ARBITRATION DECISION NO.:
669

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO
EMPLOYER:
Ohio Department of Safety

DATE OF ARBITRATION:
March 17, 1997

DATE OF DECSION:
April 23, 1998

GRIEVANT:
Hugh Livesay

OCB GRIEVANCE NO.:
15 13 (97 08 15) 0091 01 07

ARBITRATOR:
Phyllis E. Florman

FOR THE UNION:
Tim Rippeth
John Porter

FOR THE EMPLOYER:
S/Lt. Robert W. Booker
Heather Reese

KEY WORDS:
Disparate Treatment
Just Cause
Removal

ARTICLES:
Article 24 - Discipline
§24.01 – Standard
§24.02 – Progressive Discipline

Article 25 – Grievance Procedure
§225.03 – Arbitration Procedures

FACTS:

The grievant was employed with the Department of Public Safety, Ohio Highway Patrol Division as a Motor Vehicle Inspector ('MVI") at the Jackson CDL/Salvage Facility. Management terminated him on August 13, 1997 for misusing his position for personal gain by accepting gratuity and for failing to perform proper salvage inspections.

An MVI inspects salvaged, self assembled, and out of state vehicles to detect the transfer of stolen or fraudulent vehicles and parts. Customers wishing to obtain an inspection can either call ahead to schedule an appointment or come in and wait.

The secretary of the facility reported behavior of favoritism and kickbacks because of spur of the moment appointments while others have to wait weeks to get an appointment. The secretary testified that the supervisor of the facility told the employees some customers complained of favoritism in scheduling; that he instructed her to make appointments since she was new and did not know customers, that the grievant tossed the book at her, striking her on the leg, and that the grievant gave her a list of customers' scheduling preferences which she put into the book.

Pursuant to allegations of favoritism, kickbacks, free food, and failure to properly inspect the vehicles, an investigation was conducted. This investigation utilized the use of a video surveillance camera. The camera recorded the grievant failing to properly inspect 68 vehicles and on numerous occasions accepting pizza, donuts and other food. This investigation also lead to charges against other employees, none of which were removed.

The grievant was indicted on 68 criminal counts of dereliction of duty and five counts of receiving improper compensation. The presiding Judge dismissed the charges noting that "the duties imposed on [the grievant] are not so specific so as to create criminal liability for failure to perform in accord with those regulations".

Trooper Evans testified that he transferred from the Jackson Facility because he did not agree with favoritism, with people showing up without an appointment and with vehicles being inspected on rollbacks.

The grievant testified that he has accepted food from customers. However, he emphasized that customers have been bringing in food for more that 14 years and he was not aware of any work rule which prohibited eating food customers had brought in. He also testified that he did not consider a donut to be a gratuity. Furthermore, the grievant testified that he gave the secretary the list so that she could be aware of customers' desires such as customers who live far away and prefer an appointment in the morning so they can return to work.

EMPLOYER'S POSITION:

The Employer insisted that it had just cause to remove the grievant. The Employer asserted that the grievant was an active participant is a well established pattern of granting special favors to salvage dealers in exchange for gratuities of free food. The Employer also argued that the favoritism included preferential scheduling and poor inspection practices , that surveillance established he accepted gratuities and made 68 improper, inadequate inspection in under two minutes each.

The Employer also argued that the claim of disparate treatment cannot prevail.
The Employer contended that the Union is required to show other employees committed the same or very analogous offenses and have received different discipline. Furthermore, the Employer argued that the Union must show factors do not exist which rationally and fairly explain the different treatment, that arbitrators recognize a "range of reasonableness" because management has flexibility in administering discipline, and that the grievant's fact situation was unique.

UNION'S POSITION:

The Union argued that the Employer did not have just cause to remove the grievant, that the grievant was

denied due process, and that management attempted to add the new charge of assault. The Union also argued that the grievant performed inspections properly, and that the video was speculative, inaccurate, incomplete and presented without the testimony of anyone who witnessed the inspections, except Trooper Evans who said he never saw the grievant perform an improper inspection.

