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GRIEVANCE COORDINATOR

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
~~The Ohio Department of Agriculture~~

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For Department of Agriculture

Dale M. Glenn, Assistant Chief ODA Enforcement
Jim Lendavic, OCB, Labor Relations Specialist
Daniel W. Gibson, Staff Lieutenant
James H. Hix, ODA, Human Resources Administration
Charles Twining, Assistant Chief, Dairy Division, ODA

For OCSEA
Robert J. Rowland, OCSEA Staff
Randall P. Dues, Sanitarian Program Administrator 1 (Grievant)
Duane L. Murray, Chief Steward

Case-Specific Data

Date of Hearing:	July 5, 2000
Date of Award:	August 22, 2000
Contract Year:	1998-2000
Type of Grievance	Discipline/Discharge
Grievance No.	04-00 (30-07-99)12-01-13 (990730)

Robert Brookins

Robert Brookins
Arbitrator, Professor of Law, J.D., Ph. D.

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I. Preliminary Statement

The Ohio Department of Agriculture (DOA or the Employer) and OCSEA/AFSCME, Local 11 (the Union) are the parties to this dispute, and they selected the Undersigned from their permanent panel of labor arbitrators to this dispute. Accordingly, on July 5, 2000, the Undersigned held an arbitral hearing on this matter at the Ohio State Department of Agriculture, in Reynoldsburg, Ohio. All parties were present and the hearing commenced at approximately 9:00 a.m.

During the arbitral hearing, the parties had a full and fair opportunity to present any admissible evidence and arguments supporting their positions in this dispute. Specifically, they were permitted to make opening statements and to introduce admissible documentary and testimonial evidence. Witnesses testified under oath and were available for and subjected to cross-examination from the opposing advocates. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs and opted for closing arguments.

II. The Facts

Mr. Randall P. Dues (the Grievant) was a Sanitarian Program Administrator I in the Dairy Division of the Ohio Department of Agriculture. ODA employed the Grievant for approximately 13 years before terminating him on July 23, 1999 for unauthorized absence from work, theft, dishonesty, and poor job performance.[1] As a Sanitarian Program Administrator I, the Grievant's duties included: inspecting several dairy plants throughout the state of Ohio, testing dairy equipment, submitting samples of products to ODA for testing, and other sanitary-related functions. All of the dairy plants were grade A milk companies, producing yogurt, fluid milk, sour cream, and buttermilk for sale at local stores.

Because all or virtually all of his duties were in the field (away from any ODA office), the Grievant

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[1] *See,* Joint Exhibit No. 4., detailing: (1) Unauthorized Employee Absence—early departure from work, (2) theft—payment for hours not worked, (3) dishonesty; neglect of duty; failure of good behavior, (4) poor performance—involving failure to properly carry out work assignments; failure to complete assigned tasks; performance at sub-standard levels.

drove an ODA vehicle, had little direct day-to-day supervision, and worked out of his home office. As a result, the Employer supervised the Grievant through reviews of his time sheets, two-week, projected itinerary, occasional field trips with the Grievant, telephone calls, and occasional meetings. Much of ODA's supervision involved reviewing and adjusting the Grievant's projected itinerary and his daily time sheets. Otherwise, as a Sanitarian Program Specialists I, the Grievant was virtually autonomous.

On March 10, 1999, Mr. Lewis R. Jones notified the Grievant and other ODA employees that, on March 15, 1999, ODA would adopt a new weekly time report or time sheet for its employees' reports.[2] ODA instructed the Grievant on how to complete the new forms. The Grievant never asked questions about completing the new time reports and used them throughout the period relevant to this dispute. Prior to this dispute, ODA voiced no complaints about the Grievant's job performance and had no practice of discussing, with the Grievant, errors in his time reports.

On or about April 28, 1999, ODA decided to investigate[3] a coworker's allegations that the Grievant was falsifying his time report. Accordingly, the Employer assigned a team of DOA agents (Messrs. Dale Glenn and Lester Sexton) to surveil the Grievant while he worked in the field. The surveillance lasted approximately six days: May 3, 4, 10, 11, 12, and 20 of 1999.

