ARBITRATION DECISION NO.:
218

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Hazardous Waste Facilities Board

DATE OF ARBITRATION:

DATE OF DECISION:
December 20, 1989

GRIEVANT:
Michael Lepp

OCB GRIEVANCE NO.:
12-00-(88-07-27)-0028-01-14

ARBITRATOR:
Frank Keenan

FOR THE UNION:
Daniel S. Smith

FOR THE EMPLOYER:
Egdillio J. Morales

KEY WORDS:
Insubordination
First Amendment
Fourth Amendment
Just Cause
Removal

ARTICLES:
Article 24-Discipline
§24.01-Standard

FACTS:

Grievant is a Hearing Officer of the Hazardous Facilities Board. This grievance deals with his discharge, but the case is factually dependent on the facts of a previous discipline for insubordination. Grievant returned from a previous 10 day suspension and was, given non-hearing officer duties. The grievant was assigned to do some research but he did not do so. The grievant was not assigned to a hearing in which he had specialized knowledge of the subject matter; the

EPA hired another hearing officer to handle this extensive hearing.

The grievant wrote two letters protesting the waste of taxpayer's money. The grievant stated that this waste consisted of the EPA hiring another hearing officer when the grievant was competent to handle the case, and the grievant was not being assigned hearing officer duties. The grievant also asked that these letters be kept confidential. The supervisor found these letters when searching through a computer disk the grievant had stored in a filing cabinet. The supervisor was allegedly looking for information on a pending case. All three employees in the office had keys to the filing cabinet, but the grievant could have secured the disk in his own individual desk drawer. The grievant was charged with insubordination, misuse of his position for gain, and removed.

EMPLOYER'S POSITION:

The grievant abused his hearing officer status. The Hazardous Waste Facility Board must not even have the appearance of bias and grievant went to great lengths to embarrass the board and its members. Grievant has lost credibility which goes to the heart of his ability to operate as a hearing officer and maintain the impartial stance of a hearing officer. By wanting to keep the letters confidential, the letters give the impression of future favoritism. It is possible that the persons who received the two letters would expect a favor on a decision on a future hazardous waste site. Both had strong interests on hazardous waste site approval.

The problem of how the letters were obtained is moot since the letters would have been discovered by the state board anyway. The grievant also refused to do the assigned research that was clearly within his ability. He threw the research back on his supervisor's desk. The grievant could not be trusted in the extremely sensitive area of adjudication at this point and clearly refused to do assigned work. The core reason for this removal is grievant's insubordination and his reliance on inappropriate measures of self-help.

UNION'S POSITION:

First there are several procedural defects in the discharge. The Director of the EPA removed the grievant without approval by the Board. The letters that were found in the cabinet should not be allowed to be used against the grievant since they are beyond the employer's reach due to the Fourth Amendment's restriction on unreasonable searches and seizures. The grievant was removed in two steps; the rationale for discipline of the suspension was only an excuse. The employer had no thoughts of reform in assigning the research work that was clearly below the grievant's capacity. The assignment was designed only to antagonize the grievant. The grievant was assigned no other work and was left to sit idly by while another hearing officer was hired for a case in which the grievant had specialized experience.

All the other main charges are mere speculation; the grievant could recuse himself from any future hearings that even slightly involved the two letter receivers. The only reason that the grievant urged secrecy was that he recognized that he was a target of the EPA. Grievant was never told what would constitute rehabilitation or even why he was later discharged. The grievant has a First Amendment right to inform the public about a misuse of state funds. The cost of hiring another hearing officer for the reason of a continued campaign against a qualified hearing officer is an outrage.

ARBITRATOR'S OPINION:

Although the board in not dissenting knew and approved the removal of the grievant, there was no clear vision of why the grievant was removed. The arbitrator decided the main reason the grievant was removed was sending the two letters. The appearance of a conflict of interest was the underlying reason behind the removal. Grievant's supposed failure to rehabilitate himself is not a reliable reason for the employer to fire the grievant. The grievant was not apprised of the fact he

was being removed for failure to rehabilitate himself. The research he was assigned was never done and the employer took no disciplinary action until the letters were discovered.

The doctrine of inevitable discovery diminishes the Union's Fourth Amendment argument. The letters would have been discovered by the board. The grievant does have a First Amendment right to free speech. The employer must show that there interests are "significantly greater" than the grievant's First Amendment's rights. Even though the grievant's actions can be characterized as "self-help", the action could also be characterized as in the public interest. The grievant is not wholly innocent in this case and lacked judgment. In a position as sensitive as a Hearing Officer the grievant must not even appear to be biased.

AWARD:

The grievance is denied in part and sustained in part. The removal is modified to a sixty day suspension without pay. The suspension will be regarded as starting on the effective date of the grievant's discharge and grievant will not lose his seniority.

TEXT OF THE OPINION:

ARBITRATION
BETWEEN

STATE OF OHIO,
HAZARDOUS WASTE FACILITIES BOARD

and

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 11, A.F.S.C.M.E., AFL-CIO

OCB CASE #:
12-00-880727-0028-01-14
(Michael Lepp's Removal)

Appearances:

For the Board:
Egdillio J. Morales, Management Advocate
Office of Collective Bargaining
Ohio Department of Administrative Services
Columbus, Ohio

For the Union:
Daniel S. Smith, Esq.
General Counsel
OCSEA/AFSCME Local 11
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Arbitrator

Statement of the Case:

This case involves the propriety of the discharge of Hearing Officer/ALJ Michael Lepp, herein the Grievant, from his employment with the Hazardous Waste Facilities Board. The Grievant's letter of removal, set forth on State of Ohio Environmental Protection Agency's letterhead, dated July 12, 1988, and signed by Richard L. Shank, Ph.D., reads in pertinent part as follows:

"This letter is to notify you that I am terminating your employment with the Hazardous Waste Facilities Board at the close of business on July 15, 1988. This removal is the result of your insubordination, misuse of state property, misuse of position for personal gain, and hindering the performance of the work of other employees, all of which (together or apart) constitute just cause for discipline."

This followed a letter dated June 30, 1988 from Janietta Smith, Deputy Director, Office of Human Resources, OEPA, notifying the Grievant of a "pre-disciplinary hearing and outlining somewhat more extensive charges and attached hereto as Attachment IA.
Pursuant to that notice of pre-disciplinary hearing, said hearing was indeed conducted, despite a request for postponement from the Union, on July 11, 1988. The Union's perception of what transpired at the hearing, including the various positions it took with respect to the charges against the Grievant, were testified to by Daniel S. Smith, Esq., the Grievant's advocate there and here. These matters are synopsized in Mr. Smith's letter of July 12, 1988, to Director James Adair, OEPA, HWFB, and attached hereto as Attachment lB. He grieved his discharge on 7/25/88.

The Grievant's discharge was preceded by a 10-day disciplinary suspension for insubordination, which was the subject of a grievance, and arbitration before the undersigned Arbitrator, in OCB Case #G87-2931. The Opinion and Award in that matter reduced the 10-day disciplinary suspension to a 5-day disciplinary suspension. Critical to an understanding of the instant case is the preceding events and consequences as embodied in the record and the Opinion and Award in that prior case, which issued November 25, 1989; and accordingly they are incorporated herein. This is particularly necessary in light of Sahli's testimony to the effect that prior discipline of the Grievant was considered in the removal decision, coupled with the fact that the Grievant's only discipline had been the 10-day December 1987 disciplinary suspension involved in the aforementioned arbitration proceeding. It is noted that all told the record in the case thus totals 666 pages (including 10 pages from the transcript of the 2/17/89 proceedings), and voluminous documentary evidence.

There, as here, OEPA Director and HWFB Chairman Richard Shank did not testify. Rather HWFB Management relied upon Richard Sahli, Michael Shapiro, William R. Kirk, and various pieces of documentary evidence to establish their case against the Grievant. Sahli advised Shank, clearly worked closely with Shank, and participated with Shank, in the decision to terminate the Grievant. Shapiro, as the Grievant's immediate supervisor, clearly had some input. The third step designee was William Kirk. On the record made before me, one must look principally to Sahli's testimony for the reasons relied upon by Shank for terminating the Grievant. What follows are extensive relevant excerpts from the testimony of Sahli & Shapiro,

From the testimony of Richard Sahli:

Q. WOULD YOU PLEASE REPEAT YOUR POSITION WITH THE OHIO E.P.A. IN MAY OF 1988?
A. OKAY. CURRENTLY I AM CURRENT ASSISTANT DIRECTOR OF THE OHIO E.P.A. IN MAY OF '88, I SERVED AS DEPUTY DIRECTOR OF OHIO E.P.A. FOR LEGAL AND GOVERNMENTAL AFFAIRS, PRIMARILY HANDLING LEGAL ISSUES OF ANY KIND OR DESCRIPTION, ENFORCEMENT, ADMINISTRATIVE AT THE OHIO E.P.A. I HAVE BEEN A LICENSED ATTORNEY IN OHIO SINCE 1980.
Q. IN THIS CAPACITY, SIR, DID YOU HAVE A ROLE IN THE DECISION TO TERMINATE THE GRIEVANT'S EMPLOYMENT?
A. THAT'S CORRECT. DIRECTOR SHANK IS NOT AN ATTORNEY. THE ISSUES RAISED IN THE GRIEVANT'S ACTIVITIES DID HAVE QUITE A LEGAL BACKGROUND TO THEM. HE ASKED MY ADVICE AS AN ATTORNEY, OF MY OPINION OF THAT ACTION. I WAS INVOLVED IN DISCUSSIONS ABOUT HOW TO APPROPRIATELY CONSIDER THE SCOPE OF THE MISCONDUCT OF THE CONDUCT AS AN ATTORNEY.
Q. IN CONSIDERATION OF THE DISCIPLINE, WHAT FACTORS WERE CONSIDERED?
A. FOR THE REMOVAL ACTION, THE FIRST THING I THINK WAS BEFORE US WERE TWO VERY GRAVE INCIDENTS OF CONCERN, AND THAT WAS THE DEVELOPMENT OF A LETTER BY THE GRIEVANT TO BE ISSUED TO A FORMER LITIGANT BEFORE THE BOARD, A POTENTIAL FORMER LITIGANT BEFORE THE BOARD.

* * * *

THE WITNESS: OKAY. THE LETTER ITSELF -- IS DATED MAY 19TH, 1988. IT BEARS THE TOP ADDRESS OF 4174 EMERSON ROAD, CIRCLEVILLE, OHIO. THE ADDRESS OF THE -- IS TO THE EDITOR, COLUMBUS DISPATCH. IT'S SIGNED BY A WOMAN WHO'S KNOWN TO ME AS POLLY MILLER WHO RESIDES AT THAT ADDRESS.

THIS LETTER WAS FOUND BY MR. SHAPIRO AND WAS BROUGHT TO THE ATTENTION OF THE CHAIRMAN BECAUSE IT WAS ON AGENCY EQUIPMENT AT THE HAZARDOUS WASTE FACILITY BOARD, FOUND IN A MACHINE THAT HAD BEEN UTILIZED BY MR. LEPP.

WHAT WAS OVERWHELMINGLY OF CONCERN TO US WAS EDITORS OF THE DISPATCH, EVIDENTLY FOR PUBLICATION IN THAT PAPER ABOUT MISS MILL ER'S OUTRAGE TO HEAR ABOUT THE BOARD SPENDING MONEY FOR THE HIRING OF AN ADDITIONAL HEARING EXAMINER FOR BOARD BUSINESS, WHEN THERE WAS A HEARING EXAMINER AVAILABLE FOR THAT PURPOSE, AND IT EVEN UTILIZED THE PHRASE "SITTING IDLE" BECAUSE HE BLEW THE WHISTLE ON THE CHAIRMAN.

ALSO, THERE IS REFERENCE IN THE FINAL PARAGRAPH ABOUT HER CONCERNS ABOUT THE AGENCY RESPONDING TO A CERTAIN COMPLAINT AND ATTRIBUTING APPARENTLY SOME -- RAISING THE POSSIBLITY THAT THAT ACTION WAS RELATED TO THE CHAIRMAN'S ACTIONS AS THE HAZARDOUS WASTE FACILITY BOARD CHAIRMAN IN THE FACT THAT HE IS LETTING A HEARING EXAMINER GO IDLE.

THIS WAS OF GREAT CONCERN TO US PRIMARILY BECAUSE MISS MILLER HEADS A CITIZENS' GROUP OF CIRCLEVILLE, OHIO THAT WAS OPPOSED TO A HAZARDOUS WASTE INCINERATOR WHICH THE BOARD 1984. I WANT TO SAY ONE OPERATED – ONE OPERATED BY PITTSBURGH PLATE AND GLASS.

MISS MILLER HEADED A GROUP CALLED L. ECHOS CITIZENS GROUP OPPOSING THAT FACILITY. SHE WAS A LITIGANT BEFORE THE BOARD, A VERY INTERESTED PARTY

THE NATURE OF THE LETTER, AND THE FACT THAT IT WAS EVIDENTLY PREPARED BY MR. LEPP FOR SENDING TO MISS MILLER. THE LETTER COMMENTED ON TO THE LETTERS TO THE BEFORE THE BOARD. MR. LEPP WAS THE HEARING EXAMINER ASSIGNED TO THAT CASE. I AM WELL AWARE OF IT BECAUSE I WAS ALSO THE ASSISTANT ATTORNEY GENERAL ASSIGNED TO THAT CASE BEFORE MR. LEPP.

IT STRUCK US THAT UNDER THE CIRCUMSTANCES SHOWN WHERE MR. SHAPIRO ACTUALLY HAD SEEN MR. LEPP AT THE MACHINE, WHEN MR. LEPP LEFT THE MACHINE, THIS LETTER WAS RIGHT THERE ON THE SCREEN IN PUBLIC VIEW WHERE HE COULD SEE IT.

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THE WITNESS: IT WAS ON THE SCREEN AND MR. LEPP HAD PREPARED THE LETTER. WELL, THE LETTER ITSELF, IT WAS ON STATE EQUIPMENT. THAT IS A MINOR, PERHAPS INCONSEQUENTIAL THING TO US.

THE MAIN THING IS THAT THIS LETTER WAS DIRECTED TO MISS MILLER. SHE HAD BEEN A LITIGANT IN THAT CASE. AND BECAUSE PERMITS FOR THESE FACILITIES FREQUENTLY COME UP FOR RENEWAL, THE FACILITY CAN COME UP FOR REMODIFICATION, THERE'S A FAIRLY GOOD CHANCE THAT THE P.P.G. MATTER AND MISS MILLER WOULD AGAIN APPEAR BEFORE THE HAZARDOIJS WASTE BOARD AT A TIME IN THE FUTURE.

MR. LEPP DID THE INITIAL HEARING ON THAT CASE. IN THE EVENT THAT THE CASE WOULD HAVE COME BEFORE THE BOARD, NORMALLY THE CASES WOULD HAVE BEEN ASSISGNED – THAT CASE WOULD HAVE BEEN RETURNED TO MR. LEPP FOR ADJUDICATION.

NOW, WE CAN ONLY THINK OF TWO OR THREE POSSIBLE SCENARIOS UNDER WHICH WHAT MUST HAVE HAPPENED BASED ON THIS INFORMATION, ALL OF WHICH SHOWED GRAVE CONCERN.

THE FIRST WOULD HAVE BEEN THAT MR. LEPP SOLICITED MISS MILLER OR WAS GOING TO SOLICIT MISS MILLER TO SIGN THIS LETTER AND SEND IT TO <u>THE COLUMBUS DISPATCH</u>. IN OTHER WORDS, A BOARD HEARING EXAMINER CONTACTING A FORMER AND FUTURE LITIGANT TO THE BOARD WOULD HAVE HAD TO AMOUNTED TO THE REQUEST FOR A PERSONAL FAVOR TO SEND THIS LETTER.

WE THOUGHT UNDER THAT CIRCUMSTANCE THERE WOULD BE OBLIGE, POTENTIAL THOUGHT TO HER THAT IF YOU DID NOT COOPERATE, IF IT COMES BACK BEFORE THE BOARD, YOU WILL NOT BE -- YOU KNOW, IT MAY POTENTIALLY GO BAD FOR YOU.

THE OTHER POSSIBILITY WOULD HAVE BEEN THAT MISS MILLER MAY HAVE CONTACTED MR. LEPP BECAUSE SHE HAD -- HAS BEEN AWARE THERE HAD BEEN SOME NEWSPAPER STORIES ABOUT THE DISCIPLINARY ACTION WITH LEPP ON THE BOARD, AND THE FACT THAT AFTER THE EX PARTE ISSUES THAT WERE DISCUSSED, THE LAST – DURING THAT NOTICE HE HAD BEEN REMOVED FROM HIS ADJUDICATORY RESPONSIBILITIES, PERHAPS SHE HAD CONTACTED THE GRIEVANT AND THEN HE WAS, [ILLEGIBLE] LETTER. HE WAS ACTUALLY PREPARING A LETTER TO THEN SEND TO MISS MILLER.

WHY THIS WAS OF GREAT CONCERN TO US IS IF THAT CASE WOULD COME BEFORE THE BOARD AND MISS MILLER ASSISTED THE HEARING EXAMINER, WE COULD NO LONGER BE GUARANTEED THE IMPARTIALITY OF WHAT HAPPENED. THESE ARE THE SCENARIOS WE THOUGHT HAD HAPPENED. WE FRANKLY COULD COME UP WITH NO OTHER THEORY.

IF MISS MILLER INDEPENDENTLY HAD SENT THIS <u>TO THE COLUMBUS DISPATCH</u>,

THAT WOULD HAVE BEEN NO MOMENT. BUT THE FACT THAT MR. LEPP WAS INTIMATELY BOUND UP AND ACTUALLY PREPARED THIS DOCUMENT WAS OF GRAVE CONCERN. THAT TO OUR MINDS, QUITE CATEGORICALLY, DEMONSTRATED THAT IN LIGHT OF PRIOR COURSE OF CONDUCT WITH PRIOR DISCIPLINE, WHICH SHOWED HIS UNWILLINGNESS TO APPROPRIATELY FUNCTION AS AN EMPLOYEE, THAT NOW HE WAS UTILIZING AND ABUSING HIS POST AS HEARING EXAMINER WITH PARTIES WHO APPEARED BEFORE THE BOARD.

THIS TO US SHOWED AN INCIDENT THAT NOT ONLY CAST GRAVE DOUBTS UPON PROFESSIONAL, ETHICAL MANNER BUT COULD THIS INDIVIDUAL BE TRUSTED TO HAVE THE FIDUCIARY ROLE OF A HEARING EXAMINER BEFORE US AGAIN.

WE STRONGLY THOUGH THAT THIS SHED A COMPLETE BREACH, AND THAT THE FIDUCIARY RELATIONSHIP WHICH WE HAD TO HAVE WITH THE BOARD HEARING EXAMINER, TO GIVE HIM THE INDEPENDENCE WHICH WE DO GIVE HEARING EXAMINERS, AND THAT FRANKLY WITH THIS TYPE OF MISCONDUCT, THERE HE'D SHOWN A COMPLETE BREACH ON HIS RESPONSIBILITIES.

BY MR. MORALES:

Q. DID YOU CONSIDER THE PAST DISCIPLINE?

A. YES, DEFINITELY. MR. LEPP HAD BEEN INVOLVED IN AN ITEM I'D PREVIOUSLY GIVEN TESTIMONY ON BEFORE THE HEARING EXAMINER, WHERE HE HAD PUBLISHED A NOTICE OF EX PARTE COMMUNICATION THAT HAD --- WHAT WAS IN OUR OPINION AND THOSE OF OTHER ATTORNEYS -- IRRELEVANT PREJUDICIAL MATERIAL WHICH WE THOUGHT ITSELF WAS FATALLY STRONG OR HAD THE STRONG POSSIBILITY IF NOT AVAILABLE BEFORE THE BOARD, IN THE MATTER INVOLVING THE ERIEWAY FACILITIES IN SOLON OR BEDFORD HEIGHTS, OHIO.

AFTER THAT HAD HAPPENED, MR. LEPP REFUSED TO EXPUNGE THIS MATERIAL, AND THEN WENT SO FAR NOT ONLY TO REFUSE THE ORDER, BUT TO CONTINUE THE COURSE OF MISCONDUCT AND FILING A NOTICE OF SUA SPONTE. WHEN HE, HIMSELF, DID SO WITH SUCH LANGUAGE, IT ONLY CONTINUED ON THE INTEGRITY OF THAT COMMUNICATION. TO US, THAT WAS A CONTINUING COURSE OF MISCONDUCT. THEREAFTER, HE WAS RELIEVED FROM HIS RESPONSIBILITIES AS A HEARING EXAMINER. OUR THOUGHT WAS THAT HE WOULD HOPEFULLY INDICATE HIS WILLINGNESS TO BE -- TO FUNCTION IN AN INDEPENDENT AND RESPONSIBLE MANNER.

IN THE INTERVENING PERIOD BETWEEN THAT DISCIPLINARY ACTION WHICH WAS SOUGHT AND IMPOSED A TEN-DAY SUSPENSION BECAUSE OF GRAPEVINES THAT WE THOUGHT PASSED -- THE COURSE OF MISCONDUCT FOR THE HEARING EXAMINER -- WE HAD REPORTS FROM THE EXECUTIVE DIRECTOR, THE IMMEDIATE SUPERVISOR OF MR. LEPP THAT HE HAD BEEN QUITE DISVOLUNTARY, SULTRY IN HIS PERFORMANCE WHILE HE HAD BEEN ASSIGNED TO GENERAL RESEARCH WORK HE HAD NOT PERFORMED; THAT HIS HOURS HAD BEEN VERY BAD, AND THERE WAS A CONTINUING PATH, NOT OF DEMONSTRATING A WILLINGNESS TO WORK AND BE AN EMPLOYEE FOR THE BOARD BUT TO CONTINUE THAT COURSE OF INSUBORDINATION. THEN WE SEE THAT COURSE OF INSUBORDINATION, TO OUR MINDS, EXPLODING INTO AN INCIDENT OF THIS TYPE, SO WE DID THIS --

MR. SMITH: I'M GOING TO MAKE AN OBJECTION AT THIS POINT, MR. ARBITRATOR. THE QUESTION OF SULTRY PERFORMANCE OR THE REFUSAL TO PERFORM WORK AFTER HIS TEN-DAY SUSPENSION LEADING UP TO THESE INCIDENTS WAS NEVER

ALLEGED TO BE A GROUND FOR THE REMOVAL. THERE AGAIN, THEY ARE TRYING TO STACK THE CHARGES, IS WHAT IS GOING ON.

ARBITRATOR KEENAN: WELL, IF YOU HAVE AN ARGUMENT TO MAKE ON THAT BASIS, YOU CAN MAKE IT AT THE CONCLUSION OF THE HEARING, BUT HE IS TELLING ME WHAT HE DID. YOU KNOW, I CANNOT SUSTAIN AN OBJECTION ON THAT BASIS.