Finally, the Union asserts that the investigation "reeks" of disparate treatment, that no one else was fired, and that the grievant had excellent evaluations. Also, the grievant had no prior discipline and 16 years of seniority.

ARBITRATOR'S OPINION:

The Arbitrator found that just cause did not exist to remove the grievant because the grievant was subject to disparate treatment by being the only employee to be removed. The Arbitrator held that it is universally acknowledged that similarly situated employees must be similarly treated. There was no showing that a basis existed for dissimilar treatment; rather the record reflects that the grievant was singled out for discipline which was harsher than that imposed on the other employees under the same or similar circumstances.

The Arbitrator also ruled on other issues raised by the parties. The procedural argument by the Union was deemed waived because it was not raised in any grievance step until the Arbitration. The Arbitrator also found that the grievant did commit the offenses which he was charged.

AWARD:

The grievance is denied in part and sustained in part. The discharge of the grievant is reduced to a suspension for Neglect of Duty. He is to be reinstated to his position of MVI. No back pay was awarded.

TEXT OF THE OPINION: *** * ***

ARBITRATION OPINION AND AWARD

In the Matter of Arbitration between:

OHIO DEPT OF PUBLIC SAFETY

Case No. 15 03 (97 08 15)0091 01 07

and **Hugh S. Livesay**

Discharge

OCSEA/AFSCME/LOCAL 11

APPEARANCES:

For the Employer:

S/Lt. Robert W. Booker, Advocate
Heather Reese, OCB
Capt. Richard G. Corbin, Ohio Highway Patrol
Sgt. Robert VanderWissel
Sgt. Howard Hudson

Lt. Daniel Gibson
Secty. Shawn Kiefer
Trooper Larry Evans
Eric Brown
Trooper Leigh Thompson

For the Union:
TIM Rippeth, Advocate
John Porter, Director of Dispute Resolution
Capt:. S.M. Raubenolt
Hugh Livesay, Grievant

ARBITRATOR: **PHYLLIS E FLORMAN**
Louisville, Kentucky

* * *

By the terms of the Agreement between the State of Ohio ("the Employer") and the Ohio Civil Service Employees Association/Local 11 ("the Union"), disputes between the parties are to be settled in accordance with the grievance and arbitration procedures provided therein. Pursuant to such procedures **Phyllis E Florman** was selected as the arbitrator to hear a dispute concerning the discharge of the grievant for Failure of Good Behavior and Neglect of Duty.

A hearing was held on March 17, 1997 at the offices of the OCSEA in Columbus, Ohio at which the parties were **1**

afforded full and equal opportunity to make statements and arguments, introduce evidence, and examine and cross examine witnesses. The proceedings were not transcribed. Post hearing briefs were submitted April 1, 1998 as agreed.

ISSUE

The parties agreed on the following statement of the issue: Did the Employer have just cause to terminate the Grievant? If not, what shall the remedy be?

CONTRACT PROVISIONS

ARTICLE 24 DISCIPLINE
Section 24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The employer has the burden of proof to establish just cause for any disciplinary action.

Section 24.02 - Progressive Discipline

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

A. one or more oral reprimand[s]……..;
B. one or more written reprimand[s]……..;
C. a fine in a mount not to exceed five [5] days pay for any form of discipline;….;
D. one or more day[s] suspension[s];……..;
E. termination.

. . . An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

ARTICLE 25 GRIEVANCE PROCEDURE
Section 25.03 Arbitration Procedures

. . . The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement . . .

STATEMENT OF FACTS

Employed with the Department of Public Safety Ohio Highway Patrol Division, since August 10, 1981, the grievant was assigned as a Motor Vehicle Inspector ("MVI") at the Jackson CDL/Salvage Facility. He was terminated on August 13, 1997 for misusing his position for personal gain by accepting gratuities and for failing to perform proper salvage inspections. The Rules of Conduct involved provide:

Work Rule C 10 b. NEGLECT OF DUTY:
Failure to perform job duties as specified; failure to appear for work without notification to, or approval of, the employee's supervisor; absenteeism; tardiness; excessive use of sick leave; leave without pay, without an approved leave of absence.