In preparation for the surveillance, the agents obtained a copy of the Grievant's projected itineraries, reports, and telephone records. Finally, Mr. Glenn persuaded the Ohio Bureau of Workers Compensation to lend the Agents a van, from which they could surreptitiously observe the Grievant.[4]

The surveillance revealed several substantial discrepancies between the agents' observations of the Grievant at various dairies and the entries in his time sheets regarding his whereabouts and job performance.[5]

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2 Joint Exhibit No. 3G.

3 Joint Exhibit No. 3-C.

4 Joint Exhibit No.

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The agents concluded that the Grievant not only stole from ODA by exaggerating the number of hours worked but also misstated his whereabouts during working hours. These discrepancies are discussed in detail below.[6]

III. Relevant Contractual Provisions

ARTICLE 24 - DISCIPLINE

24.01 - Standard

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

24.02 - Progressive Discipline

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

Disciplinary action shall include:

A. one or more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. a fine in an amount not to exceed five (5) days pay; for any form of discipline; to be implemented only after approval from OCB;
D. one or more day(s) suspensions;
E. termination.

24.05 Imposition of Discipline

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

IV. Summaries of the Parties' Arguments

Disciplinary action shall be reasonable and commensurate with the offense and shall not be solely for punishment.

A. Union's Arguments

1. Termination in this case violates the principle of progressive discipline.
2. The Grievant gave ODA an honest 40 hours of work.
3. The Grievant thought he was completing the time sheets properly.
4. The Employer should have tried to correct the Grievant's errors before resorting to discipline.
5. Some of the Employer's witness retracted some inculpatory statements about the Grievant.[7]

B. Employer's Arguments

1. Evidence in the record support the charges against the Grievant.
2. Correcting the Grievant's erroneous time sheets would have been an ineffective deterrent, since they were intentional.

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[6] *See infra* pp. 7-22.

[7] Joint Exhibits Nos. 7 and 3(N).

3. The Grievant's misrepresentations destroyed the Employer's confidence in him.
4. The time sheets are self-evident and the Grievant received training on completing them.

V. The Issue

Whether the Grievant was terminated for just cause, if not what shall the remedy be.

VI. Analysis

A. Applicable Evidentiary Standards

Before analyzing this matter, several comments are indicated about the applicable evidentiary standards in this case. First, as usual in disciplinary disputes, the Employer has the burden of persuading the Arbitrator that the charges are valid. Second, intent lies at the heart of the employer's charge of theft and dishonesty, which in this case are based on the Grievant's alleged falsification and misrepresentation of facts in his official reports. Charges of falsification and misrepresentation embrace intent as a common and absolutely essential element that focuses on whether the Grievant deliberately misrepresented facts, stole hours from ODA, or was otherwise dishonest. As a result, ODA must establish that the Grievant not only falsified and misrepresented facts on his time sheets but also committed those acts intentionally rather than negligently. Also, because theft and dishonesty (here falsification and misrepresentation) are inherently stigmatizing charges, the Employer must establish those particular charges—relative to the others—by clear and convincing evidence rather than by the usual preponderant evidence.[8] Finally, to establish the acts of falsification or misrepresentation, that undergird the charges of theft and dishonesty, ODA must show that the Grievant falsified or misrepresented not just any old facts in his time sheets, but *material* facts therein.

B. Analytical Format

To analyze this case, one must juxtapose the day-to-day discrepancies between representations of fact in the Grievant's time sheets with the Agents's observations during the surveillance and with other

[8] Unauthorized Employee Absence—early departure from work; poor performance—involving failure to properly carry out work assignments; failure to complete assigned tasks; performing at sub-standard levels, neglect of duty, and failure of good behavior are less stigmatizing and, therefore, are subjected only to the preponderance standard.

evidence gathered during ODA's investigation of the Grievant.[9] Thus, the analytical format comprises a comparison of: (1) relevant representations in the Grievant's time sheets, (2) conflicting observations by the Agents or other probative evidence, and (3) testimony offered by the Grievant when attempting to explain these discrepancies. Finally, the Arbitrator assesses the foregoing evidence to determine whether any discrepancies constitute misrepresentation or falsification, and ultimately theft and dishonesty.