* * * *

Q. THE QUESTION WAS: DID YOU CONSIDER THE EFFECT ON THE ADJUDICATORY PROCESSES OF THE BOARD OF THE GRIEVANT'S ACTION?

A. ABSOLUTELY. THAT WAS BEFORE US. THE PRIOR DISCIPLINARY ACTION HAD ALREADY CAST TO OUR MINDS A GREAT DEAL OF CONCERN ON HIS WILLINGNESS TO PERFORM IN ANY PROFESSIONAL MANNER AS A HEARING OFFICER OF THE HAZARDOUS WASTE FACILITY BOARD.

WITH THIS INCIDENT, WE THOUGHT THAT COMPLETELY DESTROYED HIS EFFECTIVENESS AS A HEARING EXAMINER BECAUSE IT WOULD SHOW THAT FOR HIS OWN PRIVATE, PERSONAL PURPOSES HE WAS WILLING TO COMPLETELY BEFOUL THE INTEGRITY OF THE ADJUDICATION PROCESS BY REACHING OUT TO POTENTIAL LITIGANTS IN ASSISTING HIM IN AN EFFORT.

Q. MR. SAHLI, THE POLLY MILLER LETTER MAKES REFERENCE TO THE DIRECTOR OF THE E.P.A. BEING RESPONSIBLE FOR HINDERING COMPLAINTS OF THE E.P.A.

WAS THAT A FACTOR?

A. THAT WAS NOT A FACTOR. FRANKLY, I DON'T THINK WE UNDERSTOOD WHAT THAT ARGUMENT WAS ABOUT AT ALL. THE MAIN FACTOR WAS THAT THIS WAS GOING TO MISS MILLER WHO WAS A LITIGANT BEFORE THE BOARD AND WHO COULD WELL BE IN THE FUTURE.

SHE RUNS A CITIZENS' GROUP. SHE IS A VERY GOOD PERSON AND A KNOWLEDGEABLE PERSON. YET, WHEN CONTACTED OR CONTACTING A HEARING EXAMINER OF THE HAZARDOUS WASTE BOARD WAS PUT IN THE REAL POSITION OF EITHER SEEKING TO DESTROY THE INDEPENDENCE AND INTEGRITY OF THE HEARING PROCESS OR BEING CONDUCTED BY A HEARING OFFICER AT THE SAME INDEPENDENCE.

Q. I WOULD LIKE YOU TO TAKE A LOOK AT JOINT EXHIBIT 27, PLEASE, AND WE'VE ALREADY LOOKED AT THIS DOCUMENT AS THE OTHER LETTERS THAT WERE FOUND BY MR. SHAPIRO.

HOW MUCH WEIGHT DID THE AGENCY GIVE TO THESE LETTERS IN DECIDING DISCIPLINE?

A. OKAY. JOINT EXHIBIT 27 ARE COPIES OF THE PACKET BROUGHT TO THE DIRECTOR OF OHIO E.P.A. BY MR. SHAPIRO WHICH WAS CLAIMED TO BE ON THE SAME DISK AT THE HAZARDOUS WASTE BOARD ON WHICH THE POLLY MILLER LETTER WAS LOCATED.

ONLY ONE OF THESE LETTERS WAS OF PARTICULAR STRONG CONCERN. IT WAS NOT THE FIRST TIME WE HAD SEEN THE LETTER. THAT WAS A LETTER TO THE MEMBERS OF THE STATE CONTROLLING BOARD.

WHILE IT'S TRUE THAT THESE WERE PRIVATE LETTERS DONE ON STATE EQUIPMENT, THAT IS VIOLATION OF STATE LAW UTILIZING STATE LAW. THAT IS SOMETHING TO DISCIPLINE. THAT TO OUR MINDS SHOULD NOT BE DONE AND IS NOT TO BE TOLERATED IN A STATE AGENCY,

YET, IT WAS THE NATURE OF CERTAIN OF THESE LETTERS WHICH CAST LARGER ISSUES ABOUT HIS ABILITY TO CONTINUE TO SERVE AS A BOARD EMPLOYEE,

PARTICULARLY THE POLLY MILLER LETTER AND THE LETTERS TO THE STATE CONTROLLING BOARD.

Q. COULD YOU EXPLAIN FURTHER HOW THE LETTERS TO THE CONTROLLING BOARD WERE OF IMPORTANCE?

A. OKAY. AFTER THE INCIDENCE WITH THE TEN-DAY SUSPENSION, MR. LEPP HAD BEEN REMOVED FROM ADJUDICATORY RESPONSIBILITIES. HE HAD SHOWN NO WILLINGNESS TO REHABILITATE HIMSELF AND TO INDICATE A WILLINGNESS TO HAVE THOSE DUTIES RETURNED TO HIM BECAUSE HE WAS WILLING TO ABIDE BY THE RESPONSIBILITIES OF THE BOARD HEARING EXAMINER. WE WERE NOT UTILIZING MR. LEPP FOR ADJUDICATIONS. THERE IS STILL THAT COURSE OF MISCONDUCT THAT LED TO THE TEN-DAY SUSPENSION THAT WAS OF GRAVE CONCERN TO US.

THERE WAS A SECOND BOARD HEARING EXAMINER, MR. RICHARD BRUDZYNSKI. HE WAS THE HEARING EXAMINER ON AN EXTREMELY CONTROVERSIAL CASE BEFORE THE BOARD. THAT CASE WAS ON THE ENVIROSAFE HAZARDOUS WASTE LANDFILL. THAT IS LOCATED IN OREGON, OHIO, WHICH IS JUST TO THE EAST OF TOLEDO. IT IS A VERY LARGE FACILITY. IT IS A HAZARDOUS WASTE LANDFILL WHERE HAZARDOUS WASTES ARE PUT FOR DISPOSAL. DISPOSAL BY LANDFILLING IS A DISCOURAGED PROCESS FOR LANDFILLING. IT IS ONE THAT IS VERY CONTROVERSIAL. THIS WAS A VERY MAJOR CASE.

MR. BRUDZYNSKI HAD BEEN ASSIGNED -- HAD BEEN WORKING WITH THE CASE, BUT LEFT HE THE EMPLOY OF THE BOARD TO WORK FOR THE CITY OF DAYTON, REQUIRING THE BOARD TO HAVE ANOTHER HEARING EXAMINER TO HEAR THAT VERY CONTROVERSIAL CASE.

I SAY THAT BECAUSE VIRTUALLY EVERY ACTION THAT HAPPENED WAS COMMENTED ON BY THE MAYOR, CITY COUNCIL OF OREGON. THEY WERE STRONGLY OPPOSING THAT FACILITY IN THE TOLEDO AREA, AND PARTICULARLY IN THE MEDIA UP THERE.

WHEN HE LEFT, THE BOARD WAS FACED WITH A NEED TO ASSIGN A NEW HEARING EXAMINER. MR. LEPP HAD BEEN REMOVED FROM HIS ADJUDICATORY RESPONSIBILITIES. HE HAD SHOWN NO REHABILITATION AFTER THE INCIDENT INVOLVING THE TEN-DAY SUSPENSION. WE FELT WE COULD NOT, IN LIGHT OF THAT CONDUCT AT THE TIME, PUT HIM BACK IN A CASE THAT WAS THIS CONTROVERSIAL. THEREFORE, WE WERE FACED WITH THE NEED TO GET AN ADDITIONAL HEARING EXAMINER. WE WERE GOING TO HAVE TO HIRE AN ATTORNEY WITH HEARING EXAMINER EXPERIENCE TO THIS HEAR VERY CONTROVERSIAL CASE.

WHEN I SAY "CONTROVERSIAL," IT WAS VERY TECHNICAL. THE TRANSCRIPT OF THIS CASE WAS SOME 15,000 PAGES, AND THERE WERE MANY PROFESSIONAL, SCIENTIFIC WITNESSES INVOLVED. IN ORDER TO HIRE THIS HEARING EXAMINER, WE HAD TO GET APPROVAL FROM THE STATE CONTROLLING BOARD FOR THAT.

WE PREPARED -- MR. ADAIR, MR. SHAPIRO DID LOCATE A GENTLEMAN WHO HAD BEEN A HEARING EXAMINER FOR THE STATE PUBLIC UTILITIES COMMISSION WHO HAD A GOOD BACKGROUND IN COMPLEX PERMITTING ACTIONS, ADMINISTRATIVE LAW. WE THOUGHT HE WAS VERY GOOD. FOR THAT PURPOSE, WE'RE GOING TO HAVE TO CONTRACT WITH THIS INDIVIDUAL FOR $70,000. IT WAS THE CONTRACT WE WERE SEEKING BEFORE THE CONTROLLING BOARD TO DO THIS EXTENSIVE HEARING.

WE HAD ADVISED THE OFFICE OF BUDGET AND MANAGEMENT OF THE STATE OF OHIO ABOUT OUR CIRCUMSTANCES, OUR CONTROLLING BOARD REQUEST. WE DID NOT RAISE REFERENCE TO THE FACT THAT WE HAD THE ADDITIONAL HEARING

EXAMINER WHO WAS NOT ASSIGNED ADJUDICATORY RESPONSIBILITIES. WE HAD -- BUT THAT WE HAD THE SITUATION WITH MR. LEPP THAT WE FELT THAT WHILE HE WAS ON STAFF, WE COULD NOT ASSIGN TO HIM A CASE. WE DID NOT, HOWEVER, RAISE THAT TO THE CONTROLLING BOARD DOCUMENT, SO THAT WE WOULD NOT DRAW ATTENTION TO THE DIFFICULTIES WE WERE HAVING WITH HIM.

WE THOUGHT IT WOULD SERVE EVERYONE'S PURPOSE, INCLUDING MR. LEPP, NOT TO RAISE THE FACT THAT THE BOARD HAD DEFINITELY A REAL PROBLEM IN CONFIDENCE WITH MR. LEPP'S ABILITY TO CONDUCT AN ADJUDICATION OF THIS MATTER.

SHORTLY THEREAFTER, BEFORE THIS MATTER CAME BEFORE THE CONTROLLING BOARD'S CONSIDERATION, THE GOVERNOR'S OFFICE SENT TO DIRECTOR SHANK AND ALSO TO MYSELF, A COPY OF A LETTER WHICH HAD BEEN RECEIVED BY ALL OF THE MEMBERS OF THE STATE CONTROLLING BOARD. THAT LETTER IS THE SECOND LETTER ON JOINT EXHIBIT 27.

IT IS ADDRESSED TO FOUR MEMBERS OF THE STATE CONTROLLING BOARD: REPRESENTATIVE WILLIAM HINIG, REPRESENTATIVE ROBERT NESSLEY, REPRESENTATIVE ROBERT HICKEY FROM DAYTON, WHICH IS OF PARTICULAR CONCERN, AND ALSO SENATOR TED GREY.

IN THIS LETTER WHICH CAME FROM MR. LEPP, HE SPECIFICALLY OBJECTED TO THE CONTROLLING BOARD APPROVING THE $70,000 EXPENDITURE WHEN HE, HIMSELF, WAS AVAILABLE, HAD NOT BEEN ASSIGNED DUTIES. HE ALSO EVIDENTLY ATTACHED TO THE LETTER, A COPY OF A CLIPPING FROM THE TOLEDO BLADE REGARDING THIS ISSUE, AND HE ASKED THEM NOT TO CONSIDER THAT REQUEST; THAT INDEED THERE SHOULD BE PRESSURE PUT ON THE AGENCY TO RETURN HIM TO HIS ADJUDICATORY RESPONSIBILITIES INSTEAD. THE LAST SENTENCE IN THE LETTER IS: "I ASK YOU NOT TO IDENTIFY ME AS THE SOURCE OF THIS INFORMATION."

AGAIN, WHEN THE CONTROLLING BOARD MEMBERS RECEIVED THIS, THEY TRANSMITTED IT TO THE OFFICE OF BUDGET AND MANAGEMENT AND GAVE IT TO THE GOVERNOR'S OFFICE, WHO MADE IT AVAILABLE TO US.

THEREAFTER, WE DID HAVE TO EXPLAIN TO SEVERAL MEMBERS OF THE BOARD THE CIRCUMSTANCES WITH MR. LEPP OF HOW WE DID HAVE HIM ON STAFF. WE RELIEVED HIM FROM THE RESPONSIBILITIES DUE TO THE INCIDENTS INVOLVING THE TEN-DAY SUSPENSION. WE HAD HOPED THAT WE COULD ASSIGN THESE RESPONSIBILITIES BUT THAT WE COULD NOT UNDER THE CURRENT SITUATION.

THEREAFTER, THE CONTROLLING BOARD APPROVED THIS REQUEST BY A FIVE TO ONE VOTE. HOWEVER, THIS WAS ONLY AFTER A ONE-WEEK DELAY WITH THE CONTROLLING BOARD. THEY DELAYED CONSIDERATION FOR ONE WEEK IN WHICH THE INCIDENT OF THE HEARING EXAMINER ON STAFF WITHOUT ADJUDICATORY RESPONSIBILITIES WAS RAISED. THEN WE HAVE THAT INTERVENING WEEK TO GIVE A REASON FOR THAT.

WHAT WAS OF PARTICULAR CONCERN IN THIS AND WHY THIS HAS WEIGHED HEAVILY IN OUR MINDS IN TAKING THE REMOVAL ACTION WAS THAT REPRESENTATIVE ROBERT HICKEY WAS A MEMBER OF THE CONTROLLING BOARD, WHO IS A STATE REPRESENTATIVE FROM DAYTON. THERE IS A STATEMENT IN HERE, THE FIRST SENTENCE IN THE SECOND PARAGRAPH, "TO A GREATER, LESSER EXTENT WHICH OF YOU OBSERVED MY WORK FOR THE STATE" -- MR. HINIG, NESSLEY, AND GREY – “WHEN I WORKED FOR THE LEGISLATIVE SERVICE COMMISSION." MR. HICKEY FROM THE HAZARDOUS WASTE FACILITY BOARD, THE PUBLIC HEARING THAT I CONDUCTED IN

DAYTON OR THE ECOLITEC (PHONETIC) -- ECOLITEC IS ANOTHER VERY CONTROVERSIAL BOARD ACTION. IT IS ONE THAT REPRESENTATIVE HICKEY PERSONALLY IS VERY CONCERNED ABOUT, AND HE EXPRESSED THAT CONCERN. IT IS ONE TO WHICH MR. LEPP WAS ASSIGNED AND HAD BEEN ASSIGNED AS HEARING EXAMINER.

ECOLITEC IS A HAZARDOUS WASTE FACILITY RIGHT IN THE CENTER OF URBAN DAYTON, LOCATED IMMEDIATELY ON TOP OF THE PUBLIC WATER SUPPLY FOR THE CITY OF DAYTON, ON TOP OF THEIR ACQUIFER. IT IS AN EXTREMELY CONTROVERSIAL CASE. IT IS ONE WHERE REPRESENTATIVE HICKEY FROM THAT AREA HAS EXPRESSED GREATER RESERVATIONS ABOUT THAT FACILITY.

WHILE MR. LEPP WAS THE HEARING EXAMINER ON THAT CASE WAS MORE LIKELY THAN NOT TO CONTINUE TO BE HEARING EXAMINER ON THAT CASE WHEN HE WAS ASSIGNED THE ADJUDICATORY RESPONSIBILITIES. HOWEVER, HE HAD AN APPEAL HERE TO REPRESENTATIVE HICKEY THAT DON'T GO AHEAD WITH THIS ASSISTING; THAT I AM PUT BACK IN MY ADJUDICATORY RESPONSIBILITIES IN THE FUTURE INCLUDING, I ASSUME, THE ECOLITEC CASE WHICH -- SOMETHING WHICH HE WOULD HAVE BEEN ASSIGNED AND HE WAS STILL ASSIGNED TO IF HE HAD BEEN RETURNED TO THE ADJUDICATORY RESPONSIBILITIES.

WE THINK THAT PUT MR. HICKEY IN A DILEMMA OF HOW TO RESPOND TO THIS. THIS PERSON IS BACK ON THE CASE. HICKEY'S NOT GIVING ASSISTANCE, WILL THAT BE HELD AGAINST THE CITY OF DAYTON AS IT TURNED OUT, MR. HICKEY WAS THE ONE DISSENTING VOTE ON THIS CONTROLLING BOARD REQUEST.

WELL, THE DISSENTING VOTE IS – THE FACT THAT ONCE AGAIN, THE HEARING EXAMINER, MR. LEPP, THE GRIEVANT COMPROMISED, IN OUR MINDS, HIS INTEGRITY TO THE ACT WITH THE INDEPENDENTNESS OF A HEARING BOARD EXAMINER, COMPROMISES THE PUBLIC AND INDEPENDENCE FOR HIS OWN PRIVATE NEEDS, AND CONTACTING REPRESENTATIVE HICKE'S. THUS, SHOWING TO OUR MINDS THAT HE HAD GONE BEYOND THE PALE OF APPROPRIATE PROFESSIONAL CONDUCT AS AN ATTORNEY.

HOW COULD THE BOARD HAVE A HIGH LEVEL OF COMPETENCE IN THE FIDUCIARY DUTIES THAT HEARING EXAMINERS HAVE WHEN HE HAS INDICATED A WILLINGNESS FOR HIS PRIVATE PURPOSES. HE COULD CONTACT MR. HICKEY AND POLLY MILLER INVOLVED IN TWO OF THE MAJOR CASES THAT THE HEARING EXAMINER HAD. THAT IS WHY THAT LETTER WAS OF PARTICULAR GRAVE CONCERN.

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CROSS-EXAMINATION

BY MR. SMITH:

Q. IF I UNDERSTAND YOUR TESTIMONY CORRECTLY, YOU'RE BASICALLY INVOLVED IN THE DECISION-MAKING PROCESS ON -- WITH MR. LEPP CONTINUOUSLY FROM THE TIME OF THE SUSPENSION?

A. CORRECT. SINCE MR. LEPP'S ACTIONS WERE THOSE OF AN ATTORNEY, AND I WAS ALSO AN ATTORNEY, THE DIRECTOR WAS NOT, HE SOUGHT MY ADVICE AND MY VIEWS OF THOSE ACTIONS THROUGHOUT THE PROCESS.

Q. WHEN HE CAME BACK, HE WAS NOT ASSIGNED ADJUDICATORY DUTIES FROM THE

TIME THAT HE RETURNED FROM HIS DISCIPLINARY LAYOFF UNTIL HIS DISCHARGE; IS THAT CORRECT?
A. THAT'S CORRECT.

ARBITRATOR KEENAN: ALL RIGHT. NOW, WHY IS THAT SO; IF YOU KNOW?

THE WITNESS: YES, I DO KNOW. IT COMES BACK TO THE ROLE OF OUR HEARING EXAMINERS, IN OUR VIEW, AND I'D SAY EVEN A LARGER VIEW OF THE HANDLING OF THE ERIEWAY CASE.

THERE HAD BEEN, THROUGH OUR MIND, A CONTINUING AND UNCURED PATTERN OF MISCONDUCT THROUGH THEM. WHILE IT WAS TERMINATED -- I MEAN, THE SUA SPONTE ITEM WAS THE LAST ITEM IN THE TEN-DAY SUSPENSION.

I WOULD DISAGREE WITH THE CHARACTERIZATION THAT THAT BECAME THE CONCEPT OF THE REMOVAL THINKING. NONE OF US WERE THINKING ABOUT THAT UNTIL THESE LETTERS WERE GENERATED THAT I RESPONDED TO. BECAUSE OF THAT PATTERN, HE WAS REMOVED FROM HIS ADJUDICATIVE RESPONSIBILITIES.

IN A NUTSHELL, RATHER THAN GO AHEAD WITH THE ORDER AND TRY, IN OUR MINDS, UNDERTAKE THE EFFORTS THAT HE HAD BEEN INSTRUCTED TO CURE HIMSELF SO HE COULD MAINTAIN -- MAINTAINING HIS ROLE IN THAT CASE, THEN OUT CAME THIS SUA SPONTE THING WHICH WAS A – ONLY AGGRAVATING THE COURSE OF INSUBORDINATION, AGGRAVATING THE PROBLEMS WITH HIM AS REMAINING AS JUST HAVING, I BELIEVE, A FUNCTION AS HEARING EXAMINER IN THAT CASE.

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THE WITNESS: THEREAFTER, THE FACT -- WHAT MR. LEPP HAD BEEN INVOLVED WITH IN THE ERIEWAY CASE WAS WELL KNOWN IN THE LEGAL COMMUNITY DEALING WITH ENVIRONMENTAL ISSUES.

I DON'T THINK THE COMMUNITY KNEW OF THE FACT THAT HE HAD BEEN ASKED TO GO TO THE APOLOGY PROCESS TO REHABILITATE HIMSELF AS A HEARING EXERCISING THAT -- THAT IT WAS KNOWN THAT THERE WERE PROBLEMS.

WE THOUGHT UNTIL WE COULD MAKE IT PRETTY OBVIOUS, OR AT LEAST MR. LEPP WAS WILLING TO BE AS PROFESSIONAL AS WE EXPECT THE ATTORNEYS TO BE AS A HEARING EXAMINER, WE COULD NOT RETURN HIM TO THOSE RESPONSIBILITIES.

WE WERE -- UNTIL SOME INDICATION HAD COME FROM MR. LEPP ABOUT A WILLINGNESS NOT TO CONTINUE WITH THAT TYPE OF PATTERN OF MISCONDUCT, WE HAD GRAVE CONCERNS OF PUTTING HIM IN AS A HEARING OFFICER IN ONE OF OUR CASES.

I THINK THAT THE COMMUNITY -- THAT FEELING WAS SHARED OUTSIDE THE BOARD ALSO, AMONG THE LIMITED LEGAL COMMUNITY WHO HAS THE EXPERTISE TO APPEAR BEFORE THE BOARD AND BE REGULARLY APPEARING BEFORE MR. LEPP.

SO UNTIL WE COULD REHABILITATE HIM AS A HEARING EXAMINER, FOR THAT WE WERE WAITING FOR SOME POSITIVE SIGN FROM MR. LEPP, WE FELT HE COULD NOT FUNCTION AS A HEARING EXAMINER, AND AT SOME POINT IN TIME MR. ADAIR, MR. SHAPIRO REMOVED HIS ADJUDICATIVE RESPONSIBILITIES.

THEREAFTER, HE WAS GIVEN OTHER DUTIES TO DO OF A LEGAL NATURE. THEY WERE NOT ADJUDICATIVE FOR THE REASON HE PUT FORWARD. WE WERE HOPING THAT THERE WOULD BE -- MR. LEPP WOULD INDICATE HIS WILLINGNESS TO

UNDERTAKE THOSE DUTIES, AGAIN IN A WAY THAT WE -- THAT HE WOULD BE A PROFESSIONAL HEARING EXAMINER.

