the Grievant has never been disciplined during his ten years of employment with the Department. Management never notified the Grievant that he was in violation of mismanaging his time, and his supervisors, Heaney and Reynolds, never questioned his time sheets. During the time in question, the Grievant was never questioned regarding his time by any member of management. The Union argues that the termination of the Grievant is a violation of progressive discipline and is a punitive act on the part of the Employer which is further violation of the Agreement. Supervisor Reynolds had a responsibility to monitor the Grievant's work time, but he never questioned the time sheets or work schedule. The Union states that, while the Grievant was terminated, his supervisor received only a written reprimand for failure to properly monitor his time sheets and work schedule. The Union argues that this disparity must be considered as a significant factor for consideration in this case. The Union states that no discipline was issued to correct the Grievant's behavior, and he was never warned regarding his daily schedule. The Union argues that the discipline of the Grievant is clearly punitive.

The Union argues further that the investigation of the Employer was not complete and thorough. While the investigator reviewed the Grievant's P-Drive, he

ignored the C-Drive because there was a large amount of stored data. The Union states that the investigation also failed to obtain information on the various training programs the Grievant attended outside the 4200 Building and in particular those conducted by outside vendors. The Union argues that on many occasions the Grievant was on duty but had not proceeded through the kiosk at the 4200 Building. The Union argues that the investigation is deficient based upon the sole reliance on kiosk card swipes.

The Union argues that the Employer did not administer discipline consistently. Of the five employees in the unit who were being investigated, some were offered settlements which allowed for reinstatement. Others were terminated. The Union states that it was determined that other employees were reporting time in the same manner as the Grievant, but the Employer chose not to investigate.

The Union argues that the kiosk in the 4200 Building is not a time keeping device. It records who enters and exits the building for security purposes and is required for auditing purposes by the federal government. The kiosk system is known for its errors in reporting time of entry and exiting, and the accuracy of its data is not reliable. The Employer has relied on this data to terminate the employment of the Grievant, and therefore, the Union argues, the Employer's investigation is significantly flawed. The Union argues further that the spreadsheet utilized by the Employer contains errors and inaccurate data. The Union states that Investigator Johnson is not qualified in assembling spreadsheets, and the document he created became the foundation of the Employer's case for the termination of the Grievant.

The Union argues that there is no proof that the Grievant was not working during the 422 hours so claimed by the Employer. There were no eye witnesses and no video evidence. Supervisors did not consider the Grievant's work habits to be in violation of Department policy.

The Union argues further that the length of the investigation and failure of the Employer to act in a timely manner had an adverse effect on the Grievant and outcome of the matter. The Union argues that the timeliness question is reason enough for the Arbitrator to reinstate the Grievant. The pre-disciplinary hearing was conducted many months following the investigation, and the Grievant was terminated almost sixty days later.

Finally the Union argues that a conflict of interest exists in that the Employer's advocate at arbitration was also the pre-disciplinary hearing officer who recommended discipline, the step three grievance officer and the Employer's representative at grievance mediation. The Union argues that it is clear that the Employer has never been objective in the handling of this matter from the investigation through hearing at arbitration.

The Union states that the Grievant, Willie Mathis, is not guilty of violating Department policy. He should be reinstated to his position with all back pay and benefits, and, if it is determined that there was any violation, the Grievant should be reinstated with a lesser level of discipline as the penalty of termination was excessive and not for just cause.

DISCUSSION AND ANALYSIS

This is a complex case with a number of issues and challenges posed by the Union to the Employer's contention that the termination of the Grievant was for just cause. First, the Union challenged the credentials and experience of those who were directed to investigate the actions of the Grievant in respect to his time keeping and the card swipes at the kiosk at the 4200 Building. The Employer argues that it has the right to decide who conducted the investigation and the manner in which it proceeded. The Union claims that Investigator Drummond was on loan from another department and was not qualified to conduct the investigation, and Investigator Martin examined only a portion of the Grievant's work time. The Union states Martin's initial report was modified by others after it was written. The Union argues that Investigator Johnson made a number of errors when he assembled the spreadsheet which illustrated card swipes made by the Grievant. The Employer's argument, that it has the right to appoint those it deems qualified to investigate, is meritorious. The investigation will rise or fall on the ability of the investigators to provide adequate proof to justify disciplinary action. Nevertheless, the amount of time needed to complete the investigation of the Grievant is a separate concern.