Work Rule C 10 d. FAILURE OF GOOD BEHAVIOR:
Any misconduct which violates recognized standards of conduct, including but not limited to unauthorized release of information, violation of traffic laws in state vehicles, misuse of position personal gain, taking bribes, threats or acts of physical violence, verbal abuse or criminal

Sgt. Robert VanderWissel testified that he is in charge of the Auto Theft Title Fraud Unit; that Ohio has eight permanent sites where salvage, self assembled,and out of-state vehicles are inspected to detect the transfer of stolen or fraudulent vehicles and parts; that salvage title inspections are a two man job performed by a Patrol Officer [State Trooper] and a civilian MVI; and that the MVI does the

actual inspection because Troopers drive marked patrol cars and do not want grease on their uniforms.

Sgt. VanderWissel explained that customers can call ahead to schedule an appointment or come in and wait; that customers must bring with them an HP 105 receipt showing they applied for the inspection and paid the fee; and that HP 105 receipts can be purchased in bulk by salvage yards for the convenience of their customers.

Sgt. VanderWissel stressed that Policy 9 202.01 Inspection Procedure requires documenting at least three of the VIN, serial, engine, transmission, federal identification, or confidential numbers; that these numbers are confidential so the policy is not to allow customers in the garage where they can see where the numbers are located on the vehicle; that a thorough inspection takes about 30 minutes depending on the make of the vehicle and whether it has to be hosted to get to a number; and that it takes more than three minutes to do the paperwork for each inspection.

Sgt. VanderWissel acknowledged that HP 105 in VI.3. permits the person presenting the vehicle to be in the inspection area when authorized by the inspecting officer; that there is no policy regarding how to schedule inspections; that the MVI Job Description reads the MVI "shall conduct inspections . . . and perform all duties . . . as directed by supervisory officers or the trooper assigned to Motor Vehicle Inspections"; and that the Salvage Inspection Trooper Job Description reads "Schedule and conduct inspections. . ."

Sgt. VanderWissel agreed that the Trooper must sign the inspection form; that the Job Description states "Highway Patrol officers are held to a higher standard of conduct . . . than the general public"; that as a result of the Jackson Facility investigation, only the Grievant was discharged, only the secretary is still there, one Trooper chose to retire, a Sergeant was demoted, and other civilians were reassigned.

Sgt. Howard Hudson III testified that on March 18, 1997 Captain Freeman assigned him to open a criminal investigation

concerning allegations of favoritism, kickbacks, free food, other gratuities, and failure to properly inspect at the Jackson Facility; that he conducted 40 interviews with employees and customers; and that a video surveillance camera as installed from March 24, 1997 to April 6, 1997 in the desk area, and from April 6, 1997 to April 9, 1997 in the garage area.

Sgt. Hudson stated that the Department Policy prohibits accepting gratuities because it could compromise employees or the performance of their duties; that in preparing his report, if an employee was at a vehicle for two minutes or more it was treated as an inspection even though it is impossible to perform a proper inspection in two minutes; and that his written statement of his investigation concerning current employees reads:

DX L. D. HOLDCROFT

1. *On April 9, 1997 removed the surveillance video. . . constituting the offense of theft -office, tampering with evidence and obstructing justice.*
2. *On at least six occasions . . . accepted $20.00 cash to purchase lunch from salvage dealer. . .this would constitute the offense of receiving improper compensation.*
3. *On April 2, 1997 received a car jack free of charge…from salvage dealer….*
4. *On November 26, 1996 received a fresh Thanksgiving turkey from salvage customer…*
5. *On December 17, 1996 ate part of a catered Xmas Dinner supplied by salvage customer. . . .*
6. *On at least 50 occasions during 1996 and 1997 has accepted free food such as hot dogs and hamburgers from salvage customer. . . .*
7. *On numerous occasions has received donuts…pizza…and various other food items from [salvage customers]…*

MVI S. L. DUPLER

1. . . . has occasionally eaten donuts that were provided by salvage dealers . . . .