WHILE WE WERE WAITING DURING THAT PERIOD OF TIME, I THINK THERE WERE PROBLEMS THAT MR. SHAPIRO REPORTED ABOUT MR. LEPP DOING THE RESEARCH. WHILE THAT WAS OF CONCERN, THERE WAS NO DESIRE FOR DISCIPLINARY ACTION UNTIL THESE LETTERS APPEARED. BY THAT TIME, WE FELT THAT WAS A CONTINUATION AND WAS INSUBORDINATED ACTS AND THAT THEY HAD BEEN AGGRAVATED TO A GREAT EXTREME.

ARBITRATOR KEENAN: WHAT WAS AVAILABLE FOR HIM TO WORK ON IN AN ADJUDICATIVE CAPACITY FROM THE TIME HE RETURNED FROM HIS DISCIPLINARY LAYOFF UNTIL HIS DISCHARGE?

I TAKE IT THAT THE RECORD WOULD [ILLEGIBLE] POINT THAT ONE SUCH HEARING HE COULD HAVE CONDUCTED WAS THE ONE THAT THE OUTSIDE CONTRACTOR WAS ASSIGNED FOR.

THE WITNESS: THAT'S CORRECT, THE ENVIORSAFE ADJUDICATION, AFTER MR. BRUDZYNSKI RESIGNED FROM THE BOARD.

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Q. DURING THIS PERIOD OF TIME, FROM THE END OF THE SUSPENSION THROUGH UNTIL YOUR DECISION TO TERMINATE MR. LEPP, DID YOU HAVE ANY CONVERSATIONS PERSONALLY WITH MR. LEPP TO EXPLAIN TO HIM WHAT THE DIRECTOR OR THE CHAIRMAN THOUGHT WERE -- WHAT MR. LEPP'S APPROPRIATE CONDUCT SHOULD BE?
A. NO, I DID NOT. ANY SUCH DISCUSSIONS WOULD HAVE BEEN WITH MR. SHAPIRO, MR. ADAIR, FROM THE DIRECTOR.

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Q. AND THE CONTROLLING BOARD MEETINGS ARE PUBLIC, TOO?

A. YES

Q. THE PUBLIC CAN ATTEND TO ARGUE FOR AND AGAINST SPENDING FOR CERTAIN THINGS?
A. THERE IS A RIGHT OF WITNESSES TO COME BEFORE THE CONTROLLING BOARD. THAT HAPPENS ABOUT ONCE A YEAR ON HUNDREDS AND HUNDREDS OF REQUESTS.
Q. IT IS NOT UNUSUAL, THOUGH, AND ALSO IT'S CERTAINLY PERMITTED FOR PERSONS TO WRITE LETTERS TO MEMBERS OF THE CONTROLLING BOARD CONCERNING CERTAIN ISSUES WHICH THE CONTROLLING BOARD MIGHT REVIEW?
A. THAT IS CORRECT.
Q. AND, IN FACT, WOULD YOU AGREE WITH ME THAT IN TERMS OF PUBLIC POLICY, IT IS IMPORTANT FOR THE CONTROLLING BOARD TO HAVE AS FULL INFORMATION OR THE INFORMATION THAT THEY DESIRE TO MAKE THEIR DECISION WITH THE FULL INFORMATION?
A. CORRECT.
Q. NOW, ARE YOU AWARE OF ANY WORK RULE OR STATUTE OR ANYTHING THAT

PREVENTS PUBLIC EMPLOYEES FROM COMMUNICATING WITH MEMBERS ON THE CONTROLLING BOARD CONCERNING ISSUES?
A. I DON'T THINK THERE IS A FORMAL RULE JUST THE ETHICAL STANDARDS FOR ATTORNEYS.
Q. WHAT ETHICAL STANDARD?
A. CONFLICT OF INTEREST.
Q. WHAT RULE IS THAT?
A. I WOULD HAVE TO LOOK AT THE CODE OF PROFESSIONAL RESPONSIBILITY TO BE AWARE OF WHICH ONE. THERE'S A WHOLE REFERENCE OF IMPROPRIETY ISSUE.
Q. OKAY.
A. THERE IS ALSO BASIC ETHICAL LAW OF -- STATE ETHICS LAW ABOUT UTILIZING PUBLIC POSITION FOR PRIVATE PURPOSES.
Q. NOW, AGAIN, WHAT WAS THE PRIVATE PURPOSE THAT YOU FEEL THAT MR. LEPP WAS USING HIS POSITION TO ADVANTAGE?
A. IT WAS NEVER TRULY CLEAR WITH US. THE FACT THERE WAS SOME TYPE OF A PERSONAL AGENDA APPEARED OBVIOUS. WHAT THE NATURE AND THE MOTIVATIONS WERE, FRANKLY, ALWAYS WERE UNCLEAR. THE FACT THAT THE CONDUCT WAS HARMFUL TO THE BOARD WAS VERY OBVIOUS.
Q. THE FACT OF THE MATTER IS THAT THE LETTERS ON THEIR FACE STATE THAT HIS CONCERN IS THAT HE WANTED HIS DUTIES ASSIGNED BACK TO HIM, CORRECT?
A. THE LETTERS, YES, DO HAVE THAT FORMAL STATEMENT THAT WOULD APPEAR.
Q. IS THAT WHAT YOU CONSIDER TO BE HIS PERSONAL AGENDA?
A. AT LEAST IN THAT INCIDENT.
Q. DO YOU THINK THAT WAS IMPROPER FOR HIM TO ASK TO BE REASSIGNED TO HIS DUTIES AS A HEARING EXAMINER?
A. YES, I DO.
Q. YOU DO?
A. YES.
Q. OKAY. IT WAS PART OF HIS POSITION DESCRIPTION, WAS IT NOT? AS A MATTER OF FACT, ALL OF HIS POSITION DESCRIPTION AT THAT TIME WAS TO BE A HEARING OFFICER, WASN'T IT?
A. I WOULD HAVE TO LOOK AT THE POSITION DESCRIPTION. THAT WAS HIS MAIN DUTY. I THINK HE ALSO HAD PERHAPS ANOTHER FUNCTION.
Q. THAT IS WHAT HE WAS HIRED TO DO?
A. YES, UNTIL THE MISCONDUCT OCCURRED AND REQUIRED THE MANAGEMENT AT THAT BOARD TO TAKE THE ACTION, WHICH IT DID.
Q. OKAY. YOU TOOK HIS DUTIES AWAY FROM HIM HOPING THAT HE WOULD COME TO YOU AND TO SHOW HIS INTENT THAT HE HAD REFORMED HIMSELF, REHABILITATED HIMSELF?
A. THAT HE WAS WILLING TO CONDUCT HIS --
Q. BUT YOU NEVER TOLD HIM AS TO WHY YOU WERE TAKING HIS DUTIES AWAY FROM HIM?
A. THAT WOULD BE DISCUSSIONS THAT MR. SHAPIRO AND MR. ADAIR HAD. I KNOW THAT WAS THE DESIRE THAT WAS HAD.
Q. DID MR. SHAPIRO EVER TELL YOU THAT HE TALKED TO MIKE AND TOLD HIM WHAT THE MOTIVATION BEHIND YOU OR THE DIRECTOR WAS IN TAKING HIS DUTIES AWAY?

A. I DON'T RECALL.
Q. HOW ABOUT MR. ADAIR?
A. I DON'T RECALL. AGAIN, WE WERE ANTICIPATING HEARING BACK THAT AFTER THE COURSE OF CONDUCT, THAT HE WAS WILLING TO ACT IN A PROFESSIONAL FASHION.
Q. HOW DO YOU KNOW IF HE WOULD ACT PROFESSIONALLY OR NOT IN PERFORMING HIS ADJUDICATORY RESPONSIBILITIES IF YOU DIDN'T ASSIGN HIM ANY WHEN HE CAME BACK?
A. WE WERE LOOKING FOR AN EXPRESSION OF WILLINGNESS ON HIS PART TO ACT IN A PROFESSIONAL FASHION.
Q. SPECIFICALLY, WHAT WERE YOU LOOKING FOR HIM TO DO?
A. I DON'T THINK I – WE WERE LOOKING FOR SOME GENERAL RECOGNITION FOR HIM THAT HE WOULD IN THE FUTURE CONDUCT HIMSELF IN A PROFESSIONAL FASHION THAT WOULD -- WHAT WOULD HAVE SATISFIED ME, FOR INSTANCE, WOULD HAVE BEEN COMING FORWARD AND SAYING, YOU KNOW, I CAN SEE HOW IT MADE LITTLE SENSE AS A HEARING EXAMINER FOR THE BOARD TO HAVE INCLUDED THE ITEMS IN THE EX PARTE COMMUNICATION. I CAN SEE HOW THAT SUA SPONTE NOTICE HANDLED, AS IT DID, FLAWED THE LITIGATION OF THE ERIEWAY CASE. YOU KNOW, I REALLY -- I SEE THAT THESE WERE PROBLEMS -- THAT THESE WERE PROBLEMS THAT HAD BIG PROBLEMS FOR THE BOARD THAT COULD IMPACT THE CREDIBILITY. MAYBE HE DID NOT HAVE TO SAY THAT. JUST THAT THAT WAS INAPPROPRIATE. IT DID CAUSE LARGER PROBLEMS, AND IN THE FUTURE, YOU KNOW, I AM TURNING BACK THE CASES. I WILL KEEP THINGS ON THE STRAIGHT AND NARROW IN HOLDING THESE CASES. THAT WOULD HAVE DONE IT.
Q. SO BECAUSE HE DIDN'T DO THAT, YOU TOOK HIS ADJUDICATORY DUTIES AWAY FROM HIM?
A. NO, NO, NO. HE WOULD HAVE HAD THEM RETURNED HAD THAT EXPRESSION BEEN MADE. ALL OF US WERE HOPING FOR THAT.
Q. I WILL REPHRASE THE QUESTION.
A. BECAUSE HE DID NOT SAY THAT, YOU DID NOT RESTORE HIS DUTIES TO HIM?
A. CORRECT.
Q. OKAY.
A. IT WAS FOLLOWING UPON THE TEN-DAY SUSPENSION THAT WE FELT THAT HE WAS NOT IN THE POSITION TO EXECUTE HIS DUTIES. HE CONTINUED -- WE JUST WERE AFRAID THAT HE WOULD CONTINUE THAT INSUBORDINATE LINE OF CONDUCT THAT COULD HAVE DAMAGING EFFECTS ON THE CREDIBILITY OF THE BOARD AND LEGALITY OF THE BOARD PROCEEDINGS.

MR. SMITH: I DON'T THINK THIS IS RELEVANT.

ARBITRATOR KEENAN: GO AHEAD. I WANT TO HEAR IT.

THE WITNESS: UNTIL WE HAD SOME EXPRESSION THAT, YOU KNOW, HE WOULD STAY BY STRICT LEGAL REQUIREMENTS AS A HEARING EXAMINER, WE DID NOT HAVE CONFIDENCE OF RETURNING HIM.

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A. THE FACT THAT MR. LEPP, BECAUSE OF HIS PRIOR ACTIVITY, WE HAD FELT REQUIRED -- TO REMOVE HIM FROM HIS ADJUDICATIVE RESPONSIBILITIES DID REQUIRE US, WHEN MR. BRUDZYNSKI LEFT, TO HAVE TO GET ANOTHER INDEPENDENT HEARING

OFFICER. WE COULD NOT USE MR. LEPP.

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Q. NOW LET US TALK ABOUT POLLY MILLER. YOU STATED THAT POLLY MILLER WAS THE HEAD OF A CITIZENS GROUP IN A CASE THAT WAS BEFORE YOU IN 1984?
A. A CASE THAT WAS BEFORE THE HEARING EXAMINER OF THE HAZARDOUS WASTE FACILITY BOARD, THAT I WAS ALSO INVOLVED IN BECAUSE I WAS THE ASSISTANT ATTORNEY GENERAL REPRESENTING THE STAFF OF OHIO E.P.A. SO I AM FAMILIAR WITH THE CASE AND I GOT TO KNOW MISS MILLER DURING THAT CASE.
Q. OKAY. AND HAS MISS MILLER BEEN INVOLVED IN ANY FASHION BEFORE THE BOARD?
A. NO. TO DATE, THE P.P.G. MATTER HAS NEVER BEEN BACK BEFORE THE BOARD, NO.
Q. HAS ANY LITIGANT EVER COME BACK TO THE BOARD THAT YOU ARE AWARE OF?
A. NOT THAT I HAVE PERSONAL KNOWLEDGE OF. IT COULD HAPPEN AT ANY TIME. ANYTIME A FACILITY WOULD, THE MODIFICATION BOARD WOULD HAVE TO ACT ON.
Q. THE BOARD HAS BEEN IN EXISTENCE NOW FOR ALMOST NINE YEARS?
A. SINCE 1980.
Q. YOU HAVE BEEN INVOLVED BEFORE AS AN ADVOCATE AND ALSO INVOLVED SINCE 1987, AT LEAST?
A. ACTUALLY SINCE 1983.
Q. SINCE 1983?
A. YES.
Q. OKAY. AND TO YOUR PERSONAL KNOWLEDGE, A LITIGANT HAS NEVER BEEN BACK BEFORE THE BOARD?
A. TRUE, NOR IS THAT SURPRISING.
Q. SO EVEN THOUGH IT COULD HAPPEN, IT IS NOT LIKELY TO HAPPEN?
A. I THINK IT IS LIKELY THAT THESE FACILITIES WILL COME BACK BEFORE THE BOARD. THEY ARE ISSUED A PERMIT FOR INSTANCE, IN THE P.P.G. CASE IN CIRCLEVILLE, MISS MILLER WAS INVOLVED. THEY WERE GRANTED A PERMIT TO CONDUCT HAZARDOUS WASTE ACTIVITY. THAT PERMIT HAS A FIVE-YEAR PERIOD OF TIME THAT HAS TO COME BACK FOR RENEWALS. FREQUENTLY, WHEN A FACILITY COMES BACK FOR RENEWAL, THEY WANT TO MODIFY THEIR FACILITY. NOW, THE E.P.A. CAN ACT ON RENEWALS.

WHEN YOU COMBINE A RENEWAL WITH A MODIFICATION, AS FREQUENTLY AS HAPPENS BECAUSE OF THE LONG TIME LAGS IN THIS PERMITTING PROCESS, IT IS A VERY COMPLICATED PERMITTING PROCESS. IT IS VERY LIKELY THAT MODIFICATION WILL BE ATTACHED TO THE RENEWAL AND THEY WILL COME UP AGAIN.

THAT FACILITY HAS ONLY BEEN IN OPERATION -- THEY GOT THEIR PERMIT IN '84. I THINK THEY JUST COMMENCED OPERATION WITHIN THE LAST TWO YEARS. SO THEY WOULD NOT BE UP YET FOR THAT FIVE-YEAR PERIOD OF TIME FOR RENEWAL. THEY HAVE BEEN OPERATING FOR TWO YEARS, SO THEY WOULD BE LOOKING FOR A MODIFICATION AT THIS TIME.
Q. DID YOU TALK TO HER CONCERNING THIS LETTER?
A. I HAVE NOT SPOKEN TO MISS MILLER SINCE 1984.
Q. DO YOU HAVE ANY KNOWLEDGE OF ANYBODY ELSE TALKING TO MISS MILLER ABOUT THIS LETTER?
A. NO, I DO NOT.

Q. OKAY. DID YOU TALK TO MR. HICKEY CONCERNING HIS VOTE?
A. I DID NOT. I KNOW THE CIRCUMSTANCES OF MR. LEPP'S STATUS AT THE BOARD WAS COMMUNICATED TO CONTROLLING BOARD MEMBERS, NOT BY MYSELF, BY MR. ADAIR AND MR. SHAPIRO. IT WAS ALSO COMMUNICATED TO THE OFFICE OF BUDGET AND MANAGEMENT WHICH ALSO STATES ON THAT -- I ASSUME THE OFFICE OF BUDGET AND MANAGEMENT WOULD ALSO TALK TO CONTROLLING BOARD MEMBERS.
Q. NOW, MR. LEPP'S COMMUNICATIONS TO THE PRESS WERE NOT A BASIS FOR THE DISCIPLINE ALSO, CORRECT, EVEN --
A. NO, THEY WERE NOT.
Q. -- THOUGH, IN PART, WITH SOME OF HIS COMMUNICATIONS OF THE "PERSONNEL RIFTS ON ENVIROSAFE HEARINGS" AND OF ALLEGATIONS CONCERNING SIMILAR ALLEGATIONS CONCERNING DIRECTOR SHANK'S TREATMENT OF MR. LEPP AS A HEARING OFFICER?
A. I DON'T THINK ANY OF US WERE PARTICULARLY PLEASED TO SEE MR. LEPP'S CIRCUMSTANCES AND THE BOARD'S CONCERNS PUT OUT INTO PRESS BY MR. LEPP'S ATTORNEY. THAT DID STRIKE US AS BEING UNUSUAL.
HOWEVER, THERE ARE FIRST AMENDMENT ISSUES. WE DON'T GO ABOUT THE BUSINESS OF STOPPING PEOPLE FROM TALKING TO THE PRESS. ALTHOUGH, NONE OF US PARTICULARLY ENJOYED SEEING OR READING THOSE ARTICLES.
Q. SO IN YOUR MIND, IT WAS OKAY FOR MR. LEPP? I MEAN, IT WAS LEGALLY PERMISSIBLE FOR HIM TO COMMUNICATE TO THE PRESS?
A. I THINK HE DID HAVE A LEGAL RIGHT TO DO THAT. WHY HE WOULD HAVE DONE THAT, I GUESS WAS A MYSTERY TO A LOT OF US.
Q. OKAY. SO IF IT'S FAIR TO SUM UP YOUR TESTIMONY IN THIS REGARD, THERE WAS THE FACT THAT MR. LEPP'S SUPPOSEDLY REFUSED TO PERFORM NONADJUDICATORY DUTIES, AND THE FACT THAT HE COMMUNICATED TO THE PRESS WERE NOT A BASIS FOR DISCIPLINE?
A. I WOULD HAVE TO LOOK AT THE DOCUMENT. THE PRIME THINGS THAT WE FOCUSED ON, THAT I FOCUSED ON, WHY REMOVAL WAS THE ONLY REASONABLE CHANCE LEFT OR [ILLEGIBLE] LEFT WERE THOSE INCIDENTS WHERE HE SO CLEARLY VIOLATED THE HEARING EXAMINER STATUS; THAT IS, CONTACTING THOSE PARTIES. IN ADDITION TO, THERE WERE OTHER ITEMS THAT WERE CITED FOR DISCIPLINE SUCH AS HIS -- MR. SHAPIRO CAN TESTIFY TO THESE. HE HAD RAISED THOSE. I DON'T RECALL WITH GREAT SPECIFICITY ABOUT MR. LEPP'S REFUSAL TO DO THE RESEARCH ASSIGNED TO HIM, HIS REFUSAL TO DO IT WELL, AND THAT WAS ANOTHER REASON WHY HE WAS NOT RETURNED TO ADJUDICATIVE RESPONSIBILITIES.
Q. OKAY.
A. WHAT I REALLY FOCUSED ON WERE THOSE TWO REALLY GRAVE INCIDENTS WHICH TO ME WERE WELL BEYOND THE SCOPE.

ARBITRATOR KEENAN: NAMELY, THE POLLY MILLER LETTER?
THE WITNESS: YES.
ARBITRATOR KEENAN: AND THE STATE BOARD?
THE WITNESS: INTERACTION WITH MR. HICKEY ON THE CONTROLLING BOARD.
ARBITRATOR KEENAN: ALL RIGHT.
THE WITNESS: BECAUSE AFTER THAT, WE HAD NO CHOICE BUT REMOVAL AFTER THAT TYPE OF ACTION.

BY MR. SMITH:
Q. IS IT INAPPROPRIATE FOR A HEARING OFFICER TO DEVELOP A FRIENDSHIP WITH A PERSON WHO AT ONE POINT WAS AN IMPORTANT TIE TO A BOARD ACTION, A PARTY?
A. A FRIENDSHIP, NO. THE PROBLEM IS WHEN THAT FRIENDSHIP OR WHEN THAT RELATIONSHIP HAS THE POSSIBILITY OF DESTROYING HIS ABILITY TO BE AN IMPARTIAL ADMINISTRATOR.

I DO NOT INVOLVE MYSELF WITH A LOT OF INDIVIDUALS BECAUSE IT MAY -- THEY MAY HAVE BUSINESS BEFORE ME. I WILL NOT HAVE THE POSSIBLE APPEARANCE OF A CONFLICT OF INTEREST. THAT IS WHAT DISCOURAGED US WITH THIS INCIDENT BECAUSE, YOU KNOW, THIS ACTION OF THE CONTACT TO MR. HICKEY, THE CONTACT WITH POLLY MILLER.

MR. LEPP WROTE THOSE LETTERS. HOWEVER, YOU KNOW, THE POLLY MILLER LETTER WAS GOING TO -- OVER HER SIGNATURE IN THEORY. THE LETTER TO MR. HICKEY, IT HAD THE LAST PARAGRAPH SAYING THAT YOU SHOULD NOT MAKE THIS PUBLIC.

WHEN THERE ARE CONFLICTS OF INTEREST, YOU HAVE TO MAKE THOSE THINGS PUBLIC. IF THERE IS A FRIENDSHIP AND IF SOMEONE COMES BEFORE ME ON THE BOARD, I MAY HAVE A FRIENDSHIP, I WILL HAVE TO DISQUALIFY MYSELF IF I THINK THAT WILL LIMIT MY JUDGMENT.