The Union has challenged the propriety of the same management representative conducting the pre-disciplinary hearing; conducting the third step grievance meeting and initiating the Employer's response at this level; representing management at grievance mediation; and then presenting the case at arbitration as the Employer's advocate. The Employer states that the Union's argument is unfounded as the collective bargaining agreement does not impose any restrictions

or limitations. While some separation may have been advisable, the Employer's position is correct. The Agreement between the parties does not prohibit the Employer from utilizing the same member of management to conduct hearings at each step of the process and to then present the case at arbitration. The merits of the case will be determined by the proofs offered by the parties and not by who the advocates might be. It would not be unusual for a Union staff person to represent a member at the pre-disciplinary hearing, the step three meeting and to serve as the advocate at arbitration.

The Union argues that the spreadsheet illustrating the card swipes of the Grievant is inaccurate and mistake prone. The Employer has responded that, when data was determined to be inaccurate, the Grievant was given credit for time worked and was given the benefit of the doubt when data was questionable. The Employer argues that the Grievant was responsible to produce documentation indicating that he actually worked when data indicated that he had not swiped into the 4200 Building. The Union's argument, that the burden is upon the Employer, is accurate. It is not necessary for the Grievant to prove his innocence in the face of conflicting information. The Employer initially charged the Grievant with 422 hours and 52 minutes of claimed but not worked time based primarily on card swipes at the kiosk. At the pre-disciplinary hearing the Grievant accounted for over 32 hours of time when the data had indicated no swipes into the 4200 Building. During the arbitration hearing, after arduous review and testimony regarding the spreadsheet and testimony of the Grievant, almost 30 additional hours of time were credited to the Grievant as data was determined to be inaccurate. Steve Johnson, the

Investigative Supervisor who assembled the spreadsheet of card swipes, testified at hearing that a number of errors were discovered following its completion. He testified on rebuttal that it was possible that the spreadsheet still contained additional errors. The inaccuracy of the data is critical when considering the disciplinary penalty imposed on the Grievant compared to other employees who were investigated following the anonymous letter to the Department. While the existence of Last Chance Agreements is not known due to their confidentiality, testimony indicates that a number of the investigated employees received disciplinary suspensions as opposed to termination. Tiffany Richardson, who as the Employer's advocate chose to testify at hearing, stated that some employees were suspended because they were charged with less unaccounted for time than the Grievant. She testified further that one of those investigated was terminated because it had been determined that 190 hours of unaccounted for time was involved. Apparently employees with 190 hours or more of unaccounted for time were terminated while others with less questionable time were suspended. This is problematic, as the Union has argued. Intentional theft of time is a serious violation of policy whether 20 hours or 400 hours. By issuing disciplinary suspensions for some of those involved and terminating the Grievant for the same violation is one factor in the modification of the penalty in this case. And this is especially critical when the evidence clearly indicates that the spreadsheet contains a number of inaccuracies, and the true total for the Grievant has never been clearly determined. Evidence regarding the exact number of hours the Grievant may have been paid when not working remains unclear following hearing at arbitration. By drawing a

line in the sand to determine who is to be suspended as opposed to termination for the same infraction weakens the Employer's argument that the termination of the Grievant was for just cause. This is especially true knowing that the total number of involved hours in the case of the Grievant is unclear.

The Union has argued that the card swipe mechanism at the kiosk is not a time clock, as defined by the collective bargaining agreement, and cannot therefore be utilized to calculate the work time of the Grievant. Testimony indicates that the primary function of the swipe mechanism is to record who has entered or exited the 4200 Building due to the secure nature of the facility. Apparently the federal government requires the monitoring which the kiosk provides. The Union is correct in that it is not a time clock. The Grievant, and other employees, enter their work hours in the TimeKeep system. Nevertheless, the investigators scrutinized the card swipes of the Grievant in order to determine when he entered and exited the facility and then compared this information to data in TimeKeep. The Employer states that review of the card swipes is a legitimate tool of investigation, and this argument is meritorious. Although the data contained on the spreadsheet has been questioned for its accuracy, evidence is clear that on a number of occasions, the Grievant arrived at his work location after the start of his scheduled shift; he was at his mid-day break longer than authorized; and he left work prior to the scheduled end of his shift. There is no evidence that flex time was involved. Notwithstanding hours worked at home in the evening, weekend responsibilities, and meetings and conferences at locations away from the 4200 Building, the evidence is clear that the Grievant was lax in working his entire scheduled and assigned eight hour work