SGT. H.L. THOMPSON

1 . On Friday April 4, 1997 signed vehicle identity inspection report . . . without the vehicle having been properly inspected . . . constituting falsification and dereliction of duty.
2. On December 17, 1996 ate part of a catered . . . provided by [a salvage customer] …
4. On almost a daily basis . . . ate donuts knowing that they were supplied by the customers and did not take any corrective measures until after he was aware of this investigation . . . .
5. . . . A customer . . . was allowed standing appointments three days per week, most of which were just prior to lunch . . . . Almost every time [he] would bring hot dogs, hamburgers, brats and other food items for employees and ate lunch with them. . . . took no steps to correct this.
8. It was a common practice . . . to allow certain customers to remain in the garage area while inspections were being conducted. [He] had been ordered to [stop that] but he failed to do so. . . .

TROOPER D.S. CHEADLE

1*. Between March 24 and April 9, 1997 signed 61 . . . inspection reports without the vehicle having been properly. inspected . . . constitutes . . . falsification and . . . dereliction of duty. 2. On April 9, 1997 assisted in the removal and theft of the surveillance video tape. . . .*
3. On at least 50 occasions during 1996 and 1997 . . . has taken free food . . . from salvage customer . . . and has given [him] special scheduling considerations . . . .
4. On April 9, 1997 accepted a chicken dinner . . . constituting the offense of bribery. 5. On March 20, 1997 accepted two large pizzas from salvage customer . . . and inspected his vehicle without an appointment constituting the offense of bribery.
6. On April 1st and 8th accepted donuts . . . .

7. On November 26, 1996 accepted a turkey. . .
8. On at least six occasions . . . accepted $20.00 cash to buy lunch from salvage dealer. . . . [who] has been allowed special lunch appointments without having to schedule. . . .
9. On December 17, 1996 accepted a catered Xmas dinner. . . . The investigation failed to reveal any favoritism [to the salvage dealer], therefore this would constitute the offense of receiving' improper compensation.
12. Regularly solicited food items from salvage customers . . . .

TROOPER I.E. STEVIS

1 . Between March 24th and April 9, 1997 signed 19 . . inspection reports without the vehicle having been properly inspected. . . .
3. On March 7, 1997 accepted $20.00 cash to buy lunch from salvage customer [who] was allowed special lunch appointments without having to schedule . . . . This constitutes the offense of bribery.
4. On at least 50 occasions . . . accepted free food . . . from salvage customer [who] was given standing appointments . . . and whose vehicles were inspected properly . .
5. On March 20, 1997 and other occasions accepted two large pizzas . . . .
6. On march 20th and April 17, 1997 Accepted donuts…
7. On December 17, 1997 accepted catered Xmas dinner….
8. On November 25, 1997 accepted a fresh Thanksgiving turkey…..

.

TROOPER S.T. CIRCLE

1. Between March 24th and April 9, 1997 signed inspection reports without the vehicle having been properly inspected. . . .
2. On December 17, 1996 ate part of a catered Xmas dinner . . .
3. …has eaten donuts.. pizza…and grilled food supplied by customer…

4. On numerous occasions allowed customers to remain in the garage area despite orders to keep them in the waiting area.

THE GRIEVANT

1. Between March 24th and April 9, 1997 failed to properly inspect 68 vehicles . . . constituting 68 counts of dereliction of duty.
2. On January 22, 1997 . . . threw the schedule book across the desk at Shawn . . . constituting one count of simple assault.
3. Just prior to the retirement of MVI Bill Crabtree solicited cash donations totaling over $200.00 from numerous salvage customers, constituting soliciting improper compensation.
4. On at least 6 occasions . . . accepted 20.00 cash to purchase lunch from salvage dealer [who] was allowed to circumvent established scheduling procedure, this again constitutes bribery.
5. On numerous occasions accepted two large pizzas from salvage customer