THESE TYPES OF ACTIONS WOULD HAVE TO ALSO DISQUALIFY MR. LEPP. HOWEVER, HE WENT OUT OF HIS WAY TO MAKE THESE CONTACTS CONFIDENTIAL. THEREFORE, AGAIN SHOWING THE FACT THAT COULD WE NOW TRUST THIS INDIVIDUAL TO ACT IMPARTIAL AS A HEARING EXAMINER.
Q. THE BOARD DOES IN FACT HAVE RULES THAT PROVIDE THAT A BOARD MEMBER CAN REMOVE HIMSELF IF THEY FEEL THERE IS A PERSONAL CONFLICT.
A. YES.
Q. I ASSUME THE SAME IS TRUE FOR A HEARING OFFICER, YOUR RIGHT BEING A HEARING OFFICER HAS A DUTY TO REVEAL AN INTEREST WHICH MAY BIAS HIM IN A CASE.
A. BOARD RULES AND ETHICAL CANONS DO REQUIRE THAT. THE PROBLEM IS WITH HIS ATTEMPT TO CONCEAL THIS STUFF, HIS STATEMENT ON THE CONTROLLING BOARD LETTER, DO NOT LEFT THIS INFORMATION OUT, WE WERE NOT -- IN THE FUTURE WE COULD COUNT ON HIM TO DO THAT.
Q. MR. LEPP DID NOT HAVE A CASE PRESENTLY PENDING BEFORE HIM BEFORE EITHER OF THESE TWO INDIVIDUALS, DID HE?
A. HE WAS ASSIGNED TO THE ECOLITEC CASE. MR. LEPP WAS REMOVED. HE HAD GONE BACK TO HIS DUTIES. HE WOULD HAVE HAD THE ECOLITEC CASE BACK. HE HAD ALREADY BEEN IN TOUCH WITH REPRESENTATIVE HICKEY SEEKING HIS AID. MR. HICKEY OPPOSED THAT.
Q. AT THE TIME THAT HE WROTE TO MR. HICKEY, HE DID NOT HAVE THE CASE BEFORE HIM, CORRECT?
A. THAT'S TRUE. IF HE HAD, AS HIS LETTER REQUESTED, HAD HIS ADJUDICATIVE RESPONSIBILITIES RETURNED AND IF HE WERE NOT AWARE OF THIS TYPE OF ACTION, THE CONTACT OF MR. HICKEY -- CONCEALED THE STATEMENTS IN THE LETTER HE WOULD HAVE GONE BACK ON THE ECOLITEC CASE AND HIS -- ALREADY TRIED TO CONCEAL THE INVOLVEMENT WITH MR. HICKEY. I DID NOT HAVE CONFIDENCE. I DON'T

THINK ANYONE ON THE BOARD HAD CONFIDENCE FACED WITH THIS STUFF. HE WOULD NOT HAVE GIVEN A -- SOMETHING BACK TO REPRESENTATIVE HICKEY.
Q. SO IT IS YOUR SPECULATION THAT HE WOULD HAVE DONE SOMETHING IN THE FUTURE, EITHER NOT REVEALED HIS CONNECTION OR WOULD HAVE GIVEN MR. HICKEY A FAVOR? IT IS YOUR SPECULATION, ISN'T IT?
A. THAT WAS THE CLEAR PATTERN OF EVENTS WHICH DESTROYED OUR CONFIDENCE IN HIM.
Q. THE LAST PATTERN OF EVENTS WAS HIM ACTUALLY GOING OUT REVEALING MORE THAN YOU WANTED HIM TO CONCERNING A RELATIONSHIP WITH A PARTY?
A. WHICH INCIDENT IS THAT?
Q. THE NOTICE OF EX PARTE COMMUNICATION.
A. RIGHT.
Q. HE WENT OVERBOARD THAT TIME?
A. WELL, YES. HE INSERTED SOME IRRELEVANT MATERIAL INTO THE PUBLIC RECORD OF THAT CASE THAT EXPRESSED A LOT OF BIAS AND FRAUD CAME VERY CLOSE, AND ULTIMATELY WITH THE SUA SPONTE NOTICE, IN MY MIND, PREVENTED HIMSELF FROM BEING A HEARING EXAMINER ON THAT CASE.

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Q. NOW, YOU MADE A COMMENT EARLIER ABOUT YOU HAD FELT THAT HIS INTEGRITY WITHIN THE LEGAL COMMUNITY WAS COMPROMISED, I THINK, AND YOU STATED THAT YOU HAD AT LEAST HAD SOME KNOWLEDGE THAT THE LEGAL MEMBERS THAT PRACTICED BEFORE THE BOARD HELD THAT BELIEF.
A. THAT WAS A CONSIDERATION WE HAD. THE ERIEWAY CASE, IN OUR ESTIMATION, THERE WAS UNPROFESSIONAL CONDUCT. THIS EXHIBIT WOUND UP WITH THE NOTICE WHICH, TO OUR MINDS, PREVENTED THE CURING OF HIS ABILITY TO SERVICE.
Q. WHO ARE THE MEMBERS OF THE LEGAL COMMUNITY THAT TOLD YOU THAT THEIR CONFIDENCE IN HIM WAS DESTROYED?
A. WE DID NOT SPEAK TO ANY MEMBERS OF THE LEGAL COMMUNITY. WHERE OUR CONCERN WAS IS WITH A RELATIVELY SMALL GROUP OF PEOPLE IN THE LEGAL COMMUNITY, BOTH ON THE INDUSTRY SIDE AND ON THE PUBLIC SIDE, WHO HAVE A LEVEL OF LEGAL SOPHISTICATION, TECHNICAL BACKGROUND TO APPEAR BEFORE THE HAZARDOUS WASTE FACILTY BOARD.
WE ONLY HAVE A FEW CASES A YEAR. IT IS A VERY SMALL LEGAL COMMUNITY INVOLVED WITH THAT. THEY FOLLOW VERY CLOSELY WHAT HAPPENS BEFORE THE BOARD. THEY ARE THE ONES BACK IN TOUCH TO THE LOCAL COMMUNITIES, THE COUNTIES, AND THE CITIES WHO MAY BE BEFORE THE BOARD.
Q. DID YOU HAVE ANY DISCUSSION WITH ANY PERSON OF THE LEGAL COMMUNITY TO DETERMINE HOW THEY CONSIDERED MR. LEPP IN TERMS OF A HEARING OFFICER?
A. I DID HAVE ACTUALLY TWO THINGS OCCUR THAT I WAS AWARE OF IN THAT REGARD. FIRST, MR. KIRK, WHEN HE WAS REVIEWING THIS CASE, HE ASKED ME FOR MY OPINION ABOUT THE EX PARTE COMMUNICATION NOTICE AND LATER ON THE LEGAL BACKGROUND IN WHICH TO EVALUATE THE POLLY MILLER LETTER AND REPRESENTATIVE HICKEY.
Q. DID ANY MEMBER OF THE LEGAL COMMUNITY SAY THEY LACKED CONFIDENCE IN MR. LEPP'S RESPONSIBILITY AS A HEARING OFFICER?

A. I DON'T THINK SUCH STATEMENTS WERE MADE, NOR WOULD I HAVE SOLICITED THEM, NOR WOULD I HAVE WANTED TO GET THAT TYPE OF INPUT. BEING IN THE POSITION TO JUDGE, THERE WERE EXPRESSIONS I THINK I GOT BACK MORE SECOND-HAND THAN DIRECTLY, THIS WAS VERY STRANGE ACTIVITY IN THE ERIEWAY CASE. I KNOW THE COMMUNITY OUT THERE WERE VERY MUCH AWARE AND WERE FOLLOWING THIS. IT IS A VERY SMALL GROUP. ALL OF THEM AT THAT TIME HAPPENED TO APPEAR BEFORE MR. LEPP OR MR. BRUDZYNSKI.

* * * *

I GUESS JUST TO AGAIN MAKE SURE I UNDERSTAND, THE ACTUAL USE OF THE STATE'S EQUIPMENT IN YOUR MIND WASN'T THE GROUNDS WHICH WERE THE CAUSE FOR DETERMINING REMOVAL AS THE APPROPRIATE PENALTY IN THIS CASE?
A. UTILIZING STATE PROPERTY FOR PUBLIC OR FOR PRIVATE USE IS INAPPROPRIATE. IT IS AGAINST OUR POLICY. IT IS AGAINST OUR RULES, AND DISCIPLINED WHEN IT HAPPENS, SOME APPROPRIATE ACTION. HOWEVER, YOU KNOW, THAT IN DETERMINING THE NEED TO BRING A REMOVAL IN THIS CASE WAS MINISCULE AND I DON'T THINK IT WAS EVEN A FACTOR.
Q. YOU DON'T THINK IT IS EVEN A FACTOR?
A. IT WAS AN ISSUE, BUT WHAT WAS BY FAR THE STRONGEST DEALT WITH THOSE LETTERS, AND THE FACT THAT WE COULD NO LONGER COUNT ON HIM AS A HEARING EXAMINER. HE PUT HIMSELF, BY HIS ACTIONS, FAR BEYOND OUR BELIEF OF TRUST IN THE FUTURE.

* * * *

From the testimony of Michael Shapiro:

Q. I WOULD LIKE TO POINT YOUR ATTENTION TO JOINT EXHIBIT 27. COULD YOU IDENTIFY THOSE DOCUMENTS FIRST?
A. THESE ARE LETTERS OR DOCUMENTS THAT I RETRIEVED FROM A DISK. HOW I GOT THE DISK IS IN THIS MANNER: WE HAD -- WHEN THE BOARD -- WHEN THE E.P.A. ORIGINALLY MOVED FROM THE SENECA HOTEL, WHICH WAS ON THE CORNER OF BROAD AND GRANT, WE MOVED TO THE OHIO E.P.A. BUILDING WHICH IS AT 1800 WATERMARK DRIVE. IN THAT MOVE WE NEVER ACTUALLY GOT SITUATED. WE KEPT A MAJORITY OF OUR FILES IN BOXES OR THEY WERE IN FILING CABINETS BUT NEVER REALLY ORGANIZED.

WE THEN MOVED TO OUR CURRENT LOCATION IN THE GIRL SCOUT BUILDING AT 1700 WATERMARK DRIVE. WE STILL HAD A MAJORITY OF OUR FILES, DUPLICATES, JOURNAL FILES IN BOXES, ET CETERA. I HATE TO SAY IT, BUT SOMETIMES OUR FILING SYSTEM LEFT A LITTLE BIT TO BE DESIRED.

WHEN MR. LEPP WAS TAKEN OFF OF THE ERIEWAY CASE AND NOT TAKEN OFF OF THE ECOLITEC CASE, I WANTED TO ENSURE THAT WE HAD ALL THE DOCUMENTS WHICH COMPRISED THE RECORD. THAT MEANS THAT THE CASES WOULD HAVE TO BE ASSIGNED TO ANOTHER HEARING EXAMINER. WE WOULD HAVE TO MAKE COPIES OF THAT -- OF THOSE DOCUMENTS FOR THAT EXAMINER. I WANTED TO ENSURE THAT

EVERY DOCUMENT -- THAT WE HAD EVERY DOCUMENT THAT WAS IN THE OFFICIAL RECORD.

IN ORDER TO DO THAT, I DID A SEARCH OF ALL THE BOXES WE HAD. IN ADDITION, WE HAD SIX BLACK WARDROBE CABINETS. BY THAT, I MEAN THERE WAS A FILING CABINET OVER -- A CABINET OVER SIX-FOOT TALL, MAYBE SEVEN OR EIGHT-FOOT TALL, TWO DRAWERS. THERE WERE SHELVES INSIDE. WE HAD SIX OF THOSE. THREE OF THEM WERE GIVEN TO MR. LEPP, MYSELF, AND MR. BRUDZYNSKI. WE KEPT THREE OTHERS FOR STORAGE. ALL OF THEM HAD KEYS, BUT THE KEYS FOR THE CABINETS WAS THE SAME KEY. MY KEY FIT MR. BRUDZYNSKI'S AND THE OTHER'S FIT MINE.

IT WAS COMMON PRACTICE FOR US TO KEEP OUR RECORDS OF THE CASE THAT WE WERE USING IN THOSE FILING CABINETS. I HAVE ON OCCASION GONE INTO MR. BRUDZYNSKI'S FILING CABINET TO RETRIEVE DOCUMENTS WHEN HE WAS NOT THERE. I HAVE GONE TO THE ROOM. I HAVE GONE INTO OTHER PEOPLE'S ROOM TO CHECK OUT THE DOCUMENTS.

I KNOW THAT MR. LEPP KEPT DOCUMENTS IN THAT FILING CABINET. I HAD GONE INTO THE FILING CABINET TO SEE IF THERE WERE ERIEWAY OR ECOLITEC DOCUMENTS IN ORDER TO COMPLETE THAT RECORD.

I SAW JUST -- THIS OCCURRED AFTER I TOOK THAT OTHER LETTER ON THAT -- THE COLUMBUS DISPATCH – FROM THAT DISKETTE. I PUT THE DISK UP ON THE SCREEN TO SEE WHAT WAS IN THERE, WHETHER OR NOT THERE WAS DOCUMENTATION DEALING WITH ERIEWAY OR ECOLITECT, OR WHETHER THERE WERE OTHER DOCUMENTATION. I PULLED THESE DOCUMENTS AND PRINTED THEM. WE ALL HAD THOSE FILING CABINETS.

I WOULD ALSO ADMIT THE FACT -- I ALSO STATE THAT AS FAR AS THAT, THAT WAS NOT USED FOR PERSONAL STORAGE BY ANYBODY THAT I KNOW OF. WE ALL HAD DESKS. THEY HAD INDIVIDUAL LOCKS. THE LOCK TO MY DESK -- I AM THE ONLY ONE THAT HAS THE KEY. THE SAME WAY FOR OTHER PEOPLE. PERSONAL BELONGINGS, CHECKBOOK, ET CETERA, I KEPT IN MY DESK, THE SAME WAY WITH OTHER PEOPLE.

IN FACT, WE'VE HAD ONE SITUATION WHERE ONE OF OUR SECRETARIES THAT HAD LOST HER KEY. WE HAD TO OPEN THE DESK. WE HAD TO PRY THE LOCK OPEN AND THEN WE REPLACED THAT LOCK FOR HER. SHE HAD THE ONLY KEY TO IT.

Q. WHAT DID YOU DO WHEN YOU FOUND THE DOCUMENTS?

A. I RAN THE DOCUMENTS OFF AND PRESENTED THEM TO MR. KIRK.

Q. YOU MENTIONED THAT YOU KNEW OF NO ASSIGNMENT THAT THE GRIEVANT HAD. WHAT DID YOU MEAN BY THAT? AFTER THE GRIEVANT'S ADJUDICATORY DUTIES HAD BEEN TAKEN AWAY, HADN'T HE BEEN ASSIGNED ANYTHING ELSE?

A. AFTER THE ADJUDICATORY DUTIES? YES, HE WAS. AFTER HIS ADJUDICATORY DUTIES WERE TAKEN AWAY, HE WAS ASSIGNED SEVERAL TASKS. TWO OF THEM COME TO MIND, TWO PROMINENT TASKS.

IN DECEMBER OF 1987, THERE WERE SEVERAL BILLS IN THE GENERAL ASSEMBLY DEALING WITH HAZARDOUS WASTE THAT WE WERE VERY INTERESTED IN. I GOT COPIES OF THOSE BILLS AND PRESENTED THOSE BILLS TO MR. LEPP AND ASKED HIM TO DO FOUR THINGS.WITH ME AS HIS IMMEDIATE SUPERVISOR.

LATER IN THE DAY I WAS TALKING WITH MR. ADAIR IN MY OFFICE. MR. LEPP CAME IN AND THREW THE BILLS ON MY DESK.

Q. THERE'S ALREADY BEEN MUCH TESTIMONY THAT MR. LEPP'S ADJUDICATORY DUTIES WERE REDUCED.

WAS THERE EVER -- WAS THERE A PLAN TO RESTORE HIS ADJUDICATORY DUTIES?

A. YES, THERE WAS. I HAD A PLAN TO RESTORE HIS DUTIES. THEY WERE TAKEN AWAY. THEY WERE TAKEN AWAY BECAUSE THE CONFIDENCE WAS LOST. THERE WAS NO LONGER ANY CONFIDENCE THAT HE WOULD BE ABLE TO RENDER A FAIR AND IMPARTIAL DECISION. THAT HIS AGENDA -- THE BOARD GO STRICTLY TO THE RECORD.

BY GIVING HIM THESE -- THE ASSIGNMENTS OF THE BILLS, OTHER ASSIGNMENTS OF LOOKING UP THE LANGUAGE, AND ISSUES ON CONSTITUTIONAL AS TO IMPORTATION OF HAZARDOUS WASTE, ET CETERA, IT WAS MY HOPE THAT HE WOULD BE ABLE TO BE -- TO REHABILITATE HIMSELF OR PERFORM IN SUCH A MANNER THAT THESE DUTIES COULD BE REINSTATED.

Q. SO IF HE HAD PERFORMED THE DUTIES IN REGARD TO RESEARCHING THE BILLS WELL, THEN HIS DUTIES, HIS ADJUDICATORY DUTIES WOULD HAVE BEEN RESTORED?

A. THEY WOULD HAVE BEEN RESTORED. THIS WAS SOMETHING THAT MR. LEPP COULD HAVE DONE, BUT MR. LEPP IS A SKILLED RESEARCHER. HE HAD WORKED FOR LAWYERS CO-OP. HE HAD DONE AN ARTICLE. I KNEW THAT HE COULD -- I KNOW HE COULD DO THE WORK.

I WAS WAITING FOR THAT TO COME BACK, LET BYGONES BE BYGONES. I'LL ADHERE TO DO THE JOB. I AM GOING TO DO THE WORK.

Q. YOU SAID THAT CONFIDENCE WAS LOST IN MR. LEPP'S ABILITY TO BEING A FAIR AND IMPARTIAL HEARING EXAMINER. WHY WAS THAT?

A. CONFIDENCE WAS LOST, FOR EXAMPLE, BECAUSE OF THE EX PARTE COMMUNICATION, THE DOCUMENTATION THERE.

SECONDLY, THE ARTICLES TO THE BEDFORD PAPER, <u>THE CLEVELAND PLAIN DEALER</u>, <u>THE TOLEDO BLADE</u>. WE HAVE A SITUATION WHERE YOU HAVE A HEARING EXAMINER WHO IS REMOVED FROM A CASE, TALKING TO NEWSPAPER REPORTERS IN COMMUNITIES WHERE THE BOARD HAD ONGOING ACTIVE CASES. IT WAS A SITUATION THAT CONFIDENCE WAS RESTORED.

I WAS OF THE OPINION OF MR. LEPP'S AGENDA WAS NOT TO DO -- NOT TO HIS JOB AS A FAIR AND IMPARTIAL HEARING EXAMINER AND PREPARE AN ACCURATE AND COMPLETE RECORD, BUT THAT HIS MAIN MOTIVATION WAS TO EMBARRASS OR TO ATTACK THE ASSISTANT ATTORNEY GENERAL AND THE DIRECTOR AND TO CARRY ON THAT LINE OF AN ATTACK.

Q. MR. SHAPIRO, CAN YOU ADDRESS THE BOARD'S CONTRACTING OUT OF ANOTHER ATTORNEY TO HEAR THE ECOLITEC CASE?

A. YES, I CAN. THE CONTRACT -- DO YOU MEAN THE ENVIROSAFE CASE?

Q. I'M SORRY, THE ENVIROSAFE CASE.

A. YES MR. BRUDZYNSKI -- THAT'S SPELLED B-R-U-D-Z-Y-N-S-K-I -- WAS ASSIGNED TO ENVIROSAFE. HE HAD TENDERED HIS RESIGNATION IN MARCH, I THINK, TO BE EFFECTIVE MARCH 25 OF '88. HE HAD TAKEN A JOB IN THE CITY OF DAYTON.

AND HAD THE CONFIDENCE IN MR. LEPP BEEN RESTORED, MR. LEPP WOULD HAVE GOT -- I WOULD HAVE ASSIGNED MR. LEPP TO THE ENVIROSAFE CASE. WHY? BECAUSE MR. LEPP HAD ALREADY BEEN THE PRESIDING HEARING EXAMINER ON A LANDFILL CASE, THE I.T.L.T. CASE.

THEREFORE, HE HAD EXPERIENCE IN A LANDFILL CASE, ET CETERA.

HOWEVER, THAT CONFIDENCE WAS NOT RESTORED. THE BOARD DID NOT HAVE CONFIDENCE IN HIM. THERE WAS NO ALSO AGAINST THE HEARING EXAMINER. I NEEDED SOMEONE WHO COULD KEEP HIS COOL UNDER PRESSURE AND DO THE JOB TO WHICH HE IS ASSIGNED; THAT IS, BE SURE THAT REFERENCE IS CONCISE. I

WANTED SOMEONE WHO HAD EXPERIENCE IN ADVERSARIAL AND COMPLICATED CASES.

Q. MR. SHAPIRO, WOULD YOU PLEASE EXPLAIN THE SIGNIFICANCE OF THE POLLY MILLER LETTER TO US? WHY WAS THAT LETTER IMPORTANT?

A. THE LETTER WAS IMPORTANT OR CAUSED MY INTEREST FOR SEVERAL REASONS. ONE IS YOU DO NOT WANT A HEARING EXAMINER MAKING QUID PRO QUO DEALINGS WITH PARTIES THAT MAY COME BEFORE THE BOARD. YOU DON'T WANT TO GIVE THAT -- YOU DON'T WANT TO GIVE THAT APPEARANCE.

I MEAN, IF THE CASE CAME BEFORE THE BOARD AND MISS MILLER WAS A PARTY AND THERE WAS THAT RELATIONSHIP THAT EXISTED, CAUSING TO QUESTION THE EXAMINER'S ABILITY TO RENDER A FAIR AND IMPARTIAL DECISION, AND IT WAS MY FEAR --

Q. CONTINUE, PLEASE.

A. -- IT WAS MY FEAR, REALISTICALLY. YES, WE DID HAVE CASES IN WHICH PARTIES HAVE RETURNED TO THE BOARD.

FOR INSTANCE, WE HAD WASTE TECHNOLOGY INDUSTRIES, W.T.I., IN EAST LIVERPOOL WAS GRANTED, I BELIEVE, A PERMIT IN APRIL OF '84. THEY RETURNED TO THE BOARD JUST RECENTLY FOR A MODIFICATION OF THAT PERMIT. SO THERE IS A POSSIBILITY, YOU KNOW. THERE WAS A DEFINITE CASE IN WHICH THE PARTIES RETURNED.

WE DO NOT WANT THIS IMPRESSION THAT THERE IS A CLOSE RELATIONSHIP BETWEEN THE HEARING EXAMINER AND ONE OF THE PARTIES.

Q. AFTER MR. LEPP'S ADJUDICATORY DUTIES HAD BEEN TAKEN AWAY, WAS HE COOPERATING IN COMPLETING THE OTHER ASSIGNMENTS THAT HE WAS ASSIGNED?

A. NO, HE WAS NOT. I BASE THAT STATEMENT ON THIS: AS I STATED BEFORE, AND WHEN WE ASKED HIM -- WHEN I ASKED HIM TO SUMMARIZE THE BILLS, HE STATED HE WOULD NOT PERFORM TWO FUNCTIONS WHICH I BELIEVE COULD BE PERFORMED. HE WOULD MAKE NO RECOMMENDATION, AND REFUSING TO CALL THE COMMITTEES AS TO WHEN THE HEARINGS WOULD TAKE PLACE.

SECONDLY, HE THREW THE BILLS BACK ON MY DESK. IN ADDITION TO THAT, IN MAY OF '88, HE WAS GIVEN A VERY IMPORTANT ASSIGNMENT TO RESEARCH THE LANGUAGE AREA, WHICH IS A BANNING OF WASTE WHICH CAN BE DESTROYED OF HAZARDOUS WASTE FACILITIES AND ALSO TO CRITIQUE THE TRANSPORTATION OF HAZARDOUS WASTE BETWEEN STATES, WHAT SORT OF PROHIBITIONS THE PLACE CAN STATE ON THIS.