schedule and assignment on a number of occasions from March 2009 to April 2010. He was paid for hours not worked. The Grievant therefore violated, as the Employer contends, policy F 1, "Failure to carry out and/or follow directions, assignments, written policies, procedures, and/or work rules as charged by the Employer." In addition, the Grievant violated policy F 11, "Purposeful, careless, or unauthorized use or abuse of state equipment, property, state paid time, or the property of another." The critical factor in this case is that the violations occurred in a work environment in which this behavior was deemed acceptable.

Supervisor Reynolds approved the time sheets of the Grievant without question. Although he did not assign specific tasks to the Grievant, he was responsible for the approval of time sheets and monitoring of his time. Mr. Reynolds testified at hearing that he had no concerns regarding the Grievant's time and pay records. He also stated that he did not keep track of him. He claimed to have never observed that the Grievant arrived at the office late, took longer than authorized lunch breaks and left early on occasions. Evidence indicates a work setting which was lax in terms of reporting and leaving in an exact and timely manner. Evidence indicates further that management felt the Grievant completed all of his assigned work, and he received satisfactory and exemplary evaluations with no mention of TimeKeep and pay issues. The Union's argument, that the Employer did not follow the principle of progressive discipline when the Grievant was terminated, is legitimate. Evidence indicates that the Grievant notified Supervisor Reynolds that Supervisor Heaney had allowed the Grievant to work flexed hours and that his pattern of work hours had been acceptable. This provided

Mr. Reynolds the opportunity to monitor the Grievant's work hours and notify him that he was expected to work full eight hour days. He chose not to do so. Supervisor Reynolds was disciplined for these failures. Supervisor Heaney testified at hearing that he told the Grievant to log actual hours worked, and, on one occasion, stated to him that "professionals arrive on time and leave at the proper time." He testified that he did not discipline the Grievant. Supervisor Heaney chose not to manage, not to take corrective action. He testified that he never spoke to Supervisor Reynolds regarding concerns over the Grievant's time records. Evidence indicates that the Highway Patrol and Franklin County Prosecutor's Office found the lack of appropriate supervisory response to be a flaw in any criminal proceeding and in the State's case.

"Arbitrators have not hesitated to disturb penalties where the employer over a period of time has condoned the violation of the rule in the past. Lax enforcement of rules may lead employees reasonably to believe that the conduct in question is tolerated by management. Even where the employee has engaged in conduct that is obviously improper, such as threatening a supervisor, the fact that management had failed to impose discipline in the past can be a signal that unacceptable behavior will not be penalized." (*How Arbitration Works, Elkouri & Elkouri, Sixth Edition, page 994*) As reported further in "Elkouri," an arbitrator reinstated an employee and stated the following. "Employees are entitled to clear notice that rules will be enforced. Where, however, rules are not enforced but violations thereof are accepted by management, employees are lulled into believing that such rules are not serious. In effect, employees are 'sandbagged' into violating the rules and then are unfairly

punished for a violation." (*How Arbitration Works, Elkouri & Elkouri, Sixth Edition, page 995, Chivas Prods., 101 LA 546 550, Kanner, 1993*) The Grievant was not the only employee in the work unit who was lax in reporting to and leaving from the office in a timely manner. This behavior appears to have been an established and accepted pattern.

To complicate matters further, evidence indicates that employees were notified, including the Grievant, to report only eight hours of work in TimeKeep each day regardless of actual hours worked in order to avoid payment for overtime. Employees were told to flex their time during the week so as not to work more than forty hours. Sylvan Wilson, Deputy Director of the agency, testified that employees were expected to work eight hours per day, but, if they worked overtime on any one day, they were to only enter eight hours on time sheets and flex during the week. Wilson stated that employees could submit "default schedules" as opposed to actual hours during 2010. Surely management had not intended for an environment, which allowed for laxity in reporting time and hours worked and pay for time not worked, but this was the end result. Deputy Director Wilson signed the Grievant's performance evaluation for 2009 which stated the following regarding the Grievant. "Willie has always demonstrated a high standard of ethical behavior and good integrity." Evidence indicates that management was aware that the Grievant was being investigated regarding his time records when this evaluation was written and approved. If the Employer felt that the Grievant was in violation of policy regarding the reporting of his time, it never brought the matter to his attention. This is problematic. And the investigation of his time keeping from March 2009 to April