1. March 24, 1999

The Grievant's records of March 24, 1999 indicate that he performed Grade A Milk Inspection High Temperature Short Time Tests (HTST) in the Dannon Dairy Plant on March 18 and 24, 1999. However, after examining the temperature recording charts for Dannon's HTST units, Dannon's Processing Business Area Coach (Mr. Richard Wenning) and the Assistant Chief, Dairy Division, ODA (Mr. Twining) concluded that the Grievant did not perform the HTST tests. Mr. Twinning credibly testified at the hearing that the Grievant did not perform the HTST tests. The statement of Mr. Wenning is hearsay, since he did not appear at the arbitral hearing to offer their testimony and have it subjected to cross examination. Nevertheless, Mr. Wenning's statement has some probative value inasmuch as it is corroborated by Mr. Twinning's testimony, which is not hearsay.

During the hearing, the Grievant offered no testimony to refute Mr. Wenning and Mr. Twinning's testimony, therefore, the Arbitrator credits Mr. Twinning's testimony primarily and Mr. Wenning's statement secondarily as a basis for finding that the Grievant did not complete the HTST tests as he had claimed in hie reports. Clearly, claiming to have performed a test that was not performed is falsification and misrepresentation of a material fact.

2. April 12, 1999

On of the Grievant's time sheets indicate that between 11:30 a.m and 4:30 p.m. he was at Reiter

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[9] Although the Agents' surveillance covers only some of the days discussed below, the Employer introduced evidence other than that gathered in the surveillance. Consequently, the Arbitrator will consider that extra-surveillance evidence as well.

Dairy, thereafter he left and traveled to his home office. However, ODA telephone records show that he made telephone calls from his home at 2:09 p.m. and 2:13 p.m. When testifying, the Grievant never explained this discrepancy.

The Arbitrator holds that on April 12, 1999, the Grievant misrepresented a fact. His time sheet indicates that he arrived home at after 4:30 p.m., but ODA's telephone records show that he was at home at or before 2:09 p.m. Furthermore, the misrepresentation was of a material fact because it directly impugns the Grievant's honesty and integrity and strongly suggests that he was paid for time that he did not work.

Although the telephone records are hearsay—out-of-hearing statements offered to prove the truth of the matter asserted therein—they are, nonetheless, admissible hearsay for three reasons. First, the telephone records are introduced into the arbitral record as joint exhibits, indicating that the Union did not object to them as hearsay. By agreeing to submit the records as joint exhibits, the Union implicitly waived any objections it might have otherwise raised either to the admissibility of those records, or to the probative weight they should receive. Second, by agreeing to submit the telephone records as joint exhibits, the Union implicitly waived its right to have ODA establish a foundation for them as business records that were maintained in the ordinary course of ODA's operations. Third, the telephone records tend to support the pattern of misconduct established by the Agents' personal observations—the Grievant continually misstates his whereabouts and job activities. Henceforth in this opinion, the Arbitrator will, therefore, accord the telephone records the probative value of any other competent, circumstantial evidence.

3. April 13, 1999

After comparing the Grievant's Quarterly Inspection Reports with United Dairy Farmers, Inc.'s temperature recording charts for HTST Units Nos. 1 and 2, Mr. Glenn Delong and Mr. Richard Volpp (employees of United Dairy Farmers, Inc.) told the Agents that the Grievant had not performed the HTST tests. In addition, Mr. Volpp conferred with Mark Sanderfier who accompanied the Grievant while at the United Dairy Farmers' plant on April 13, 1999. Mr. Sandefier also concluded that the Grievant did not

perform the tests. Finally, Mr. Twinning juxtaposed the temperature recording charts and the Quarterly Equipment Tests Reports and concluded that the HTST tests were not performed and reiterated that conclusion at the arbitral hearing, where his testimony was fully available for cross-examination.