AS I STATED BEFORE, MR. LEPP IS A SKILLED RESEARCHER. HIS WORK PRIOR TO THAT, HE HAD AN ABILITY TO DO RESEARCH ON THE LAND BAN WASTE. HE DID NOT EVEN COMMENTS ON THINGS THAT A PARALEGAL WOULD KNOW.

THERE WAS NO COMMENT ON TREATMENT, STANDARDS, NO COMMENT ON MIGRATION, GENERATOR CERTIFICATION, ON DEMONSTRATED AVAILABLE TECHNOLOGY, ON STORAGE PROHIBITION, ET CETERA.

FURTHER, ON THE QUESTION OF THE TRANSPORTATION OF HAZARDOUS WASTE -- IT IS BETWEEN STATES -- THERE WAS NOT EVEN A CITATION TO THE PREDOMINANT CASE IN THAT ISSUE; THAT IS, A SUPREME COURT CASE IN RE:
PHILADELPHIA VS. NEW JERSEY.

THERE WAS NO COMMENT ON HOUSE BILL 592, WHICH WAS CURRENTLY APPEARING BEFORE THE GENERAL ASSEMBLY WHICH DEALT WITH THIS ISSUE. THERE

WAS NOT A CITATION TO A LEGAL REVIEW. NO CITATION TO ANY CASE. NO CITATION TO ANY TECHNICAL JOURNAL.

BESIDES THAT, THE ASSIGNMENT WAS DUE ON -- LET'S SAY MAY 18TH FOR A DATE. ON THAT DATE HE GAVE ME THE PAPER IN HANDWRITTEN FORM.

IN OTHER WORDS, TO RECAP WHAT I AM SAYING, THERE WAS NO INDICATION, WHATSOEVER, THAT HERE WAS A PERSON THAT WAS WILLING TO DO A JOB THAT HE COULD DO, THAT HE HAD THE ABILITY TO DO. HE WAS PERFORMING IN A WAY THAT WAS UNACCEPTABLE TO AN ATTORNEY ONE OR PARALEGAL. IF A PARALEGAL GAVE ME THAT DOCUMENTATION, I WOULD FIRE HIM. I WOULD ASK -- I WOULD CEASE HIS EMPLOYMENT.

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Q. SO YOU KNEW ABOUT POLLY MILLER'S LETTER BEFORE YOU WENT LOOKING?
A. YES, SIR. AFTER THE -- AFTER I GOT THE POLLY MILLER LETTER.
Q. IT IS YOUR TESTIMONY THAT KNOWLEDGE OF THE POLLY MILLER LETTER WASN'T THE MOTIVATION FOR LOOKING THROUGH HIS DISKS TO FIND OTHER LETTERS.
A. NO, NO. IN ADDITION TO THAT, I TURNED THE ENTIRE OFFICE UPSIDE DOWN LOOKING FOR DOCUMENTS FOR THOSE TWO CASES, FOR ERIEWAY AND ECOLITEC. ONCE AGAIN, I DID NOT WANT TO GO TO THE PARTIES.
Q. AND THE RELATIONSHIP BETWEEN THE TWO INCIDENTS IS COINCIDENTAL IN YOUR MIND?
A. THE MOTIVATION FOR GOING INTO HIS OFFICE AND -- AND I LOOKED IN OTHER PLACES. I LOOKED IN THE FILE CABINETS, WHATEVER, ANY DOCUMENTS I COULD FIND OUTSIDE OF GOING INSIDE THE DISK.
Q. NOW, YOU MADE A COMMENT EARLIER ABOUT WHY YOU WERE CURIOUS ABOUT MIKE TYPING ON THE SCREEN BECAUSE YOU KNEW AT THAT TIME HE HAD NO ASSIGNED DUTIES. I THINK THOSE WERE YOUR WORDS.

THIS WAS ON MAY 18TH OR THEREABOUTS BELIEVE. LOOK AT YOUR AFFIDAVIT.
A. YES.
Q. IT'S ON JOINT EXHIBIT 24.

SO ON MAY 18TH YOU KNEW THAT MIKE HAD NO ASSIGNED DUTIES?
A. NO DUTIES THAT I KNOW OF.
Q. YOU WOULD HAVE BEEN THE PERSON THAT WOULD HAVE ASSIGNED HIM, CORRECT?
A. I SHOULD HAVE BEEN THE PERSON THAT WOULD HAVE ASSIGNED HIM. IF MR. ADAIR ASSIGNED HIM A DUTY, MR. ADAIR WOULD COME THROUGH ME OR TELL ME.
Q. CERTAINLY IF YOU HAD QUESTIONED WHETHER HE HAD ANY DUTIES, YOU WOULD ASK MR. ADAIR. YOU HAD THAT AUTHORITY OR YOU HAD THAT PRIVILEGE TO ASK MR. ADAIR IF HE WAS ASSIGNING MIKE ANY DUTIES.
A. I COULD HAVE ASKED MR. ADAIR.
Q. DID YOU?
A. NO, BECAUSE HE MADE A HABIT OF TELLING ME WHAT DUTIES HE WAS ASSIGNING.
Q. BASED ON WHAT THE PRACTICE WAS, YOU WOULD HAVE KNOWN OF ANY DUTIES THAT WERE ASSIGNED TO MR. LEPP?
A. THAT'S CORRECT.
Q. SO BASED UPON YOUR KNOWLEDGE AS OF MAY 18TH, HE HAD NO ASSIGNED

DUTIES?
A. TO THE BEST OF MY KNOWLEDGE, HE HAD NO ASSIGNED DUTIES. AND IT WAS NOT CUSTOMARY FOR HIM TO DO HIS OWN TYPING.
Q. BASED ON THE CUSTOM, YOU HAVE NO REASON TO BELIEVE THAT MR. ADAIR DID ASSIGN HIM OTHER DUTIES?
A. I HAD NO REASON TO BELIEVE THAT.
Q. OKAY. AND THAT'S TRUE FOR ALL TIMES, ISN'T IT, AFTER HIS RETURN FROM THE SUSPENSION UP THROUGH MAY 18TH, 1988, THAT YOU BELIEVE -- YOU KNEW THAT HE HAD NO ASSIGNED DUTIES?
A. COULD YOU REPEAT THE STATEMENT AGAIN?
Q. FROM THE TIME OF HIS -- FROM THE TIME MR. LEPP RETURNED FROM HIS SUSPENSION -- WELL, LET ME BACK UP. MR. LEPP'S SUSPENSION WAS SERVED THE END OF DECEMBER THROUGH TO JANUARY 2ND, I BELIEVE.
A. YES. JANUARY 2, '88.
Q. HE WAS THEN ON DISABILITY LEAVE UNTIL ABOUT THE MIDDLE OF FEBRUARY.
A. YES.
Q. FROM THE TIME MR. LEPP RETURNED FROM HIS DISABILITY LEAVE IN THE MIDDLE OF FEBRUARY THROUGH TO MAY 18TH , IT WAS YOUR BELIEF, WAS IT NOT, THAT MR. LEPP HAD NO ASSIGNED DUTIES?
A. THAT IS INCORRECT. NO.
Q. WHAT DUTIES WAS HE ASSIGNED BETWEEN -- FROM THAT PERIOD OF TIME -- WITHIN THAT PERIOD OF TIME?
A. AS STATED EARLIER, THERE WAS THE DUTIES TO PERFORM RESEARCH ON THE LAND BAN AND ON THE INTERSTATE TRANSPORTATION OF HAZARDOUS WASTE THAT WAS DUE IN THE EARLY PART OF MAY.
Q. DUE IN THE EARLY PART OF MAY?
A. YES.
Q. OKAY.
A. THAT WAS A DOCUMENT WHICH I TESTIFIED EARLIER THAT HE GAVE ME IN HANDWRITTEN FORM.
Q. WHEN DID HE GIVE YOU THAT?
A. EARLY PART OF MAY. I DO NOT HAVE A DATE ON THAT, SIR.
Q. SO WHEN WAS HE GIVEN THAT ASSIGNMENT APPROXIMATELY?
A. I BELIEVE EVEN ONE OF YOUR JOINT SUBMITTALS CONTAINS THAT. IT WOULD BE A MEMORANDUM FROM MR. ADAIR.
Q. I WILL SHOW IT TO YOU THEN. I DON'T THINK THIS IS A JOINT EXHIBIT, AND CORRECT ME IF I AM WRONG (INDICATING).

MR. MORALES: NO, THIS HAS NOT BEEN INTRODUCED YET.
DO YOU HAVE A COPY FOR ME?

MR. SMITH: NO, BUT I WILL MAKE ONE.

MR. MORALES: CAN I TAKE A LOOK AT THAT, MIKE?

MR. SMITH: LET ME MAKE A QUICK COPY. WE WILL GO ONTO SOMETHING ELSE WHILE THAT'S BEING DONE.

BY MR. SMITH:

Q. OKAY. I WANT TO GET SOME OF THE CHRONOLOGY HERE.
YOU TALKED ABOUT ASSIGNING MIKE LEPP SOME DUTIES AND THESE LAND BANK CASES.
A. LAND BAN CASES.
Q. SORRY. THE LAND BAN CASES WERE ONE SET OF DUTIES. THE OTHER SET OF DUTIES INVOLVED RESEARCHING THE STATUTE?
A. NO, RESEARCHING THE INTERSTATE TRANSPORTATION OF HAZARDOUS WASTE.
Q. WHEN DID YOU ATTEMPT TO ASSIGN MIKE THAT DUTY?
A. THAT PROBABLY WOULD BE IN THE DOCUMENT THAT YOU HAVE. I DON'T REMEMBER OFF HAND.
Q. OKAY. IT WAS NOT THE SAME ONE -- OKAY.
NOW, AT THE TIME THAT MIKE LEPP WAS RELIEVED OF HIS ADJUDICATORY RESPONSIBILITIES, DID YOU EXPLAIN TO MIKE WHAT YOUR REHABILITATION PLAN WAS FOR HIM?
A. NO.
Q. DID YOU TELL MIKE IN ANY WAY WHAT YOU FELT HE NEEDED TO DO IN ORDER TO BE CONSIDERED ACCEPTABLE TO BE A HEARING OFFICER AGAIN?
A. NO.
Q. DID YOU TELL HIM THAT YOU EXPECTED TO REASSIGN HIM TO HEARING CASES, SOME FUTURE CASES DEPENDING ON HOW WELL HE BEHAVED OR HOW WELL HE DID HIS DUTIES THAT WERE ASSIGNED?
A. I TOLD HIM THAT HIS CASES WERE REMOVED FROM HIM. I DID NOT SAY FOR A PERMANENT TIME. I DID NOT SAY FOR A DEFINITE TIME.

ARBITRATOR KEENAN: DID YOU SAY WHY?
THE WITNESS: I DON'T REMEMBER. I MAY NOT HAVE. I DON'T THINK I DID. I THOUGHT IT WAS IMPLIED WHY.

BY MR. SMITH:

Q. SO MIKE HAD NO IDEA FROM YOU AT LEAST WHEN OR IF HE WOULD BE ASSIGNED HEARINGS AGAIN OR ON WHAT CONDITIONS?
A. NO. I DID NOT -- I DID NOT TELL HIM THAT HE WOULD BE ASSIGNED HEARINGS THE NEXT DATE OR ET CETERA.
Q. I'M SORRY FOR THE CONFUSION. I WAS NOT ANTICIPATING USING THIS DOCUMENT UNTIL MR. SHAPIRO TESTIFIED.
IS THIS THE MEMO YOU'RE TALKING ABOUT CONCERNING WORK ASSIGNMENTS (INDICATING)?
A. YES, SIR.
Q. IT IS?
A. YES, SIR.

ARBITRATOR KEENAN: UNLESS I FORGET, WHEN YOU TOLD HIM HIS CASES WERE BEING REMOVED FROM HIM, WAS THIS ALL AT THE SAME TIME WHEN HE WAS GIVEN THESE OTHER ASSIGNMENTS?
THE WITNESS: NO. THIS MEMORANDUM IS DATED MAY 11TH, 1988. HIS CASES WERE REMOVED FROM HIM SOMETIME BETWEEN OCTOBER, WHENEVER THE DATE OF

THE EX PARTE COMMUNICATION WAS -- OCTOBER 11TH AND DECEMBER 18TH, I BELIEVE, SOMETIME IN THERE.

I BELIEVE MR. LEPP HAS A DOCUMENT THAT SAYS – IT IS MY RECOLLECTION OR MY STATEMENT THAT HE WILL BE ASSIGNED NO CASES; THAT HE WILL TAKE NO PHONE CALLS. I DON'T REMEMBER THE DATE OF THAT.

ARBITRATOR KEENAN: I THINK IT IS SIGNIFICANT ENOUGH THAT IF IT IS A DOCUMENT, IT SHOULD BE IN THE RECORD. IT HAS COME OUT MANY TIMES.

MR. SMITH: I THINK IT IS A JOINT EXHIBIT.

ARBITRATOR KEENAN: IF IT IS NOT ALREADY IN THE RECORD.

MR. SMITH: IT IS A MEMO FROM MIKE TO MIKE. AS MR. SHAPIRO MENTIONED, IT IS AN UNSIGNED MEMORANDUM.

THE WITNESS: YES.

MR. SMITH: I HAVE TO FIND IT HERE.

MR. MORALES: IT'S JOINT EXHIBIT 20.

MR. SMITH: THANK YOU. JOINT EXHIBIT NO. 20, DATED DECEMBER 2ND, 1987, AND IT'S FROM MICHAEL B. LEPP TO MICHAEL SHAPIRO.

"I HAD A BRIEF DISCUSSION WITH MR. SHAPIRO THIS MORNING. FROM THAT UNDERSTANDING -- FROM THE CONVERSATION, I HAVE DEVELOPED THE FOLLOWING UNDERSTANDING. I HAVE NO CASE-RELATED DUTIES, WHATSOEVER. ANY DOCUMENTS OR PHONE CALLS THAT COMES TO MY ATTENTION, IT IS TO BE REFERRED IMMEDIATELY TO MR. SHAPIRO."

IT ALSO IS ADDRESSED TO MR. ADAIR.

ARBITRATOR KEENAN: THAT IS JOINT EXHIBIT WHAT?

MR. MORALES: JOINT EXHIBIT NO. 20.

ARBITRATOR KEENAN: SO IS THIS THE -- MEAN, MR. SAHLI'S TESTIMONY WAS THAT THESE DUTIES WERE REMOVED FOLLOWING HIS SERVICE -- HIS SERVING THE TEN-DAY SUSPENSION. POINT OF FACT, I GUESS IT WAS SOMETIME -- SOMEWHAT BEFORE THE SERVICE OF SUSPENSION.

MR. SMITH: THAT'S CORRECT.

ARBITRATOR KEENAN: IS THAT WHAT THIS DOCUMENT INDICATES?

MR. SMITH: THAT IS WHAT IT WILL INDICATE, YES.

BY MR. SMITH:

Q. NOW, THE MAY 11TH MEMO DOCUMENTS, OH, FIVE RESPONSIBILITIES.

A. YES.

Q. OKAY. THIS DOCUMENT WAS PREPARED, WAS IT NOT, AFTER AND IN RESPONSE TO THE NEWSPAPER ARTICLES THAT CAME OUT WHICH TOLD THE PUBLIC THAT MIKE WAS SITTING AROUND IDLE, HAVING NOTHING TO DO BUT READ MAGAZINES, CORRECT?

A. INCORRECT. THIS DOCUMENT WAS PREPARED AS A MEMORANDUM OF A CONVERSATION WITH MR. -- LET START OVER.

THIS DOCUMENT WAS PREPARED AS MEMORIALIZATION OF A DISCUSSION MR. ADAIR AND MYSELF HAD WITH MR. LEPP TO WRITE DOWN WHAT HIS WORK ASSIGNMENTS WERE.

Q. LET ME SHOW YOU WHAT WE HAVE IDENTIFIED AS UNION EXHIBIT NO. 14 (INDICATING)

MR. SAHLI HAS TESTIFIED THAT THE O.E.P.A. CLIPS NEWSPAPER ARTICLES THAT

ARE RELEVANT AND CIRCULATES THEM.

MR. MORALES: OBJECTION. THE MOTIVATION FOR THE STATEMENT OUTLINING WORK ASSIGNMENTS IS NOT RELEVANT TO THE TERMINATION.

ARBITRATOR KEENAN: WELL, IT IS FROM YOUR PERSPECTIVE. FROM THE UNION'S PERSPECTIVE IT WOULD BE BECAUSE THEY CONTEND THAT IT IS PRETEXTUAL. THIS IS THE KIND OF EVIDENCE THAT WOULD TEND TO GO TO PRETEXTUALITY. FROM YOUR POINT OF VIEW, IT HAS NOTHING TO DO WITH THAT BECAUSE YOU DENY PRETEXTUALITY.

MR. SMITH: THERE ARE TWO ISSUES. THE UNION IS CONTENDING THAT HE WAS NOT ASSIGNED ANY DUTIES FOR A SUBSTANTIAL PERIOD OF TIME, AND THAT IN ESSENCE, IT IS A CONDEMNATION ARGUMENT. IF THE EMPLOYER IS ARGUING THAT MR. LEPP -- BY USING EQUIPMENT -- WHAT WAS HE SUPPOSED TO BE DOING IF HE WAS NOT ASSIGNED ANY WORK TO DO IN THAT REGARD? SO WE HAVE TO ATTEMPT TO SHOW THAT.

THE OTHER THING IS THAT IN TESTIMONY ON DIRECT-EXAMINATION, MR. SHAPIRO HAS ATTEMPTED TO AGAIN PAINT MR. LEPP BAD. HE WAS NOT DOING THIS, HE WAS NOT DOING THAT. WELL, WE ARE ENTITLED TO SHOW THAT HE WAS NOT DEFINED DUTIES UNTIL HE BROUGHT IT TO SOMEBODY'S ATTENTION.

ARBITRATOR KEENAN: OVERRULED.

MR. MORALES: I JUST WANT TO POINT OUT THAT THE UNION'S CONTENTION THAT HE WAS NOT ASSIGNED DUTIES FOR A PERIOD OF TIME IN TOTAL IS IRRELEVANT. BECAUSE HE WAS NOT ASSIGNED DUTIES IS NO JUSTIFICATION FOR HIS ACTIONS. IF HE HAD A PROBLEM WITH THE DUTIES THAT HE WAS ASSIGNED, THAT HE HAD AN OPTION TO THE GRIEVANCE PROCEDURE TO SEEK REMEDY. THAT WAS THE PROPER REMEDY. THAT WAS THE PROPER WAY TO PURSUE HIS ALLEGED GRIEVANCE AND NOT TO UNDERMINE THE ACTIVITIES OF THE BOARD.

ARBITRATOR KEENAN: WELL, AS MR. SMITH INDICATED, THERE WERE TWO BASES FOR HIS OFFERING THE DOCUMENT. I HAVE ALREADY EXPLAINED HOW THE FIRST BASIS WOULD HAVE SOME RELEVANCE, SO I WILL OVERRULE THE OBJECTION.

BY MR. SMITH:

Q. WERE YOU FAMILIAR WITH THAT DOCUMENT WHEN IT CAME OUT, THAT NEWS ARTICLE?

A. IF YOU'RE ASKING ME DID I READ IT, I MAY HAVE. I DON 'T -- IT'S DIFFICULT TO SAY.

Q. IT'S DIFFICULT TO SAY. YOU DON'T REMEMBER?

A. TO BE QUITE FRANK, THERE WERE MANY ARTICLES CONCERNING THIS. WHETHER OR NOT I READ THIS PARTICULAR ONE, I COULD HAVE. IF I KEPT A SCRAPBOOK, YES, I WOULD -- I COULD GO AND REFRESH MY MEMORY WITH THAT.

Q. SO PUBLICATION OF THIS ARTICLE, IN YOUR OPINION, IN TIME IS COINCIDENTAL WITH RELATIONS TO THE PUBLICATION OF THIS ASSIGNMENT FROM MR. ADAIR CONCERNING WORK ASSIGNMENTS FOR MR. LEPP?

A. MY MOTIVATION WAS THIS: I, IN DECEMBER, HAD ASSIGNED MR. LEPP TO REVIEW FOUR OR FIVE BILLS. I HAD THAT ASSIGNMENT THROWN BACK AT MY FACE, AND HIS REFUSING TO MEET WITH ME. I AM NOT NECESSARILY GOING TO GO RIGHT BACK AND ASSIGN HIM MORE STUFF. THEN IT CAME DOWN --

Q. WHY NOT?

A. WHEN SOMEONE -- WHEN SOMEONE WHO IS A SUBORDINATE, WHEN YOU GIVE THAT

PERSON MATERIAL TO DO, GIVE HIM A CASE ASSIGNMENT TO DO AND HE SAYS, "I NEED CLARIFICATION," QUOTE, UNQUOTE, AND I ASK HIM "WHAT CLARIFICATION DO YOU NEED?" AND HE TELLS YOU, "FROM YOU, NOTHING. YOU ARE NOT CREDIBLE."

WHEN YOU'RE TALKING WITH YOUR SUPERVISOR AND HE COMES IN YOUR OFFICE AND THROWS IT DOWN ON THE DESK TO, YOU ARE NOT GOING TO SAY, "HERE, MIKE, HERE IS A DIFFERENT ASSIGNMENT."

Q. THIS INCIDENT OCCURRED ON OR AROUND DECEMBER 2ND THAT YOU ARE TALKING ABOUT?

A. SOMETIME IN DECEMBER.

Q. BEFORE HIS SUSPENSION, CORRECT?

A. I THINK YOU KNOW.

Q. THE SUSPENSION THAT WAS IMPOSED IN THE MIDDLE OF DECEMBER?

A. YES.

Q. OKAY. YOU DIDN'T SEEK TO DISCIPLINE MR. LEPP FOR REFUSING TO DO THAT WORK ASSIGNMENT, CORRECT?

A. I CALLED THAT TO THE LABOR RELATIONS SPECIALIST ATTENTION.

Q. BUT, IN FACT, HE WAS NOT DISCIPLINED FOR THAT, CORRECT?

A. THAT'S CORRECT.

Q. AND YOU NEVER ATTEMPTED FROM THAT TIME UP UNTIL MAY TO ASSIGN HIM ANY DUTIES, CORRECT?

A. TO THE BEST OF MY KNOWLEDGE, YES.

Q. MR. LEPP WAS SITTING AROUND DOING NOTHING FOR A PERIOD OF FIVE MONTHS?

A. IT'S TOUGH TO SAY FIVE MONTHS. AS YOU SAID, HE WAS ON -- I THINK HE WAS ON, WHAT, A LEAVE WITHOUT PAY. HE WAS ON VACATION, ET CETERA. THERE WAS A PERIOD OF TIME WHEN WAS IN THE OFFICE DOING NOTHING.