[who] was allowed special lunch appointments and always brought two large pizzas. . . . charge of bribery.
6. On over 50 occasions during 1996 and 1997 salvage customer. ..supplied food for cookouts. [He] was allowed by [the Grievant] and other
employees to circumvent the schedule procedures . . . . offense of bribery.
7. On November 26, 1996 accepted a fresh Thanksgiving turkey from salvage customer . . .[who] had been allowed to have vehicles scheduled
on his property. . . .
8. On December 17, 1996 accepted a catered Xmas
dinner from salvage customer [who] was not shown favoritism . . . offense
of receiving improper
compensation.
9. On March 271h, April 1" and April 8" received donuts from customer [who] was allowed standing appointments and many vehicles were not
inspected. . **8**

10. On many occasions has solicited gratuities from salvage customers by telling them to bring donuts, pies or lunch on their next appointment.
11…….

MVI G.L. CALLIHAN
1. Between March 24" and April 9, 1997 failed to properly inspect 31 vehicles . . .
2. On November 26, 1996 accepted a fresh Thanksgiving turkey from salvage customer [who] had been allowed to have vehicles inspected on his property. . . .
3. On December 17, 1996 accepted a catered Xmas Dinner . . .
4. on numerous occasions has received donuts . . . pizza …and various food items from from salvage customer…..

SECRETARY S.R. KIEFER
1. On November 26, 1996 accepted a fresh Thanksgiving turkey. . . . she did not provide any favors . . . .
2. On December 17, 1996 ate part of a catered Xmas dinner. . . no favoritism . . .
3. On numerous occasions has eaten donuts …pizza…and other food items customers . . . no special favors . . .

DX D, GOMPF
1……[no] wrong doing….

MRW D. KISOR
1…….did on at least one occasion eat pizza that had been provided by a salvage customer…….

MEW R. PARKER
1…….did on at least one occasion eat pizza that had been provided by a salvage customer…….

Sgt. Hudson acknowledged that the video tape has no audio; that there is no record of what

conversations **9**

occurred; that none of the vehicles allegedly improperly inspected were re inspected for purposes of his investigation; that the trooper not the MVI is responsible for signing the inspection form; that it is not illegal to sell inspection receipts; that Sgt. Thompson was the supervisor, failed to follow orders, failed to properly inspect, and was only demoted; and that as a result of his criminal investigation a Grand Jury issued indictments but a Judge dismissed the charges against the Grievant of 68 counts of dereliction of duty and five counts of receiving improper compensation, his Order reading in part:

> *. . . For purposes of this Motion [to Dismiss] the court will assume that [the Grievant] failed to make proper inspections . . . and did accept the donuts and pizza . . . .*
>
> *. . . The duties imposed on [him] . . . are not so specific so as to create criminal liability for failure to perform in accord with those regulations. The procedure to be followed is to fire the . . . employee*. . . . the indictment is insufficient.
>
> *. . . The Court finds that it was not the intent of the legislature to outlaw the common habits of human sociability. The State . . . concedes as much, asserting it was not the donuts or the pizza, but that it is the favoritism shown to those who brought them to the office. . . .*
>
> *Favoritism, however, is quite subjective. . . . It is common for government offices to accommodate the heavy users of their services by providing special work areas, hours, etc. Accommodating big volume customers is a common management practice both in and out of government. If a person gets friendly service . . . and brings in a box of donuts . . . or if the staff eats the donuts, has a crime been committed? . . . We think not . . . .*
>
> *To be sure, an appearance of favoritism may arise. . . . Violations of the policy, however,* **10**
>
> *would only give rise to grounds for some job action such as suspension or firing. . . .*

Lt. Daniel Gibson testified that he is Assistant District Commander of District 9; that he was assigned to take statements during the investigation; that work rules prohibit accepting gratuities or giving favorable service because of the service we provide; that the Grievant has received training and has been doing inspections for 16 years; and that the inspection team divides responsibilities between the MVI and the trooper.

Lt. Gibson noted that during his July 9, 1997 interview with the grievant, the latter acknowledged he accepted free food and a turkey, and the supervisor said customers should not be in the garage. The Lieutenant acknowledged that he supervised Sgt. Thompson; that on several occasions the Sergeant failed to obey orders; that there is no written rule prohibiting customers in the garage; that Sgt. Thompson was not discharged; and that he did not know the content of the grievant's training.