Although Mr. Twinning's out-of-hearing conclusion is hearsay, it lost most of its objectionable taint when Mr. Twinning restated his conclusion while testifying at the arbitral hearing. In addition Mr. Twinning's conclusion tends to corroborate Mr. Delong, Mr. Volpp, and Mr. Sandefier's, conclusions, all three of which are hearsay because they did not testify at the arbitral hearing. Furthermore, the statements of Mr. Delong, Mr. Volpp, and Mr. Sandefier were submitted as joint exhibits. Accordingly, the Arbitrator will afford these three statements the same probative value as any other competent testimony. These false statements about the Grievant's job performance are misrepresentations of material facts.

4. April 19, 1999

Here, the Grievant's time sheet indicates that from 8:00 a.m. to 9:00 a.m. he was en route to Reiter Dairy in Springfield, Ohio. However, ODA telephone records show that he made telephone calls from his home at 8:47 a.m. From 9:00 a.m. to 3:00 p.m., the Grievant claimed he was inspecting the Reiter Dairy, but ODA telephone records show that he made telephone calls from his home office at 2:52 p.m. While testifying, the Grievant offered no credible explanation for these discrepancies. For the reasons discussed above, the telephone records are accorded probative value. These false statements about the Grievant's whereabouts are misrepresentations of material facts.

5. May 3, 1999

The Grievant's time report shows that, on May 3, 1999, he took samples at the Dannon plant from 8:30 a.m. to 12:00 p.m. In contrast, the Agents saw him inside a McDonald's Restaurant from 11:00 a.m. until 11:19 a.m. and inside the Osgood State Bank from 11:30 a.m. to 11:32 a.m. More important, they later observed his automobile parked in front of his home at 11:50 a.m. Finally, ODA telephone records show that the Grievant made telephone calls from his home at 11:49 a.m. and 12: p.m.

During the arbitral hearing the Grievant testified that on the morning of May 3, 1999, he visited DFA only to find that there were no Grade A products available for him. He then went to Dannon where he collected samples of both raw milk and end-product and mailed them to ODA's office in Reynoldsberg, Ohio. After that he had lunch and went home where he checked his mail, returned his telephone calls, and began his personal day at approximately 1:00 p.m.

The Grievant's time records and the Agents' observation are discrepant. Because the Agents saw the Grievant inside a McDonald's Restaurant at 11:00 a.m., he obviously left the Dannon Plant sometime before 11:00 a.m. Nor did he return to Dannon after leaving McDonald's Restaurant because the Agents saw his vehicle in front of his house at 11:50 a.m. and because he made telephone calls from his home at 11:49 a.m. and 12:00 p.m. In short, approximately 18 minutes after he was observed in the Osgood State Bank, the Grievant was home.

Although it is unclear exactly how much time the Grievant actually spent at the Dannon plant, it is clear that he exaggerated the length of his visit there by at least one hour. In other words, his time sheet indicates that he was collecting samples at Dannon when he was actually elsewhere. That he took off part of the day on May 3, 1999 as a personal day neither excuses nor justifies the misleading statement that he collected samples from 8:00 a.m. to 12:00. That assertion is a misrepresentation of fact. Furthermore, that misrepresentation is material because it tends to erode his trustworthiness and credibility, even though some of the hour that is the subject of the misrepresentation was spent eating lunch. Saying that one ate lunch and did some banking from approximately 11:00 a.m. to 12:00 a.m. is very different from saying that one spent that time collecting samples at Dannon.

6. May 4, 1999

On May 4, 1999, the Grievant said that from 7:30 a.m. to 8:00 a.m. he traveled to Dannon in Minster where he performed tests from 8:00 a.m. to 4:30 p.m. On the other hand, the Agents observed the Dannon plant from 7:00 a.m. to 10:00 a.m.; from 1:00 a.m. to 1:45 p.m.; and from 2:30 p.m. to 5:30 p.m. without

catching a glimpse of the Grievant's vehicle. Furthermore, they saw his vehicle parked in his driveway at 10:25 a.m. and at 2:10 p.m. Finally, neither the Grievant's name nor signature appeared on Dannon's official sign in/out sheet for May 4, 1999.