Q. AND THE STATE WAS PAYING HIM TO DO NOTHING?

A. YES, SIR.

Q. OKAY. HOW MUCH DO YOU THINK IT COST THE STATE FOR THE USE OF THE STATE EQUIPMENT TO PRINT THE DOCUMENTS THAT YOU HAVE IDENTIFIED TODAY?

A. PLEASE REPEAT THE QUESTION.

Q. HOW MUCH DO YOU THINK IT COST THE STATE?

A. HOW MUCH DO YOU THINK IT COST THE STATE FOR WHAT?

Q. FOR MR. LEPP TO PRINT THE DOCUMENTS THAT ARE HERE TODAY.

A. THE COST IS NOT THE RELEVANT QUESTION. THE RELEVANT QUESTION IS WHEN THE STATE -- WHEN AN

*** * * ***

Q. NOW, YOU STATED ALSO THAT MR. LEPP HAD EXPERIENCE IN DOING LANDFILL CASES.

A. THAT'S CORRECT, SIR.

Q. WHAT WAS THAT CASE AGAIN THAT HE DID?

A. THAT WAS THE IT/LTV CASE, I GUESS IS THE BEST TERMINOLOGY. IT IS A LANDFILL CASE.

Q. WHERE DID THAT OCCUR?

A. IN CANTON TOWNSHIP, CANTON. TO THE BEST OF MY KNOWLEDGE, THE DOCUMENT WOULD SPEAK FOR ITSELF, IF I COULD GET THE DOCUMENT. IT WOULD BE PRIOR TO THE EX PARTE. IT WAS FILED BEFORE THAT.

Q. MR. LEPP, IN YOUR OPINION, PERFORMED ADEQUATELY IN THAT CASE?
A. YES, HE DID.
Q. OKAY. DID HE GIVE YOU ANY INDICATION THAT HE COULD NOT HANDLE THAT CASE?
A. NO, SIR. HE DID AN ADMIRIAL JOB IN THAT CASE.
Q. IN FACT, MR. LEPP UP UNTIL THE POINT THAT THIS EX PARTE COMMUNICATION MATTER TOOK PLACE, IN YOUR OPINION, WAS AN EXCELLENT HEARING OFFICER, WAS HE NOT?
A. HE PERFORMED HIS JOB VERY WELL.
Q. OKAY.
A. WE HAD DIFFERENCES OF OPINION AS TO THE CONDUCT OF HIS CASE, BUT I WILL SAY THAT HIS WRITTEN REPORTS AND RECOMMENDATIONS WERE VERY GOOD.
Q. WITH A HEARINGS OFFICER THAT HAS SUCH A GOOD HISTORY AND HAS WORKED WELL FOR THE BOARD UP UNTIL THIS POINT, WHY IS IT THAT THE SUPERVISOR CANNOT TELL HIM WHAT THEY EXPECT OF HIM TO DO? WHY IS IT THAT YOU COULD NOT GO TO MIKE AND SAY, "MIKE, THIS IS A PROBLEM. IF YOU WANT TO GET BACK ON BOARD, THIS IS WHAT YOU'VE GOT TO DO AND THIS IS WHAT WE EXPECT."
A. AT THAT TIME, COMMUNICATION HAD BROKEN DOWN. BECAUSE OF THE ACTIVITY, IT BECAME VERY, VERY CLEAR THAT WE WERE DEALING IN A -- WE ARE NOT DEALING IN A HEARING EXAMINER RELATIONSHIP. WE WERE DEALING IN A BARGAINING UNIT-EMPLOYEE-SUPERVISOR RELATIONSHIP.

I HAD ORDERED HIM TO DO SOMETHING TO EXPUNGE THE IRRELEVANT PORTIONS AND APOLOGIZE, AND THAT KIND OF THING. HE HAD NOT DONE THAT. BECAUSE HE WAS NO LONGER FOLLOWING THE DIRECTION OF MANAGEMENT AND THAT HE WAS NO LONGER -- WE WERE NO LONGER COMMUNICATING, IT BECAME VERY, VERY DIFFICULT TO DEAL WITH THE SITUATION.

I WOULD ASSUME THE REASON I DID NOT TELL HIM WHY THE CASES WERE REMOVED FROM HIM IS BECAUSE I THOUGHT IT WAS VERY OBVIOUS. IT WAS A SITUATION WHERE HE BASICALLY REFUSED TO OBEY A DIRECT ORDER OF A SUPERVISOR UPON WHICH THE SUPERVISOR SAID IF YOU DO NOT DO THAT, DISCIPLINARY ACTION WILL TAKE HOLD OR COMMENCE AND THAT COULD INCLUDE TERMINATION.
Q. THERE WAS A STANDOFF, BASICALLY, FROM THE TIME HE GOT BACK FROM THE SUSPENSION UP UNTIL THE MIDDLE OF MAY?
A. NOT A STANDOFF. YES, HE WAS REMOVED FROM HEARING EXAMINER DUTIES, BUT HE WAS GIVEN AN OPPORTUNITY TO EXPLAIN THE BILLS. HE WAS GIVEN AN OPPORTUNITY TO DO THE OTHER MATERIAL.
Q. THIS WAS IN THE MIDDLE OF MAY, CORRECT?
A. YES.
Q. SO HE WAS NOT GIVEN ANY OPPORTUNITY PRIOR TO MAY?
A. BETWEEN MAY AND DECEMBER? I WOULD SAY NO. I WOULD SAY NO.

ARBITRATOR KEENAN: GOING BACK FROM MAY BACK TO DECEMBER?
THE WITNESS: FROM DECEMBER OF '87 TO MAY OF '88.

BY MR. SMITH:

Q. OKAY. SO FROM DECEMBER THROUGH MAY, HE WASN'T -- YOU DIDN'T TRY TO

IMPLEMENT YOUR PLAN TO REHABILITATE HIM?
A. WHEN I TRIED TO IMPLEMENT THAT PLAN IN DECEMBER -- I TRIED TO IMPLEMENT THAT PLAN IN DECEMBER OF '87 AND MAY OF '88, AND DURING THE INTERIM THERE WAS A TIME THAT HE WAS ON, I BELIEVE, ADMINISTRATIVE LEAVE WITH PAY AND HE WAS ON VACATION.
Q. WHEN YOU HAD FIRST ORDERED HIM TO DO THOSE DUTIES, THAT WAS PRIOR TO THE SUSPENSION?
A. BEING WHAT DATE?
Q. THE FIRST -- WHEN YOU ASKED HIM TO DO THE MATERIAL THAT IS REFLECTED IN THE DECEMBER 2ND MEMO FROM MIKE TO YOU.
A. THAT WAS PRIOR TO THE SUSPENSION, YES.
Q. AND JUST TO MAKE IT CLEAR, AFTER THE SUSPENSION WAS SERVED --
A. CAN YOU TELL ME WHAT DATE THAT WAS, SIR?
Q. HE FINISHED SERVING THE SUSPENSION ON JANUARY 2ND, 1988. AFTER THAT DATE, THE FIRST TIME YOU ATTEMPTED TO ASSIGN MR. LEPP DUTIES WAS THROUGH THIS MAY 11TH MEMO?
A. I WOULD SAY YES.
Q. SO AFTER HE SERVED THE SUSPENSION, YOU TOOK NO ACTION TO "REHABILITATE HIM" UNTIL MAY 11TH, 1988?
A. IF YOUR STATEMENT IS ACTION TO REHABILITATE BY ASSIGNING HIM THE WORK, NO.
Q. AND YOU DIDN'T COMMUNICATE TO HIM WITH WHAT -- WITH WHAT YOU EXPECTED HIM TO DO? TELL ME WHAT ACTION YOU TOOK, IF ANY KIND OF ACTION, AFTER HE SERVED HIS SUSPENSION TO "REHABILITATE HIM."
A. THE ONLY ACTION WOULD BE GIVING HIM THOSE ASSIGNMENTS AND IN THE HOPE THAT HE WOULD PREPARE, FULFILL THOSE ASSIGNMENTS AND TO THE CAPABILITY THAT HE HAS.
Q. OKAY. AND THAT ASSIGNMENT WAS GIVEN IN MAY?
A. THAT'S CORRECT.
Q. OKAY. NOW, DID MIKE'S COMMUNICATION TO THE PRESS IN ANY WAY FACTOR IN YOUR DECISION TO RECOMMEND DISCIPLINARY ACTION?
A. PROBABLY IMPLIEDLY. BY THAT, I MEAN THAT I AM OF THE OPINION -- EXCUSE ME -- I'M OF THE OPINION THAT WHEN YOU ARE ASSIGNED A CASE, YOU ARE REMOVED, ET CETERA, THAT ONE SHOULD NOT COMMENT TO THE PRESS UPON THAT. AND THAT SHOWED A CONTINUATION OF HIS UNWILLINGNESS TO PERFORM IN A MANNER LIKE A HEARING EXAMINER WOULD PERFORM.
Q. OKAY.
A. IT WAS NOT A DIRECT -- TAKEN IN ISOLATION, NO. IT WAS NOT A DIRECT BECAUSE YOU DO THIS, YOU TAKE DISCIPLINARY ACTION. IT IS AN ACCUMULATION OF EVERYTHING WITH THE SPECIAL IMPORTANCE WE DEEMED THE POSITION OF HEARING EXAMINER.
Q. YOU ALSO MADE A REFERENCE IN TALKING, I THINK, ABOUT THE POLLY MILLER LETTER, ABOUT HOW YOU GOT TO PREVENT QUID PRO QUO DEALINGS, DEALINGS BETWEEN HEARING OFFICERS AND POTENTIAL PARTIES BEFORE THE BOARD.
A. IT IS THE APPEARANCE OF IMPROPRIETY.
Q. DID YOU CALL UP AND QUESTION MISS MILLER AND ASK HER WHAT HER INVOLVEMENT WAS IN THE CASE, HOW SHE GOT INVOLVED IN WRITING THE LETTER?
A. I VIEW THAT AS TOTALLY IRRELEVANT. THE MERE FACT THAT THERE WAS A

PERSON THAT HAD RESPONSIBILITY FOR TRYING CASES, THAT AFTER READING THE LETTER WAS IN ASSOCIATION WITH THAT PERSON, IN MY MIND THAT WAS IT.
Q. WHEN THE BOARD RULES OR IF THE AGENCY RULES IT IS PROHIBITED FOR A PERSON TO DEVELOP A RELATIONSHIP WITH A PAST LITIGANT BEFORE THE BOARD? WHEN I SAY "RELATIONSHIP," I MEAN BECOME FRIENDS.
A. THERE IS NO PROHIBITION ABOUT BECOMING FRIENDS. I WOULD SAY THAT COMMON SENSE WOULD INDICATE THE FACT THAT WHEN THE RELATIONSHIP GOES TO THE MEAT OF YOUR EMPLOYMENT AND THAT YOU ARE HELPING THAT PERSON, WHEN THAT PERSON IS HELPING YOU AGAINST YOUR EMPLOYER, AND THEN YOU SERVE AS A HEARING EXAMINER, YOU MAKE A RECOMMENDATION, TO ME THAT IS A BEGINNING OF AN APPEARANCE OF IMPROPRIETY.
Q. MR. LEPP DIDN'T MAKE ANY RECOMMENDATION HERE FOR A CASE THAT POLLY MILLER WAS A PART OF IN THIS -- RELATED TO THIS MATTER, CORRECT?
A. HE MADE A RECOMMENDATION FOR A CASE THAT SHE WAS A PART OF.
Q. BACK IN 1984?
A. THAT'S CORRECT.
Q. BACK IN '84?
A. YES.
Q. SO YOU'RE SPECULATING IF A CASE WERE TO COME UP, IF MIKE LEPP DID NOT DISCLOSE THE RELATIONSHIP, THERE WOULD HAVE BEEN AN IMPROPRIETY THERE?
A. THAT'S CORRECT. I AM SAYING THERE WOULD BE AN IMPROPRIETY THERE. THE SAME WAY THAT THERE IS AN IMPROPRIETY DEALING WITH THE LEGISLATURE TO REPRESENT A DISTRICT IN WHICH THERE IS A FACILITY THAT IS COMING BEFORE THE BOARD.
Q. ALL RIGHT.
A. THAT REPRESENTED REPRESENTATIVE HICKEY.

Other matters of note include the fact that the Grievant's status was reported extensively in the press. In this regard the Board subscribes to a press clipping service and I infer that the Board member thus became aware of the press coverage of the Grievant's situation in this manner. These newspaper articles first appeared on December 3, 1987. Other newspaper articles followed on March 12, 1988, May 10, 1988, May 16, 1988, and May 17, 1988. These articles generally quote a private attorney retained by the Grievant, one Diane Porter. Porter was clearly critical of the O.E.P.A., the HWFB, and Director/Chairman Shank in particular, accusing him of improprieties in connection with the December 1987 disciplinary layoff of the Grievant, and generally setting forth the Grievant's position in the matter. Various of these articles also make reference to a "whistle blowing" cause of action, asserting improper retribution against the Grievant by the HWFB by blowing the whistle on Chairman Shank, which action was subsequently withdrawn. The May 1988 articles question the HWFB's decision to hire outside Hearing Examiner Nusken for the Envirosafe care and report on the State Controlling Board's interest in "the Lepp case." These articles refer to interviews with Lepp himself, and with spokesmen for the HWFB.

It is noted that Ms. Polly Miller, who testified at the hearing, is an ardent advocate for a safe environment. She owns a farm in Circleville, Ohio, which she perceives as being contaminated by a PPG hazardous waste facility nearby. In 1984 she opposed the PPG facility as head of a citizen's still active. At that time the Grievant was conducting the adjudicatory hearing to determine whether the HWFB would recommend licensing of PPG. Clearly Miller and the Grievant developed a mutual respect for one another at that time. Subsequently, at Miller's invitation, the Grievant

visited Miller's farm on one occasion. In May 1988, Miller read one of the newspaper articles concerning the Grievant referred to above, clipped it out, and sent it to the Grievant. Thereafter the Grievant contacted Miller and asked if she would consider sending a letter to the Columbus Dispatch. She indicated she would consider doing so. The Grievant on the HWFB computer, composed the following letter:

4174 Emerson Rd.
Circleville, OH 43113

May 19, 1988

Letters to the Editor
Columbus Dispatch
34 S. Third St.
Columbus, OH 43215

Ladies or Gentlemen:

I am outraged to read that the state Hazardous Waste Board spends $70,000 on a hearing officer to conduct a hearing on a case when at present there is a hearing officer on the Board's staff who is doing nothing. And then, to make matters worse, because the $70,000 hearing officer is inexperienced, the Board has to hire a geologist in addition to assist him.
But the story is even more outrageous. The Board is spending all this money because the hearing office that, is doing nothing is idle because he blew the whistle on the Chairman (EPA Director Richard Shank) when the Chairman put improper pressure on the hearing officer.

At the same time all this is going on, I have a formal complaint pending with the Ohio EPA to get them to take action on the PCB contamination of Scippo Creek (including a major fish kill). Months have gone by and nothing has been done. The Ohio EPA always claims it is understaffed. Well, maybe they could do something about some serious environmental problems if the Hazardous Waste Board Chairman behaved properly.

Sincerely,

Polly Miller

1-474-3231

The Grievant does not contest that he left the letter on the computer's screen. As it turned out, Miller was unwilling to send the letter to the Dispatch and she never did so. As she explained she herself had a formal complaint pending at the time with the EPA concerning what she perceived to be inaction on their part with respect to a spill from the PPG facility in Circleville.

The Grievant testified that he used a floppy disc on the HWFB's computer to comprise letters to his son and others, including the State Controlling Board letters in question here, particularly the following:

1798 Sawgrass Drive
Reynoldsburg, OH 43068
April 1, 1988

Representative William Hinig
Ohio House of Representatives
State House
Columbus, OH 43215

Representative Robert Netzley
Ohio House of Representatives
State House
Columbus, OH 43215

Representative Robert Hickey
Ohio House of Representatives
State House
Columbus, OH 43215

Senator Ted Gray
Ohio Senate
State House
Columbus, OH 43215

Gentlemen:

To a greater or lesser extent, each of you has observed my work for the state. Mr. Hinig, Mr. Netzley, and Mr. Gray, I hope you will remember me from the 8 1/2 years that I worked for the Legislative Service Commission; Mr. Hickey, from the hazardous waste facility board (HWFB) public hearing that I conducted in Dayton for the Ecolotec case. In addition, Mr. Gray is my state senator. I now contact you in your capacity as a member of the controlling board.
At the April 11, 1988, meeting of the controlling board you will be asked to approve the expenditure of state funds for the Ohio EPA (or HWFB) to hire Ralph Nusken as a hearing officer on a contract basis to complete the hearing on a case for which the hearing officer assigned to that case (Richard Brudzynski) resigned in order to begin a new job with the City of Dayton. Mr. Nusken has an excellent reputation as a former state hearing officer and nothing in this letter is meant as criticism of him.

I think you should know that I am on the payroll of HWFB as a hearing officer but have, as a result of a conflict (involving my independence as a hearing officer) with the chairman of HWFB, been stripped of all of my adjudicatory duties. The essentials of this conflict are outlined in the enclosed clipping from the Toledo Blade. Before this conflict with the chairman I had no blemishes of any kind in my entire 5 1/2 years with HWFB. In any event, I find it hard to believe that the state can afford to hire a hearing officer by contract when a proven hearing officer with no duties (except for a very occasional, brief research assignment) is already employed by HWFB.

I ask you to not identify me as the source of this information.

Sincerely,

Mike Lepp

1798 Sawgrass Drive
Reynoldsburg, OH 43068

May 12, 1988

Members of the Controlling Board
State House
Columbus, OH 43215

Dear Members:

At your last meeting, you decided to defer to May 16, 1988 action on the request of Ohio EPA to enter into a contract with Ralph Nusken for up to $70,000 to act as the hearing officer in the continuation of the Hazardous Waste Facility Board (HWFB) hearing on the Envirosafe case. I believe my name was mentioned in connection with your consideration of this request inasmuch as I am a hearing officer employed by HWFB and am currently assigned no hearings.

While I am a state employee, I am also a taxpayer and for that reason I think you should be aware of my record both before my attorney filed my action at the Personnel Board of Review against HWFB, Mr. Adair, and Mr. Shapiro under the whistleblower statute and before the events that are the subject of that action. For that reason I have enclosed a copy of my most recent performance evaluation. Because there has been a statement that I am not "qualified" I have enclosed a copy of my resume as well. If you have questions I can be reached at 644-2470.

I believe in open government and know that information is a key basis for your decisions. However, under the circumstances, I do ask that you attempt not to reveal me as the source of these enclosures.

Yours sincerely,

Michael B. Lepp
Enclosures

This disc was then put in a locked cabinet in his office. The Grievant had a key to his cabinet. At the hearing he recalled that others in the office, including Shapiro, had a key for their own cabinets, but that the keys fit all cabinets. According to the Grievant's credible testimony, there was no custom at the HWFB office of going into one another's cabinet without permission.

The record reflects that employers of other state agencies, and the Union on their behalf, petition legislators, including the State Controlling Board, sometimes with success, to reverse the policy decisions (such as the closing of a State facility) of their Employer-Agency. Clearly these lobbying efforts include, among other motivations, a desire to preserve their jobs. No discipline has resulted from these efforts. The clear inference from the Grievant's testimony is that the Polly Miller and State Controlling Board letters were motivated by his desire to save his job. It appears

that it was the Grievant's perception that an effort to constructively discharge him was underway.

With respect to the December 1987 assignment from Shapiro to review pending legislative bills, the Grievant indicated he believed he had a right to refuse such because he felt "this particular assignment was chosen just to antagonize me." In this regard the Grievant indicated from the outset of his employment with the HWFB he had indicated his lack of desire to work in legislative matters or to lobby. Shapiro asserted no awareness of the Grievant's reluctance in that regard.

The Grievant explained that he went to the press in March because "I wanted my job back. I thought it would no longer be a tenable position of whoever it was that was giving the orders about my particular case. It would no longer be tenable for them to play games for my job."

According to the Grievant, at the pre-disciplinary hearing management did not articulate its "conflict of interest concerns" vis a vis the Polly Miller and State Controlling Board letters.

The Grievant denies the December statements attributed to him in the anonymous statement. (See Attachment # II)

Asked "isn't it true that you are under an obligation as a hearing officer to avoid even the appearance of impropriety," the Grievant replied, "I think that is true, yes."

Asked if he would recuse himself from any case involving Ms. Miller, the Grievant indicated he would do so because of his "friendship" with her. Asked if he would recuse himself from further proceedings in the Ecolotec case, within the District of State Representative and State Controlling Board member Hickey, the Grievant indicated he would not do so because "I felt no conflict there."

The following excerpt from the Grievant's testimony is also relevant:

WHAT WAS YOUR MOTIVATION, YOU KNOW, FOR THE THINGS THAT YOU DID?
A. WELL, THERE WAS TWO MOTIVATIONS. ONE, AS I SAID, I FELT VERY STRONGLY THAT THE PUBLIC HAD A RIGHT TO KNOW WHAT WAS GOING ON IN THIS CASE AND FOLLOWING EVENTS, ALL OF WHICH BUILT UP AND BUILT UP AND BUILT UP. BUT IT WAS ALL ABOUT LETTING THE PUBLIC KNOW WHAT WAS GOING ON. AN OPEN AND HONEST GOVERNMENT IS WHAT I AM TALKING ABOUT.

THAT WENT TO -- THAT COMMENT EXTENDS TO THE FIRST ARTICLE IN THE PAPERS TO A LATER ARTICLE. IT EXTENDS TO THE WHISTLE-BLOWER ACTION, AND IT EXTENDS TO THE VARIOUS LETTERS TO THE EDITOR. IT EXTENDS TO THE OTHER LETTERS THAT WERE CITED HERE, AS DOES THE SECOND ITEM, WHICH WAS TO RESTORE MY JOB.

I WAS OBVIOUSLY CONSIDERED TAINTED AT THE BOARD, AND I FELT THAT THE ONLY POSSIBLE WAY OF RESTORING MY POSITION, GETTING MY JOB BACK OR PREVENTING MY DISMISSAL, IN FACT, WAS TO TURN TO ANOTHER FORUM AND REPORT THE TRUTH, AND THAT THE TRUTH WOULD, IN FACT, HAVE THE EFFECT OF MAKING THOSE PEOPLE WHO WERE MAKING THE MANAGEMENT DECISIONS IN THIS CASE REALIZE THEY WERE DOING SOMETHING VERY WRONG AND, IN FACT, THEY WERE GETTING THEMSELVES FURTHER AND FURTHER IN THE HOLE. THERE WERE TWO PURPOSES.

In explaining why he asked for confidentiality in his letters to the State Controlling Board the Grievant explained that he felt he "was a target by that time . . . that my presence was not particularly wanted . . . there was a very clear message being given to me by the fact that nothing was being given to me to do and I did not want necessarily to get myself in further trouble with them."