Secretary Shawn Kiefer testified that since February 1996 at the Jackson Facility she answers the phone, does payroll, makes appointments, and greets customers; and that she reported behavior of favoritism and kickbacks because of spur of the moment appointments, standing appointments, others having to wait weeks to get an appointment, and things getting out of control with customers coming and going

Secretary Kiefer recalled that at a January 19, 1997 meeting Sgt. Thompson told employees some customers complained of favoritism in scheduling; that he instructed her to make appointments since she was new and did not know customers; that the grievant tossed the book at her, striking her on her leg; and that the grievant gave her a list of customers' scheduling preferences which she put into the book.

Secretary Kiefer acknowledged that she ate some of the food brought in by customers; that she told customers they could buy receipts across the street at Osborne Equipment; that the grievant's list was helpful and he did not tell her

she had to follow it; and that she did not tell Sgt. Hudson the Grievant was enraged on January 22, 1997.

Mr. Eric Brown testified that he is office manager for Osborne Equipment; that the grievant asked them to keep salvage receipts available for customers who came for inspections; that it was an inconvenience; that people were upset about having to forfeit their scheduled inspection so he decided to do it; and that he did not see a pattern of the same customers coming in to buy receipts.

Sgt. Leigh Thompson testified that he was interviewed on June 24, 1997; that he was the supervisor at the Jackson Facility; that he had no problems with the Grievant; and that he gave him good evaluations.

Trooper Larry Evans testified that he worked at the Jackson Facility from November 1995 until he voluntarily transferred out in June 1996; and that he transferred because he did not agree with favoritism, with people showing up without an appointment, with vehicles being inspected on rollbacks, and with Sgt. Thompson failing to back him up.

Trooper Evans acknowledged that he had personality conflicts with others there; that the Grievant was his partner in inspections; and that the Grievant knew how to do his job.

Captain S.M. Raubeno. testified that he conducted the Grievant's pre discipline 17baring on August 18, 1997; that he concluded just cause existed for discipline; that he heard three or four cases that same day; and that he heard the evidence, reviewed the reports, made his determination, and submitted his recommendation all in the same day.

The Grievant testified that he has been an MVI for 16 years; that he received on the job training but no formal school training in performing inspections; that over 5000 inspections a year are performed at his facility; that no supervisor ever approached him about how he was performing his job; and that Sgt. Kelly assigned him to schedule appointments.

The Grievant emphasized that customers have been bringing in food for more than 14 years; that he was aware of the Work Rule prohibiting gratuities but added no one said do not eat the food which is brought in, and he never considered a donut to be a gratuity; that he was told customers should not be watching inspections, but added he has no authority over customers and does not have a badge; and that he gave Ms. Kiefer the list so she could be aware of customers' desires such as Mr. McClanahan who lives 45 minutes away and prefers an appointment when the facility first opens so he can get back to work.

The Grievant acknowledged that an inspection can take from two minutes to three hours; that transmission numbers can be in six different locations on a car; that confidential numbers can be anywhere on a car; that it is unfair to have some customers skip over the schedule; and that appointments are usually on a first come, first serve basis.

POSITION OF THE EMPLOYE

The Employer insists that it had just cause to discharge the grievant; that its decision was no unreasonable, arbitrary, capricious, or discriminatory; and that the grievant was an active participant in a well established pattern of granting special favors to salvage dealers in exchange for gratuities of free food.

Additionally, the Employer argues that the favoritism Included preferential scheduling and poor inspection practices; video surveillance established he accepted gratuities and made 68 improper, inadequate inspections in under two minutes each; and that he was properly trained.

Further, the Employer maintains that it is irrelevant that the judge dismissed the charges; that removal was never contingent upon a criminal charge; and that the arbitrator should not consider granting clemency or substituting a more lenient penalty.