2010 occurred over a period of two years. Arbitrator Duff made the following observation in a similar arbitration case. "Where a Company has taken a lenient attitude toward misbehavior of an employee over a period of time, and does not impose any substantial punishment on him to convince him of the necessity to reform, it would not be just to permit such infractions to be accumulated and made the basis for a discharge." (*Rochester Telephone Corp. and Communication Workers of America, 45 LA 538 540, Arbitrator Clair V. Duff*) And Arbitrator Dobry wrote the following when he reduced termination of an employee to a disciplinary suspension. "Management bears at least some of the responsibility for Grievant's conduct. Its lax enforcement was a signal that unacceptable behavior was tolerable. Its attempt to abruptly draw a line, without first giving a warning that a new infraction would result in discharge, helped to ensnare Grievant into a further violation." (*Champion Spark Plug and United Auto Workers, 93 LA 1277 1284, Arbitrator Stanley T. Dobry*) Supervisor Reynolds essentially paid no attention to the comings and goings of the Grievant; failed to monitor his time; automatically approved his time sheets; and accepted the Grievant's explanation that Supervisor Heaney allowed for his flexible schedule. Supervisor Heaney stated to the Grievant that failure to arrive at the office in a timely manner and leaving early were not the actions of a professional employee, but he failed to notify the Grievant that he was in violation of policy which could result in disciplinary action. He allowed the behavior to continue. Employees were instructed to enter only eight hours in TimeKeep and to flex their time in order to avoid overtime. This was an environment in which strict adherence to the start and end of the scheduled shift was not enforced by management over a

period of time. The Grievant was one of a number of employees caught up in this loose setting. Evidence indicates that additional employees, beyond those who were investigated based on the anonymous letter, may have engaged in the same practices. The Union's argument, that the Employer chose not to extend the investigation beyond the original six employees, when the practice may have been more widespread, is accurate and so noted.

The Ohio State Highway Patrol concluded their investigation when it became clear that supervisory staff approved the time sheets of the Grievant and the other employees who were being investigated, and the county prosecutor's office declined to take the matter on as a criminal offense for the same reasons. Kathleen Martin, the department investigator, who was initially assigned to the case, testified at hearing that "supervisors were not supervising employees." Although Investigator Martin was transferred during the investigation, she testified that the card swipe system did not provide an actual accounting of time worked and that she did not agree with the conclusions of the investigation of the Grievant. She testified further of her expressed concern that the investigation was not extended beyond the six named employees when others were revealed. Ms. Martin possesses a degree in criminology, an MBA and serves as a member of White Collar Crime Unit. Although this Arbitrator places little stock in findings from unemployment compensation appeal hearings, the conclusions at this venue mirrored those reached by the Highway Patrol and prosecutor's office, that supervisors approved the Grievant's time and behavior. Jim Benedict, the Union steward for the unit, testified that the Union expressed its concern regarding the reporting of eight hours as opposed to

time actually worked at a labor management meeting during this time period. The Grievant may have been more lax than others in the work unit, but the environment allowed for the behavior.

Evidence indicates that the Grievant was first notified, in an investigative interview, of the investigation on March 31, 2010. The Employer interviewed the Grievant a second time on April 4, 2012. Two years following the first interview. This lengthy investigation was concluded and report submitted to the Employer on April 30, 2012, two years following the last work date investigated. The Employer waited until August 2012 to conduct a pre-disciplinary hearing on August 16 and terminated the employee on October 12, 2012. The Union's argument, that the Employer was negligent in extending the investigation over a two year period and then waiting until October, 2012 to terminate the Grievant, is understandable. During the investigation it became clear that the Grievant was entering time in TimeKeep which he had not actually worked, but evidence indicates that at no time was he notified of the policy violations and possible disciplinary consequences. The Union's additional argument, that it would be difficult for the Grievant to remember his work activity on any given date two and three years later, is meritorious. The collective bargaining agreement provides no limit for conducting an investigation, and the Employer is allowed sixty days to notify an employee of disciplinary action following a pre-disciplinary hearing. But Section 24.02 of the Agreement states that "Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence. . . ." This provision continues. "An arbitrator deciding a disciplinary grievance must consider the timeliness of the Employer's decision to