It was also the Grievant's testimony that at his pre-disciplinary hearing no mention was made of any of poor performance of post-suspension work assignments; nor of insubordinate conduct; nor of wrongdoing by having gone to the press; nor of hindering others' performance. In these matters he was corroborated by the testimony of advocate Smith who indicated that "there was never any

mention as to the employee's poor work performance or refusal to do any duties, being insubordinate in any other way. There was never any reason as to what in the letters was the substantive reason for the discipline, as Mr. Sahli testified, as to the impact of the two letters. There was never that explanation." Rather, according to Smith, Kirk, who presided, kept insisting that the allegations were "self-evident."

According to the Grievant's fellow Hearing Examiner/ALJ Brudzynski, state equipment, including the computer, could be used for personal business, "the only caveat was that you did not make unreasonable use of the equipment." Thus Brudzynski, who trained employees on the use of the computer, would encourage use of the computer for personal business in order to familiarize oneself with the equipment. According to Brudzynski, himself, Executive Directors Peggy Vince and James Adair, and General Counsel Shapiro all used the computer to prepare resumes for non-State jobs. Shapiro denied doing so. Brudzynski, who served as Union Steward, also used the computer for Union business.

The Union's Position:

The Union takes the position that the disciplinary termination of the Grievant is "fraught with gross procedural violations" and in any event "has no basis in fact which meets the fundamental elements of just cause." By way of elaboration concerning its contention of procedural flaws, the Union contends that O.E.P.A. Director and HWFB Chairman Shank had no authority to discipline the Grievant. It is the Union's contention that "to vest O.E.P.A. Director Shank with authority to discipline Board employees creates a conflict which makes the autonomous operation of the Board unfeasible. As in this [Grievant's] suspension, Director Shank removed the Grievant without Board approval . . . Shank was without lawful authority to discipline the Grievant, and the discipline must be found to be invalid."

Additionally, the Union contends that while the Board now relies on various and sundry bases and reasons to support its termination of the Grievant, their reasons were not made known to the Grievant prior to the imposition of the discipline of termination and hence Section 24.04 of the parties' contract was not complied with. Thus, according to the Union, the Board only now contends that: the Grievant failed to work for the five months preceding his dismissal, whereas no discipline was imposed at the time; that the Grievant flat out refused to perform work assignments (insubordination), whereas no discipline was imposed at the time; improperly spoke to the news media, whereas no discipline was imposed at the time; and improperly wrote to his son on work time and on work equipment, whereas no discipline was imposed at the time. Moreover, asserts the Union, the Grievant was never told prior to the arbitration hearing herein that a basis for his removal was: "attempted coercion of a State legislator" (the Union's characterization of the Board's contention); "the future possibility of an appearance of impropriety as a hearing officer" (the Union's characterization of the Board's contention); or "his possible failure of a never mentioned 'rehab program'."

It is the Union's further contention in this regard that the purported fact that the aforesaid reasons were first set forth at the arbitration hearing "is an indicator that they are but after-the-fact rationalizations . . . contrary to the most simple notions of just cause."

Another contention of the Union is that part of the justification for the Grievant's termination is clearly without probative proof. Thus, the Union points to the anonymous statement furnished it at the pre-disciplinary hearing and the Board's reliance on same, as the testimony indicated, as "indirect evidence" of the Grievant's alleged "disloyalty and malicious intent." It is the Union's contention that it follows that "part of the justification for the removal must automatically fall."

Yet another contention of the Union is that the Grievant has been treated disparately. In support of this contention the Union points to the mere oral reprimand meted out to O.E.P.A.

employee John Kirwin on December 27, 1988 for personal use of State equipment (a computer) and its pending unfair labor practice charge alleging that the Board "allows nonunion employees use of State equipment on State time for nonbusiness, personal (but antiunion) purposes." It also points to the use with impunity, of State equipment for personal business by other employees (ALJ Brudzynski) and Management alike, asserting that "the use of State equipment on State time was "a permitted practice in the HWFB office so long as that practice was not abused."

It is the Union's contention that in any event there exists here "damning circumstantial evidence" establishing that "the reasons for the discipline were pretextual." It is the Union's position that in reality "the Grievant was removed for his report of ex parte communication . . . the Employer knew that it could not entirely ignore the Agreement's strictures on progressive discipline, so it removed the Grievant in two steps." The pretextual nature of the Grievant's termination is made manifest, argues the Union, by the alleged facts that: no work assignments from early January to mid-May 1988 were given to the Grievant, which as the Grievant testified, made him feel that a "message" was being sent to him that he was not wanted and should resign; while the Grievant purportedly failed to meet the terms of the Board's rehabilitation plan for him, such a rehabilitation plan was never discussed with the Grievant, indeed such a plan never existed, and was, rather, a "hastily constructed sham"; the Board's efforts to hire an outside contractor to conduct HWFB hearings wherein the Grievant's idle status was concealed because, asserts the Union, the Board had already (March 1988) decided to discharge the Grievant.

With respect to the Board's reliance on the Grievant's letter to inter alia, State Representative Hickey in his capacity as a member of the State Controlling Board, the Union asserts that reliance cannot be had on said letter because it was obtained illegally, i.e., it was obtained in the course of an unconstitutional search of an area in which the Grievant had a reasonable expectation of privacy, and hence, pursuant to the exclusionary rule applicable concerning searches and seizures violative of the Fourth Amendment, must be suppressed and not considered. O'Connor v. Ortega, 107 S.Ct. 1492 (1987).

In any event, argues the Union, the Employer's basis for removal, judged on merit, does not constitute just cause for discipline." In this regard the Union contends that:

"The chief allegation against the Grievant was that he tainted his status as hearing officer because of 1) the possibility that he would not disclose his relationship with a possible future litigant before the Board and 2) the possibility that he would have in the future ruled against a State legislator who sat on the State Controlling Board." The Union contends that these allegations are "mere speculation." More than that, they are remote speculation, . . . It presumes not only that the Grievant would in the future be assigned to a case involving these persons (an unlikely possibility) but also that in the future the Grievant would commit wrong by not disclosing a relationship which conflicted with his duties as a hearing officer . . . just cause can never be based on speculation."

Implicitly asserting that a full investigation is a prerequisite to meeting the just cause standard, the Union asserts that the Board's investigation here was lacking, since it concededly never encompassed any discussion with Ms. Polly Miller or State Representative Hickey "to ascertain their relationship to the Grievant or to determine whether there was any level of intimidation."

The Union additionally asserts that "the Employer violated the Grievant's First Amendment right when it disciplined the Grievant for the content of his speech." In this regard the Union relies on Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1978).

It is the Union's contention that

"in Givhan, the Court found that a public employee's public and private speech were protected. A

balancing test was used. On one side was the 'interests of the employee as a citizen, in commenting on matters of public concern.' On the other was the 'interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' The employer's interests must be significantly greater to prevail over those of the employee. In this case, the employer's interests are not as significant as those of the Grievant. The Grievant had a right and a significant interest to communicate to his legislators, his union, his professional colleagues and his friends. The matter, having been published in several newspapers, was certainly of public interest. The employer, on the other hand, had no compelling reason to prevent the communication. The Grievant spoke and wrote the truth. Second, he only wrote to those who expressed an interest or who had a professional interest in his situation. Under these circumstances, the Grievant's speech was totally protected."

Finally, the Union seeks a plenary remedy. Thus it requests that the disciplinary action

"be expunged in its entirety. It requests full back pay (without subtracting intermittent earnings) with a daily compounded interest rate of ten percent (10%). It requests an order directing the employer to reinstate the Grievant to all of his duties as hearing examiner as identified in his 1985 position description (Joint Exhibit 22). This remedy is important for the following reasons:

1. The disciplinary action should be expunged because no basis for any discipline exists whatsoever.
2. The Grievant is entitled to full back pay with the requested interest because: a) of the fraudulent and pretextual nature of the disciplinary action, b) the Grievant's loss of the enjoyment of his income, c) the Grievant's loss of interest accrued on potential savings, d) the financial hardship suffered by the Grievant as a result of his loss of income. This remedy is not intended to be punitive. Normally, the Union would allow for mitigation and not request interest. However, in this case the Union strongly believes that the employer's actions in disciplining the Grievant were not in good faith. Thus, the Grievant is entitled to the fullest make-whole remedy.
3. The arbitrator is requested to order that the Grievant be assigned to the duties as identified in his 1985 position description because: a) the employer prior to the Grievant's termination did not assign the Grievant any duties, b) the Grievant's profession was that of a hearing examiner, and not of some other legal specialty, c) it is necessary to fully vindicate the Grievant. The Grievant is a professional. When the employer first took away his hearing examiner duties, that was itself a form of punishment. It not only sent a message to the Grievant that he was not wanted, it sent a message to other employees as to what were the consequences of being a whistleblower. It is important that to be vindicated in the eyes of his fellow employees that the Grievant be assigned to his normal duties. Those duties are contained in the 1985 position description. The 1988 position description is not appropriate because it was drafted after the Grievant's hearing examiner duties were removed.

The arbitrator is not exceeding his authority to make such an order. It is certainly within his remedial powers as an arbitrator. There is also legal precedent (concerning this very same employer) which indicates that it is not legally improper to order an employee to be returned to his or her former duties. In the recent case of State ex rel Olander v. Ohio EPA, 45 O.St. 3d 196 (the Ohio EPA refused to comply to a Court's direction reinstating an employee to his former position (with former duties). The Ohio Supreme Court found that such an order was proper."

So it is that the Union argues that the grievance be sustained.

The Board's Position:

The Board takes the position that the Grievant "is guilty of insubordination, misuse of State

property, misuse of his position for personal gain, and hindering the performance of the work of other employees." In support of its position the Board points to the Polly Miller and Robert Hickey letters, and asserts that they "demonstrate that the Grievant was willing to abuse his hearing examiner status, and the impartiality of his position, in order to continue pursuing his insubordinate course of conduct." The Board also refers to the aforesaid letters as creating a "conflict of interest." It is the Board's contention that "the Grievant's actions constituted a total breach in his relationship with the Employer and gave the HWFB no option but to terminate the employment relationship."

With respect to the charge of insubordination, the Board disavows "discipline for disobeying any one order," and relies instead on "his entire demeanor during the months that followed [his suspension]," which it characterizes as "flagrant disrespect for his supervision and management in general." Additionally the Board asserts that "the content of the Polly Miller letter was seen as another example of the Grievant's insubordinate attitude. In that letter he accused the Chairman of the HWFB of improprieties leading to delays in the EPA's handling of serious environmental problems. It . . . was intended to serve the Grievant's own purposes since Polly Miller stated that the content was minimally discussed with her. Thus, there was little or no foundation for the Grievant's allegations. These allegations are invalid and are nothing more but manifestation of his own inimical feelings toward the Director of the EPA." According to the Board in the Polly Miller letter, the Grievant "essentially declares the Director of the EPA, whom he cites by name, has stalled the effectiveness of the agency. In the public sector, these types of insubordinate allegations are the height of disloyalty . . . erod[ing] public confidence in the Administration and in the effectiveness that Agency . . . . such consequences are easily foreseeable from the Grievant's statements." Forest City Publishing Co., 58 LA 773 (McCoy, 1972); Factory Services Inc., 70 LA 1088 (Fitch, 1978). It is the Board's contention that the content of the Polly Miller letter casts "grave doubts on the ability of the Grievant to impartially preside over important hazardous waste hearings, since the EPA would always be a party before the HWFB. "Concerning its perception that the Union contends that the Board has condoned public attacks on it by not seeking to discipline the Grievant for numerous newspaper articles questioning the Board's conduct of its affairs, the Board asserts that said contention "is somewhat contradictory of [the Union's] professed concern for the Grievant's First Amendment rights. The Employer was merely balancing the rights of the Grievant to criticize his government with the needs of the agency to maintain credibility. The Grievant stepped over the line when he directly wrote a letter containing slanderous allegations which was to be printed [the Polly Miller letter], and when he sent the letters to the Controlling Board." Moreover, asserts the Board, the Grievant's attorney, and not the Grievant himself, was quoted in the newspaper articles, whereas "the Grievant outlined the letters for which he was disciplined. Management [disciplined the Grievant] only when it was obvious that the Grievant himself was responsible for writing letters damaging to the mission of the agency."

With respect to the charge of misuse of State equipment, the Board asserts that there is no challenge to the fact that the Grievant wrote the letters in question on State equipment, and thus the real issue was the purpose for which he misused the equipment. The misuse itself was only a small factor in the discipline. It was an aggravation of much more serious offenses which, in and of themselves, constitute just cause for removal." In any event, contrary to the Union's assertion, no disparate treatment in the form of more lenient discipline vis a vis this matter of misuse of State equipment is made out, asserts the Board, because no similar case ever existed. "In the instant case the misuse of State equipment was by an attorney hearing examiner whose sole purpose was to attack and discredit the Employer and for his own personal gain. This is a situation unequal unto itself." Further, the Board maintains that Shapiro did not transgress the purported rule proscribing the personal use of State equipment such as the computer, for Shapiro indicated "that

he only used State equipment on activities which also benefitted the Employer."

With respect to the charge that the Grievant "misused his position for personal gain," the Board contends that this alleged offense constituted "management's gravest concern." The Board contends that the Grievant "committed this offense on two occasions. . . the first was his attempt to have a former litigant before the HWFB write a letter on his behalf to the Columbus Dispatch. The second was his letter to the Controlling Board attempting to block the approval of the release of funds, which included a Controlling Board member who had a vital concern in a case on which the Grievant had presided." According to the Board, it was "likely" that Miller and Hickey would be involved in matters before the HWFB again, and "this should have been obvious to a professional attorney and hearing examiner for the Board." It is the Board's contention that "because the action of the HWFB invokes intense public sentiment and scrutiny, it is necessary that hearing examiners avoid even the appearance of a conflict of interest. [The Grievant] indicated that he understood the importance of avoiding such appearances. However, by participating in the [Polly Miller] letter to the Dispatch he sowed the seed for an eventual conflict. Moreover, and of critical importance, he placed Ms. Miller and himself in a compromised position. Whether or not she initiated the contact is irrelevant. Had she refused to assist [the Grievant] she might have faced difficulty when she again appeared before him. In addition, the fact remains that had the letter been successful in restoring [the Grievant's] adjudicatory duties, he would have been indebted to her. . . . Management could not allow the potential for an appearance of impropriety on behalf of the Board or its examiners to continue, especially after management had been informed of the letter to the Controlling Board." With respect to the latter, the Board asserts that the Grievant "asked the Controlling Board to help him obtain adjudicatory responsibilities by blocking the approval of funds for an additional hearing examiner. [The Grievant] reminded Representative Hickey that he had been the hearing examiner for the Ecolotec case. [That] case is of great importance to the Representative because of the hazardous waste facility involved is in his district. The appearance of impropriety is therefore unmistakable. [The Grievant] essentially is seeking to strike a deal with the representative. Furthermore, [the Grievant] requested that his communication . . . be kept a secret. Mr. Hickey's lone vote against the approval of the funds was indicative of the Grievant's leverage. . . .The Grievant had a responsibility to avoid even the appearance of such a conflict. Instead, at a minimum, he fostered this appearance by secretly misusing his position to leverage the support of the Controlling Board. In consideration of the great responsibility the Grievant had as a hearing examiner and of the very serious nature of the issues before him, Management made the only prudent decision available. Inaction by Management after learning of the Grievant's impropriety would have been negligent."

With respect to the charge of interfering with the work of other employees, the Board points to the Grievant's letter to the State Controlling Board. The Board asserts that "Management . . . had lost confidence in the Grievant's ability to preside over and conduct a fair and impartial hearing and to render an unbiased recommendation," with the consequence that hiring an outside Hearing Examiner (Ralph Nusken) to handle the complex and controversial Envirosafe case became necessary. Since a search for an examiner and authority to hire him had to be secured from the State Controlling Board, "time and expense" were taken up to accomplish these tasks. It is the Board's contention that "this effort and expense would have been wasted had a majority of the Board members been swayed by the Grievant's correspondence."

Referring to its perception of the Union's contention that Management violated the Grievant's due process rights by refusing to divulge the name of an individual who had purportedly reported that the Grievant made public statements (memorialized in the May 19, 1988 memo, Union Ex. #20) in which he indicated an intent to undermine the mission of the Agency, the Board contends that "Sahli addressed the concerns of the Agency Head and the factors which led to the decision to

terminate the Grievant. He did not mention the incident recorded in the May 18, (sic) memo because it was not a factor. The Union's contention that the discipline should be modified because of an alleged procedural flaw in not sharing the author of that memo is ludicrous. Proof of the veracity of the memo is in no way essential to support the Grievant's removal. Management invites the Arbitrator to do as Management did. Throw it out and give it no weight. "In the alternative," argues the Board, if the Arbitrator finds a procedural flaw exists, "it is not fatal to the Employer's case because the charges were based on the content of the letters written by the Grievant." Additionally, the Board asserts that while Kirk stated that the statements [attributed to the Grievant] influenced him indirectly, that is, in Mr. Kirk's mind they reaffirmed the Grievant's motivation in initiating the conduct that resulted in the charges," Kirk stated "that none of the charges listed in the notice of termination were supported by the May 18 (sic) memo." Moreover, asserts the Board "Kirk is not the Agency Head and does not have the responsibility for making final decisions to impose discipline."

It is the Board's further position that "the Grievant's actions were self-help measures damaging to the grievance procedure." Thus the Board perceives that the Union argues "that the Grievant's actions were justified because he was deprived of his adjudicatory duties." The Board responds in two ways. It asserts that it was justified in interrupting the Grievant's adjudicatory responsibilities, because it "possessed legitimate concerns over the ability of the Grievant to maintain the appearance of impartiality while conducting hearings in which the Attorney General participated." Refusing nonadjudicatory duties assigned the Grievant, asserts the Board, "should have been immediately disciplined . . . instead, management treated him leniently and gave him the opportunity to demonstrate a change of attitude. . . . In response the Grievant embarked on a strategy of attacking the Agency and Management through clearly slanderous letters based upon unfounded allegations. Secondly, the Grievant's efforts at self-help were totally inappropriate and unacceptable. The Grievant was required to seek relief through the grievance procedure if he believed management was acting outside of its inherent rights in violation of the . . . Agreement. However, management did not violate the . . . Agreement. Management has the right to assign, or in this case not to assign, duties as it sees fit. The proper course of conduct for the Grievant would have been to perform the research duties he was assigned and to then grieve his reduction of adjudicatory responsibilities. . . . "It is inherent in employment relationships that employees obey directives and not attack the Employer through self-help, but resolve disputes peacefully through the grievance procedure. . . . The Grievant's belief that he was wrongly deprived of adjudicatory duties does not mitigate his actions against the Employer. On the contrary, the Grievant's resort to self-help compounds the wrongfulness of his acts."

It is the position of the Board that "management did not violate the Grievant's constitutional rights." At the outset the Board contends that "the First and Fourth Amendment protections were not specifically incorporated into the . . . Agreement and thus an allegation of violation of such rights is not within the jurisdiction of this proceeding."

Alternatively and additionally, "Management contends that in this case, the Union must show that the . . . Agreement authorizes employees to exercise such rights while on management's time." Social Security Administration, 81 LA 312 (King, 1983). In addition, the Supreme Court has held that public sector employees do not have an unlimited protection of speech. In Rankin v. McPherson, 97 L. Ed. 2d. 315 (1987) the Court stated that a balance exists between the employee's interest in making the statements and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In this regard the Board contends that "the Grievant's statements went to the very heart of his employment as a hearing examiner [and] impeded his ability to perform his duties as hearing examiner and explicitly interfered with the work of the HWFB. The disloyalty he displayed and more importantly his

unwillingness to maintain the appearance of impartiality both weight heavily against the Grievant's interest in making the statements, especially since his statements were acts of self-help and the grievance procedure was available for him to seek redress."

With respect to the Union's Fourth Amendment contentions and reliance on O'Connor v. Ortega, the Board asserts the instant case is readily distinguishable because "the Grievant could not possibly have retained a similar expectation of privacy. His door did not have a lock and his supervisor possessed a key to the cabinet where [the allegedly unconstitutionally seized] documents were stored. . . . The Grievant had a supervisor who had the right to review the Grievant's work and the work files he possessed. The Grievant's supervisor had legitimate, work related interests in the files maintained in the Grievant's office. . . . The Court ruled in Ortega that public employers should be given wide latitude to enter employees, offices where there is a legitimate operational reason." Additionally, the Board points out that following the search of the Grievant's office and the discovery of the Grievant's letter to the State Controlling Board, the Governor's office forwarded a copy of it to the Board. Hence, argues the Board, "Management would have obtained the letter even if Shapiro had not found it in the Grievant's office. Thus, the Union's allegation that a violation of the Grievant's Fourth Amendment right occurred is baseless and moot."

With respect to the Board's perception of the Union contention to the effect that the termination of the Grievant was improper because the Chairman of the HWFB does not have the authority to discipline employees, the Board asserts that Section 24.05 of the Agreement does not require that the appointing authority directly impose all discipline. Furthermore, asserts the Board, the Union itself provided evidence that it did not consider the entire membership of the HWFB to be the Agency Head. Section 24.05 of the Agreement states that, “The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head. In Joint Exhibit 19 the Arbitrator will find a copy of [Union advocate] Smith's written presentation included in the disciplinary trail. That presentation is addressed, not to the entire Board, but to James Adair who at the time was the Executive Director of the Board's staff. The first paragraph of Mr. Smith's presentation begins, “Pursuant to Section 24.05 of the Collective Bargaining Agreement . . . I am submitting for your consideration the following Union statement . . .” Thus, the Union's argument is in direct conflict with its past actions. Moreover, asserts the Board "the Arbitrator should not even concern himself with this matter since the stipulated issue does not require the Arbitrator to decide whether or not a violation of Section 24.05 occurred and this technical matter is not an element of just cause."

So it is that, on the basis of all the foregoing, the Board urges that the grievance be denied.

The Issue:

As stipulated by the parties, the issue is: "Was the Grievant's employment terminated with just cause? If not, what should the remedy be?"

Discussion and Opinion:

First addressed is the matter of whether HWFB Chairman Shank, who discharged the Grievant, had the "authority” to discharge the Grievant or whether only the entire Board (or presumably a majority thereof) could do so. On this point I find that in effect the entire Board has adopted Shank's discharge action. Thus, if one thing is certain, it is that the Grievant's status was a matter of the highest profile from and after May 1988. His status was being aired in the newspapers and the Board subscribed to a news clipping service. It is certain that if in no other way, through this avenue all members of the Board were kept abreast of his status. His actual firing by Shank was likewise reported in the papers. Yet no member stepped forward to disagree

with Shank's discharge action. They must therefore be deemed to have sanctioned it.