Finally, the employer contends that the claim of disparate treatment cannot prevail; that in the parties' 10 year history of arbitration the burden of proof has clearly required the union to show other employees committed

the same or very analogous offense and have received different discipline, and to show factors do not exist which rationally and fairly explain the different treatment; that arbitrators recognize a "range of reasonableness" because management has flexibility in administering discipline; and that the grievant's fact situation was unique.

POSITION OF THE UNION

The Union insists that just cause is lacking; that the Grievant was denied due process because the hearing officer could not conduct a full and fair investigation; that management attempted to add the new charge of assault; and that he was subjected to disparate treatment.

Further, the Union argues that the Grievant performed inspections properly as he was trained, and under the direct supervision of a trooper; that the video was speculative, inaccurate, incomplete and presented without testimony from anyone who witnessed the inspections except Trooper Evans who said he never saw the Grievant perform an improper one; and that the Grievant did not sign any inspection forms.

Next, the union contends there are no written policies concerning how inspections are scheduled or which part the MVI is responsible for performing; that if customers were circumventing the schedule or rules, they were doing so with the authority of the troopers; and that there is no proof of preferential treatment towards customers who brought in food or that food is prohibited gratuities.

Finally, the Union asserts that the investigation "reeks" of disparate treatment; that no one else was fired; and that the Grievant had excellent evaluations, no prior discipline, and 16 years seniority.

DISCUSSION

Under the just cause standard adopted by the parties in Section 24.01, the employer must establish that the Grievant committed the offense[s] with which he was charged, and that the discipline imposed was justified under the circumstances. It is up to the Grievant and his Union to establish factors

in mitigation. For the reasons which follow, it is found that the discipline imposed cannot stand.

First, there is the procedural argument advanced by the union. It asserts due process violations occurred because Hearing Officer Raubenolt heard more than one case and issued his recommendation the same day; it took a short time to remove the Grievant; the hearing notice covered 16 months; and a new charge of assaulting Secretary Kiefer was added.

However, this argument cannot prevail because it was not raised in any grievance step until the arbitration and procedural matters not raised sooner are deemed waived; the August 7, 1997 statement of charges does not include an assault charge; it cannot be assumed the Hearing Officer was unable to reach a reasonable and fair decision because he heard more than one case and wrote his recommendation in the same day; there is no claim the Hearing Officer failed to follow up on a witness or document identified by the Grievant or his union; the Hearing Officer's decision was limited to whether just cause existed for discipline to be imposed; and it was not shown that the integrity of the pre discipline hearing was compromised.

As to the offenses, first the Grievant was charged with a violation of Work Rule C.10.b. Neglect of Duty. The Rule defines it in part as "Failure to perform job duties as specified." Specifically, the employer insists the Grievant failed to perform proper salvage inspections.

Neglect of Duty is a, factual question which is to be judged , light of facts existing at the time. Video tape evidence established that on March 24th and 25th, and April 7th and 8th the Grievant failed to leave the desk area when vehicles entered the facility for inspection. It also showed that on March 24th, 25th, 26th, 27th, 28th and 31st, and April 1st , , 2nd, 7th, and 8th he walked to vehicles which entered the facility but viewed them without tools, "rags" and/or flashlight. In none of those instances was he seen either spending more than two minutes at the vehicle or recording at least three vehicle identification numbers.

Unrefuted testimony established that documenting those numbers is required by Policy 9 202.01 Inspection Procedure

and is part of the MVI's job. The fact that inspections are performed by teams, and that he was not the only employee doing what was seen, go to the question of penalty and not to the commission of the offense. Thus, the employer met its burden of proof as to that offense.

The Grievant was also charged with violating Work Rule C.10.d Failure of Good Behavior. This offense is defined in part in the Work Rule as "Any misconduct which violates recognized standards of conduct, including . . . misuse of position for personal gain, taking bribes . . . . " Specifically, the employer maintains the Grievant misused his position for personal gain by accepting gratuities of free food and by granting special scheduling favors in exchange.