begin the disciplinary process." This Arbitrator is concerned over the length of time it took the Employer to conduct the investigation, interview the Grievant in April 2012 two years following the first investigative interview, and delivering the decision following the pre-disciplinary hearing. This is a case that the Employer considered to be a potential criminal violation. Yet it took almost three years to impose discipline. Testimony by management at hearing indicated that the matter was delayed because there were only two labor relations officers handling the entire agency, and "it was a very busy time." It is difficult to accept this response regarding a disciplinary matter of this magnitude.

Although it has been determined that the spreadsheet, which catalogued the card swipes of the Grievant, contains inaccurate data, and testimony suggests the possibility of additional inaccuracies, the investigation of the Grievant clearly indicates late arrival, long lunch periods and early departure from the work site on many occasions. The Union argues that the card swipe mechanism is not a time clock, but the review of the swipes is a fair investigative tool. The Grievant clearly entered information in TimeKeep which was not an accurate reflection of time actually worked on many occasions during the one year period which was the subject of the investigation. The spreadsheet contains sufficient data, even in the face of numerous inaccuracies, to justify the charge of violation of ODJFS Standards of Employee Conduct, policies F 1 and F 11. The statement by Supervisor Heaney, that professional employees arrive at work on time and leave on a timely basis, is on point. The Grievant, on a number of occasions, was paid for time not worked. Nevertheless, the failure of supervision to address the practice of late arrival and

early leaving created an environment in which short work days were an acceptable practice. In addition, management directed employees to enter eight hour work days in TimeKeep regardless of actual time worked in order to avoid overtime with the understanding that employees would flex their time. This practice enhanced the laxity and acceptability of flexible coming and going in violation of department policy. The Grievant was never counseled, confronted over, or disciplined for his shortcomings even when it became evident, in the early stages of the investigation, that his behavior was unacceptable. Finally, the length of time involved with the investigation and disciplinary process is difficult to reconcile.

The failure of management to enforce the standard work shift; the failure to counsel or discipline the Grievant; the fact that other employees who engaged in the same violations of the Grievant received disciplinary suspensions; and the unreasonable length of the investigation and disciplinary process are mitigating factors in this case. The Employer violated Sections 24.01 and 24.02 of the collective bargaining agreement when it terminated the employment of the Grievant. Termination of employment was not for just cause although the Grievant violated policies F 1 and F 11. The Grievant, Willie Mathis, is to be reinstated as a Software Development Specialist 4 in the SETS Unit of the Ohio Department of Job and Family Services no later than the beginning of the next pay period following the date of this Award. He is to receive no back pay. Lost pay and benefits from the date of termination, October 12, 2012, to the date of reinstatement will be considered a disciplinary suspension, and the personnel record of the Grievant will so reflect modification of disciplinary penalty.

AWARD

The grievance of the Union is granted in part and denied in part pursuant to Sections 24.01 and 24.02 of the collective bargaining agreement. The Grievant, Willie Mathis, is to be reinstated as a Software Development Specialist 4 in the SETS Unit of the Ohio Department of Job and Family Services no later than the beginning of the next pay period following the date of this Award. He is to receive no back pay. Lost pay and benefits from the date of termination, October 12, 2012, to the date of reinstatement will be considered a disciplinary suspension, and the personnel record of the Grievant will so reflect modification of disciplinary penalty.

Signed and dated this 11th Day of September, 2013 at Cleveland, Ohio.

Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th Day of September, 2013, a copy of the foregoing Award was served, by way of electronic mail, upon Jamecia Little, Advocate for OCSEA, Local 11 AFSCME; Tiffany Richardson, Advocate for the Ohio Department of Jobs and Family Services; and Victor Dandridge, Ohio Office of Collective Bargaining. In addition the Award was served upon Sandi Friel, OCSEA, and Alicyn Carrel, Office of Collective Bargaining.

Thomas J. Nowel
Arbitrator