Next addressed are some of the serious inconsistencies and shifting grounds concerning just what were the reasons for Shank's discharge of the Grievant. Thus the participants in the discharge decision along with Chairman Shank, Sahli and Shapiro, are at odds over whether or not the Grievant's dalliances with the press were a factor leading to the Grievant's discharge or not. According to Sahli, such was not a factor, but according to Shapiro such was a factor. Then there is the unequivocal language in the Grievant's discharge letter signed by Shank, who was being advised in the matter by Sahli, to the effect that all of the reasons therein alleged, including perforce the allegation of misuse of state property, either taken together or standing alone, merited "discipline," whereas Sahli indicated in his testimony that the misuse of State property was "inconsequential," "minuscule," and, indeed stated: "I don't think it was even a factor." Still further on this point, and mindful that the Grievant's discharge letter used the term "discipline" and not "discharge," in context, since the discipline in question was, in fact, discharge, I believe the letter must be read as stating that each of the grounds therein stated standing alone warranted discharge. But, as the Union points out, others used State equipment for personal business with impunity or with but an oral reprimand. Clearly then, were the Board to adhere to its position that the Grievant's (mis)use of State property (the computer) for personal business was, standing alone, worthy of discharge, it would be treating the Grievant disparately, in violation of the parties' contractual just cause standard.[1] I find Sahli to generally be a credible witness. On this point, therefore, I take Sahli's testimony at face value and find that, notwithstanding the Board's assertion in its letter discharging the Grievant, the Board did not rely on the Grievant's misuse of State property as a ground for the Grievant's discharge. At best it was a "minuscule" aggravating factor vis-a-vis other grounds that were relied upon. In addition, there are the facts that bases argued in the post-hearing brief as grounds for the Grievant's discharge were simply not related in Sahli's testimony when he was setting forth the rationale for the Grievant's discharge. Thus Sahli did not indicate that "disloyalty" (strongly argued in the Board's brief) was a factor leading to the discharge decision. To the contrary, the entire thrust and import of Sahli's testimony was that the Board's overwhelming focus and concern was the alleged appearance of a conflict of interest purportedly created by the Grievant seeking help in the reinstatement of his adjudicatory duties from a former litigant and an interested legislator in cases likely to come before him again, were he successful in his restoration effort. Moreover, whereas Polly Miller's letter's reference to Director/Chairman Shank could arguably be regarded as "disloyal," and such was so argued by the Board in its post-hearing brief, Sahli indicated that the Grievant's references to Shank in said letter were not a factor leading to the Grievant's discharge. I credit Sahli. Accordingly, in any event the Board cannot now point to the content of the Polly Miller letter as evidencing disloyalty, when it clearly failed to do so at the time of the Grievant's discharge. Fundamental notions of fairness imbedded in the just cause concept proscribe it from doing so at this juncture.

Yet another inconsistency in the Board's position is the indication in Sahli's testimony that on the one hand the Grievant's failure to rehabilitate himself, and his purported insubordination in refusing work assignments following his December 1987 disciplinary suspension influenced the Board adversely toward the Grievant in the course of its removal decision, while on the other hand testifying that no discipline was meted out for these infractions and indeed indicating that no consideration was given to removal until the occurrence of the Polly Miller and State Controlling Board letter.

Suffice it to say that these inconsistencies and contradictions do nothing to inspire confidence in a conclusion that the Board had a clear vision of just precisely what was the wrongdoing on the Grievant's part. Such confidence is still further eroded by procedural due process (Section 24.04)

failures here, to wit, the failure to apprise the Grievant at his pre-disciplinary hearing that the Board was relying on the grounds that he'd purportedly insubordinately refused work assignments with respect to pending legislative bills, and the failure to apprise the Grievant at his pre-disciplinary hearing that the Board was relying on his failure to rehabilitate himself in accordance with the rehabilitation plan planned for him. Still further on this point, no merit can be found on these bases in any event. Thus, as the Union points out, in December 1987/January 1988 when this alleged insubordination took place, the Board failed to take any action. Fundamental notions of "just cause" simply prohibit the Employer coming back months and months later, and resurrecting and relying on such stale instances to support any discipline, much less severe discipline. With respect to the Grievant's failure of his rehabilitation plan, the record is clear that the rehabilitation plan planned for him, itself somewhat obscure,[2] was in any event concededly never communicated to the Grievant. This Catch-22 circumstance into which the Board would cast the Grievant simply can't be sanctioned under the applicable just cause standard. The just cause standard does not countenance having conduct expectations for an employee; not communicating those expectations to the employee; and then subsequently faulting the employee for failing to achieve said expectations, which is what transpired here.

As Sahli credibly testified, the Grievant's letters to the State Controlling Board weighed heavily in management's decision to terminate the Grievant. These letters were included in the packet of letters secured by Shapiro from the cabinet in the Grievant's office. Pursuant to the U.S. Supreme Court's O'Connor v. Ortega case, cited above, the Union seeks to suppress these, and all letters included in the packet, on the grounds that they came into the possession of the Board as a consequence of a constitutionally prohibited, and hence illegal, search and seizure, with the consequence that this evidence, the entire packet of letters, must be suppressed and not considered. In this regard, both parties recognize that the O'Connor v. Ortega case sets forth the governing principles. There the Court held that Fourth Amendment restraints govern employer searches of government employees' private property and that a case by case analysis is required to determine whether an employee has a reasonable expectation of privacy in his office. The reasonableness of the search is dependent on the context of the search and requires a balancing of the nature and quality of the intrusion on Fourth Amendment interests with the importance of the government interests justifying the intrusion. As has been seen, the parties differ in their contentions with respect to: whether the Grievant had a reasonable expectation of privacy; what was Shapiro's time motivations in undertaking the search; and to whom the balance should tip. However, the Union's position overlooks the doctrine of inevitable discovery, in essence invoked by the Board, which in effect suspends the Fourth Amendment's protection and analysis if the sought-to-be-suppressed evidence would have inevitably been discovered anyway. Here, such is the case. Indeed, it appears from Sahli's testimony, as corroborated from the dates of the letters in question and the date, considerably subsequent, of the search, that the Board was apprised by the Governor's office, and furnished copies of the State Controlling Board letters, prior to Shapiro's search. In these circumstances the parties' conflicting contentions with respect to the Fourth Amendment need not be, and are not, addressed. The State Controlling Board letters are not suppressed. But can the Board discipline the Grievant for their content? That is, can the Board properly perceive them as "disloyal" and hence worthy of discipline, up to and including discharge? As has been seen, the Union contends that the Grievant's First Amendment rights preclude any such perception, or at least preclude taking any adverse action or discipline as a consequence of such perception. In this regard, the parties cite appropriate legal precedent. The Union's citation, the Givhan case, is somewhat more analogous in that it involves criticism, as here, of Employer policies and actions. Since Sahli credibly testified in effect that only the State

Controlling Board letters were looked upon as manifesting disloyal and/or insubordinate conduct,[3] the Givhan principles need be applied to them only, and need not be applied to the Polly Miller letter, the content of which was not considered in the removal deliberations, as heretofore noted. Again, a balancing test is applicable. One side of the balance is the interest of the employee as a citizen in commenting on matters of public concern. The other side of the balance is the interest of the State, as an Employer, in promoting the efficiency of the public services it performs through its employees. As has been seen, the parties differ in their perceptions concerning how the balance should tip. In my judgment it must tip in favor of the Grievant-employee's First Amendment rights. Thus, as the Union points out the issues involved were matters of public interest, namely the public purse. In sum, the Grievant was urging the use of his services at $30,000+/annum, as opposed to an outlay of up to $70,000.00. The Grievant was not seeking to undermine the Board's work but get it done cheaper and by "more experienced" personnel, to wit, himself (the latter point being acknowledged by management's witnesses at the hearing). Predictably the Controlling Board would seek the Board's response, and they did. Moreover, by 6 to 1 they evidently were persuaded by it. The Grievant could hardly be accused of concealing the Board's response from the Controlling Board since he himself had never been confronted by the Board with the rationale behind his extended withdrawal from adjudicating duties nor had he been confronted with his alleged failure to rehabilitate himself or indeed of the rehabilitation plan/expectations the Board was holding him to. Frankly, a refrain of the "management-at-fault also" theme must be heard. Nor is it inevitable that Representative Hickey viewed the appeal to him, among others on the Controlling Board, as an effort to cut a deal on the Ecolotec case. To the contrary there is simply no good reason to doubt the Grievant's representation that he simply was focusing attention and reminding the members of the Board who knew him, how they knew him. Significantly, no discipline was imposed for the newspaper articles because, as Sahli testified, First Amendment considerations were believed to prohibit such, and these letters to the Board were merely a rehash of these news articles. For all the record shows, Representative Hickey may have simply been persuaded that a better job could have been performed for less money by the Grievant. Perhaps he saw the Grievant as a known quantity, and Nusken as an unknown quantity. The point is, a corrupt situation was hardly the inevitable conclusion to be drawn. I decline to draw it.

As the Board argues, its interest was in preserving the effort to get Nusken on board due to its lack of confidence in an unrehabilitated Grievant. In this regard I doubt seriously if the difference in costs, some $35,000.00, represented the "time and effort" investment in preparing to hire Nusken. With respect to the unrehabilitated Grievant, I've already found fundamental unfairness in the characterization of the Grievant as unrehabilitated and/or unfit. But it seems to me that it must be observed that the impetus for initially removing the Grievant from adjusticatory duties was clearly to afford a cooling off period vis-a-vis the bruised feelings at the Attorney General's office. However, if one considers that there was plenty of blame to go around, as found in the disciplinary layoff case, and especially in light of Muchnicki's far from blameless conduct in seeking an improper intervention, by the Chairman, in addition to his caustic tone and manner with the Grievant, then it must be concluded that by the time the Board sought Nusken's services the "decent interval" in the Grievant's adjudicatory duties arguably called for had long since come and gone. In my judgment management has not mustered the requisite quantum of considerations and evidence to warrant the conclusion that its interests are "significantly greater" than the Grievant's First Amendment rights. Hence it is found that the content of the Controlling Board letters was protected and therefore could not be characterized as improper "self-help" and therefore the subject of discipline. Indeed virtually all these First Amendment cases could be characterized as "self-help"

in the sense that employees seldom criticize the employer's actions unless they see said actions as hindering their self-interest, which happens to coincide, as here, with a public interest. The Board cannot accomplish indirectly that which it cannot accomplish directly, namely, discipline for the content of the protected speech.

Furthermore, in my judgment the Social Security case cited by the Board does not serve to undermine the First Amendment conclusions reached here, for the reason that it simply wasn't shown that the Controlling Board letters were composed on working time. For all the record shows they were composed on the Grievant's break or lunch time. Finally on the point, given the Grievant's truncated work duties, it would appear that the Board would be hard pressed to establish the underlying rationale that "work time is for work" and not for the composition of personal letters.

Then too, I find without merit the Union's pretextual contentions. To be sure the Board's inconsistent stances and shifting grounds for the Grievant's discharge are the very stuff of which "pretext" cases are made, but I find too strained the theory that such was a pretext for a "two step" removal process, thought out and adopted at the time of his December 1987 disciplinary layoff.

What remains then is the alleged act of soliciting help from a former litigant and a Representative interested in litigation which was taken away from the Grievant, in matters which may again come before the Grievant, thereby creating the appearance of a conflict of interest because the solicited parties may feel they'll be retaliated against if they fail to cooperate, and the Grievant fails to recuse himself. In this regard, it is noted that the Grievant conceded that he was obliged to avoid even the appearance of an impropriety. As previously found in the disciplinary layoff case, appearances are critical. It is also noted that the Board's work is high profiled and controversial. It is also extremely important work. These factors could well lead to the "appearance" the Board perceives, albeit I don't believe the record supports that such was perceived by the Grievant as he went ahead and sought such help.

Moreover, given the Grievant's recent discipline, he ought to have been particularly sensitized to all his work place obligations including the acknowledged obligation to avoid even the appearance of impropriety, such as a potential conflict of interest. Hence some discipline was called for. However, by no stretch of the imagination can it be said, as Sahli in essence testified, and as the Board argues in its post-hearing brief, that no alternative but discharge was called for, or that his conduct "went to the very heart of his employment . . . and impeded his ability to perform his duties as hearing examiner," or that the "Grievant's actions constituted a total breach in his relationship with his Employer, "warranting discharge." Notwithstanding the Board's impassioned rhetoric, there simply was, for all the many reasons noted above, no just cause for discharge.

In my view in light of the Grievant's prior (albeit uncharacteristic) misconduct, and the peculiar needs of the Board for the highest standards of probity and propriety, the Grievant's lapse of cautious judgment (as in the instance of his prior discipline) in creating a situation which could be perceived as a conflict of interest giving rise to the appearance of an impropriety, is worthy of a sixty (60) day disciplinary suspension without pay. No bad faith on the Board's part is found. Accordingly, the normal remedy in such circumstances, reinstatement to his former position with full back pay and benefits (less of course pay for the period of his 60-day suspension) and without loss of seniority, will be awarded. That "former position" as the record reflects includes considerable adjudicatory duties. Since this decision finds no disabilities in the Grievant vis-a-vis the performance of his adjudicatory duties, the restoration of such are contemplated in this remedy. The record also reflects changes in the job description concerning the amount of time contemplated to be spent in adjudicatory duties. The impact of those changes, if any, on the potential of a reinstatement remedy was simply not litigated before me. Hence I find myself without jurisdiction to rule on that issue as the Union in essence requests that I do. And in the absence of

bad faith, no interest is awarded.

Award

For the reasons more fully set forth above, the grievance is denied in part and sustained in part. The Grievant was not discharged for just cause. Discipline of a sixty (60) calendar day suspension without pay is, however, warranted for a lack of cautious judgment in creating the appearance of a conflict of interest. The Grievant's records shall reflect this modification in his discipline and he shall be reinstated to his former position with full back pay and benefits (less of course pay for the period of his 60 calendar day suspension to be regarded as having commenced on the effective date of his discharge), and without loss of seniority.

Dated: December 20, 1989

Frank A. Keenan
Arbitrator

State of Ohio Environmental Protection Agency
P.O. Box 1049,1800 WaterMark Dr.
Columbus, Ohio 43266-0149

June 30, 1988

Mr. Michael Lepp
1798 Sawgrass Drive
Reynoldsburg, Ohio 43068

Dear Mr. Lepp:

Please be advised that upon receipt of this letter you are being placed on administrative leave with pay and are to immediately vacate any and all Ohio EPA facilities, including the HWFB.

The purpose of this letter is to inform you that you are scheduled for a pre-discipline conference on July 11, 1988 at 9:00 a.m. in the Office of Human Resources of the Ohio EPA to determine whether or not just cause exists for a recommendation to be made to the Director to discipline you. I have been authorized by Director Shank to hold such a conference. William R. Kirk shall serve as the Management Representative.

In order to make sure that you are aware of the circumstances which give rise to this possible recommendation for discipline, be aware that documentation has been provided to this office by the management staff of the HWFB. It appears from this documentation that:

1. You have allegedly misused state equipment in what appears to be a continuance of your insubordinate act by typing letters which are damaging and interfere with the mission of the Ohio EPA and the HWFB.

2. In addition, it is alleged you have publicly made statements which reflect that your intent is not to promote the general welfare of the citizens of Ohio, but to destroy and/or extremely limit the abilities of the OEPA to maintain or improve the quality of life for the citizens of Ohio.

3. In addition, it is alleged you have left the work area without properly, or what appears to be correctly notifying your supervisor.
4. In addition, it is alleged that you did produce on state time and on state equipment, documents that, regardless of the fact of whether or not they were published, clearly show that you have abused and/or misused your position for personal gain (i.e. the letter for signature of a Ms. Polly Miller). This letter, and others, show an intent to interfere with or adversely affect the ability of the Ohio EPA and HWFB to fulfill their mission.

The Conference will not be conducted as a formal hearing. It is intended to provide the agency an opportunity to communicate to you the evidence on which the proposed disciplinary action is based and to provide you an opportunity to respond to that evidence. You, or your OCSEA representative, will be entitled to present evidence on your behalf and to refute or respond to the agency's evidence in support of the discipline, including presenting documents and witnesses.

In preparation for the conference, you may inspect and copy the file materials which give rise to this action. The Labor Relations Officer will make this information available to you on your request.

At the conclusion of the conference, I will determine whether or not just cause exists. The Director will determine the appropriate disciplinary action which may include time off without pay or removal.

This letter is your formal notice of the conference. You will be notified of any change in the schedule. Please be advised that your failure to attend the conference as scheduled will result in a waiver of your right to a pre-discipline conference.

Sincerely,

Janietta R. Smith,
Deputy Director,
Office of Human Resources

JRS/kkb-j
cc: Bill Kirk, Labor Relations Officer
Richard L. Shank, Director
Jim Adair, Executive Director, HWFB

July 12, 1988

Director James Adair
Ohio Environmental Protection Agency
Hazardous Waste Facility Board
1800 Watermark Drive
Columbus, Ohio 43215

Dear Director Adair:

Pursuant to Section 24.05 of the Collective Bargaining Agreement between OCSEA, Local 11, AFSCME, AFL-CIO and the State of Ohio, I am submitting for your consideration the following Union statement based on the predisciplinary hearing held for Michael Lepp on July 11, 1988.

First, let me bring to your attention two matters of concern to the Union as to how management conducted the predisciplinary hearing.

The OCSEA Staff Representative assigned to OEPA in Columbus is Ron Stevenson. On Wednesday night (July 6, 1988), Ron suffered a serious heart attack. In spite of this knowledge, OEPA Labor Relations Director Janietta Smith refused, on Friday, July 8, 1988, to grant a continuance of the predisciplinary hearing.

I questioned Ms. Smith about this denial at the predisciplinary hearing. She said that she could not continue the hearing because she did not have the authority to do so. She informed me that only the Director (I assume you) had the authority to grant a continuance. I asked her to whom should the Union have requested the continuance, her or the Director. Ms. Smith said she didn't know.

Throughout this exchange, Ms. Smith's tone was curt and hostile. Further, her rationale was illogical and unbelievable. It sent the message to myself and the others present that the Department was not interested in conducting a meaningful hearing.

Needless to say, the Union's ability to represent Mr. Lepp was severely curtailed. My ability to prepare was minimal given the unanticipated time constraints. I informed Ms. Smith of this fact at the outset of the hearing.

Also, at a point during the course of the hearing, management Advocate Bill Kirk ordered Chief Steward Lisa Talsgrove to leave the hearing. The reason for this was Lisa commenting that a statement by Mr. Kirk was “ridiculous".

Mr. Kirk's action in my eyes constituted grounds for an unfair labor practice charge. Meetings between management and the Union are supposed to be free and open. Management should value the input the Union can provide to the decision-making process. At a minimum, Management can neither tell the Union who its representative shall be or what that Representative says. Ms. Smith characterized Ms. Talsgrove’s remark as "unprofessional". Even if I agreed with that characterization (and I do not), an "unprofessional" comment is not grounds for ordering a Union representative out of the hearing.

Now, I would like to explain to you why no just cause exists to discipline Mr. Lepp. I will address each charge in the order set forth in the predisciplinary notice letter dated June 30, 1988.

1. The Union will demonstrate that the use of the State equipment was not improper in light of

past practice afforded both to Mr. Lepp and other employees. Further, the Union will show that the substance of the materials written do not constitute insubordination. Mr. Lepp is neither a management nor a confidential employee. He has constitutional rights to free speech. Mr. Kirk, upon request, provided no evidence that the letters in question in any way damaged or interfered with OEPA's mission. His position, that the letters are of themselves were damaging and interfering, is simply not logical.

2. The allegations set forth in the second charge are supported by an unsigned, unanimous, abbreviated letter. The Union demanded to know the author of the letter. Mr. Kirk admitted that he knew the name of the author but refused to provide it. The Union considers this a violation of Section 24.04 of the collective bargaining agreement which substantially affects the Union's ability to respond to the allegations. Based on the evidence provided, the Union would argue that comments made off-work and in a social setting are not grounds for discipline. Management's attempts to control speech or punish "unacceptable" speech is itself reprehensible.

3. At the hearing, Mr. Kirk withdrew this charge.

4. The Union's response to the fourth charge is similar to that of the first. In addition, Mr. Kirk provided no evidence to support the allegation that Mr. Lepp sought or received personal gain. Lastly, the Union raised a concern as to how management came into possession of the alleged documents. The Union will continue to

investigate and examine whether the process used constituted an illegal search and seizure.

Generally, the Union raised as a defense the fact that Mr. Kirk's evidence was directed only at the quality Mr. Lepp's speech. He provided no evidence to demonstrate how Mr. Lepp's work or work produce was diminished by the exercise of his first amendment rights, or for that matter, how the “mission" of the OEPA was affected by any thought or action of Mr. Lepp.

Because Mr. Kirk's evidence was deficient in these several respects, please consider this letter an ongoing request for the names of witnesses or evidence which the Employer intends to use to support disciplinary action against Mr. Lepp. Thank you for your consideration in this matter.

Sincerely yours,

Daniel S. Smith
General Counsel
OCSEA/AFSCME Local 11

DSS:sls

cc: David Johnson, Regional Director
J. Bulzan, Chapter President (#2528)

Lisa Talsgrove, Chief Steward
Michael Lepp, Grievant
Janietta Smith, OEPA, Labor Relations Director
William Kirk, Management Advocate

May 19, 1988

To Whom it May Concern:

At a social gathering on December 19, 1987, I heard Mike Lepp make several remarks about a situation he was in with the Ohio EPA. I don't remember his exact words, but the meanings were clear:

Ohio EPA was "messing" with the wrong person.

He wouldn't roll over for them.

He wouldn't go along with what they wanted.

He wouldn't let them (meaning Director Shank, Mike Shapiro & Dennis Muchnicki) get away with what they were doing, or trying to do.

If anything happened to Mike Lepp's job, or if he was forced to leave the Agency, he said he would take all of them with him. "Them" being Shank, Shapiro & Muchnicki.

He also said he wouldn't hesitate to get the press involved & that he had hired an attorney.

He didn't like the above mentioned people & would do anything to see that they were discredited.

I also heard Mike say these things at other times after the December date. Again, I don't remember the exact words he used, or the dates, but the meaning was always the same.

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[1] I find it unnecessary to make any findings concerning the Union's contentions vis-a-vis its finding unfair labor practice charge and the evidence it relies on in support thereof for the reason that it would merely be redundant of other evidence on the "disparate treatment" point the Union makes.

[2] This plan was variously described by Sahli as the performance of non-adjudicatory duties in a fashion indicating he would act professionally in an adjudicatory setting; an expression that he would stay by strict legal requirements as a hearing examiner; or simply acknowledge his mistake concerning the ex parte communication matter.

[3] This brings to mind the Union's contentions with respect to the anonymous source of purported expressions of motivation by the Grievant, which, as rank hearsay, can't be considered here, and Kirk's assertion that nonetheless they "indirectly" were considered by him. Directly to the point, as the Board in essence contends, Kirk did not truly participate in the removal decision deliberations and in any event had no authority to impose discharge, and hence these issues are deemed out of the case.