Concerning accepting free food, the Grievant does not deny doing this. He emphasized, however, that customers have been bringing in food for 14 years, that no one told customers not to or told employees not to eat it, and that he was aware of the rule against accepting gratuities but did not consider donuts to be in that category. These circumstances relate to the penalty imposed and not to whether the Grievant accepted gratuities in the form of free food. He clearly did.

Whether the employer proved that in exchange for the gratuities the Grievant granted those customers special scheduling favors is not so clear. The employer corrected notes that the criminal proceedings are not binding on this proceeding. But Judge Grey's reasoning is instructive. He wrote:

> *. . . among ordinary people there is often a exchange of things of value, a ride, a shared umbrella, a cup of coffee, a cigarette, a stick of gum. It is not uncommon for law firms to send a box of candy or cookies to county officials around Christmas time . . .*
>
> *The State of Ohio concedes . . . it was not the donuts or the pizza, but the favoritism shown to those who brought them in . . . . Favoritism, however, is quite subjective.*

> *. . . it is common for government offices to accommodate the heavy users of their services by providing special work areas, hours, etc. Accommodating big volume customers is a common management practice. . . .*
>
> *What is favoritism? Did they get good service because they brought in the donuts and the Pizza, or did they bring in the donuts because they got good service? One must guess. . . . To be sure, an appearance of favoritism may arise. . . . Nothing would prevent the office supervisor from prohibiting it or punishing any member of the staff who violated the policy. Violations . . . would never rise to the status of a criminal offense*.

Reasonable persons would have to guess whether certain customers got special scheduling favors because they brought in food, or vice versa. It cannot be said with a degree of certainty or confidence that the employer proved the Grievant misused his position for personal gain. It is not disputed that repeat customers' scheduling requirements were known and accommodated. But it is not clear whether these accommodations were made as good management practice, or were made in order for the Grievant to personally benefit. In fact, everyone at the facility including Secretary Kiefer benefitted from the free food. That being said, reasonable people could conclude there was an appearance of favoritism.

Regarding the penalty imposed, it is found the union met its burden of establishing that the

Grievant was subjected to disparate treatment by being the only employee to be discharged. It is universally acknowledged that similarly situated employees must be similarly treated. Just cause requires that employees engaging in the same type of misconduct be treated basically the same unless there exists a reasonable or contractual basis for variations in penalties.

The Employer relies especially on **State of Ohlo and OCSEA**, Case No.27 24(03 20 89) 18 01 03 (Dworkin 1990) and **State of Ohio and OCSEA**, Case No.23 06(89 11 13) 01 21 01 03 (Rivera 1990) to establish that the Grievant's situation was

unique and not comparable to those who received lesser penalty. It argues, "he alone created the aggravating circumstances *which established the basis for his removal."*

Arbitrator Dworkin found the Union did not establish "*the Grievant was singled out for discipline which his offense [carelessness in inspecting a room, failing to detect an inmate hiding under a table]*, *in view of his employment record and other similar circumstances, did not merit.*" Arbitrator Rivera found the Grievant failed to report an injury to an inmate thereby endangering another's health and committing the offense of incompetence. She found no disparate treatment because none of the other attendants were present or were charged with incompetency and the Grievant had prior discipline for the same offense.

Here, unlike those cases, the Grievant and all the other troopers and employees accepted the same free food. Here, not just the Grievant did the scheduling. Secretary Kiefer also accommodated the preferences of repeat customers. Here, the Grievant had good evaluations and no prior discipline in 16 years of employment. Here all MVIs and Troopers, except for one, conducted the inspections or lack thereof, in the same way on the video tape.

In short, there was no showing that a basis existed for dissimilar treatment. Rather, the record reflects that the Grievant was singled out for discipline which was harsher than that imposed on the other employees under the same or similar circumstances. Not even the supervisor of the facility who was aware of the situation and who participated in accepting the food and the conduct was discharged.

AWARD:

The grievance is denied in part and sustained in part. The discharge of the Grievant is reduced to a suspension for Neglect of Duty. He is to be reinstated to his position of MVI. Under the circumstances, no back pay is awarded.

DATED: April 23, 1998

PHYLLIS E FLORMAN Arbitrator