The Grievant testified that he took a vacation day on May 4, 1999. He explained that Dannon's equipment test was originally scheduled for May 3, but Dannon later said it could not do the test then. Consequently, the Grievant telephoned his supervisor and switched his vacation day from May 3 to May 4, 1999. Also, the Grievant agreed to perform the Dannon equipment test on May 6, 199.[10] However, he said he incorrectly noted in his travel log that the equipment test was scheduled for May 4, instead of May 6, 1999. Consequently, when the Grievant performed the equipment test, on May 6, his Quarterly Equipment Test Report still erroneously indicated that he was scheduled to perform the test on May 4, 1999.[11] Finally, he replicated this mistake on his time sheet.

Under these circumstances, the Arbitrator is persuaded that this erroneous entry in the Grievant's time sheet was due more to negligence than to intent. Therefore, time sheets for May 4, 1999 do not misrepresent a material fact and were not the product of dishonesty.

7. May 10, 1999

On May 10, 1999, the Grievant's time report indicates that he conducted inspections and Hydraulic Tests at Guenthers & Sons from 10:00 a.m. to 3:00 p.m. and that he traveled home between 3:00 p.m. and 5:00 p.m. Still, the Agents observed him at Guenthers at 10:05 a.m, leave Guenthers at 11:30 a.m., and drive to a Wendy's Restaurant on State Routes 27N & 126, where he remained from 11:34 until 12:00 p.m. Finally, the Agents observed the Grievant's vehicle in his driveway at 3:20 p.m., on May 10, 1999.

The Grievant claims that while he was at Guenthers he administered tests, inspected transfer

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[10] *See* Joint Exhibit No. 3(A), indicating that the Grievant made the telephone call in question, on May 3, 1999.

[11] *See* Joint Exhibit No. 3(K).

facilities, and went to lunch. Then, en route home, he stopped at Springdale to check for broken seals. Then he went home where he loaded coolers onto his truck, checked and filed mail, checked machines, and did miscellaneous paper work for remainder of the day. He also testified that the agents would not have seen his car at home on May 10, 1999 because he parked the vehicle behind a brick building

The important question here is how long was the Grievant at Guenthers, on May 10, 1999? His time sheet indicates that he was there from 10:00 a.m. to 3:00 p.m. That is a false statement because the Agents observed him leaving Guenthers at 11:30 a.m. and inside of a Wendy's Restaurant from 11:34 until 12:00 p.m. Indeed, the Grievant testified that he took an unannounced lunch break that, nevertheless placed him somewhere other than where he claimed to be from 10:00 a.m. to 3:00 p.m. If the Grievant wanted to take a lunch break—to which he is clearly entitled—he could have easily noted that on his time sheet rather than give the impression that he worked straight through his lunch break. Ultimately, he is in a far better position to account for his breaks than is ODA. Taking a lunch break while indicating that he was working is a misrepresentation of fact, which may not be as material as some other misrepresentations but clearly is not de minimis.

The remaining question is whether—and, if so, when—the Grievant returned to Guenthers after leaving Wendy's and when, on May 10, 1999, did he ultimately leave Guenthers. The record provides no answer to the first question. However, the second question is partially and inferentially answered by the Agents' observing his car in his driveway at 3:20 p.m. The Grievant testified that the Agents could not have seen his car at home on May 10, 1999 because it was parked behind a building. However, the Arbitrator finds the Agents's testimony more credible here. By observing the Grievant's vehicle in his driveway at 3:20 p.m., the Agents deduced that he had to have left Guenthers before 3:00 p.m., because, in their actual driving experience, twenty minutes is insufficient to traverse the distance between Guenthers and the Grievant's home. Based on these reasons, the Arbitrator holds that the Grievant left Guenthers before 3:00, contrary to what his time sheet indicates. Finally, the Arbitrator holds that the Grievant's time sheets for May 10,

1999 misrepresent facts that have some though not overwhelming materiality, inasmuch as the Grievant is entitled to take a lunch break.

8. May 11, 1999

On May 11, 1999, the Grievant's time sheet indicates that from 7:30 a.m. to 9:00 a.m., he traveled to Tillers Foods in Dayton, where he collected samples from 9:00 a.m. to 9:30 a.m. Then, from 9:30 a.m. to 10:00 a.m. he traveled to Caprine Estates and collected samples there from 10:00 a.m. to 10:45 a.m.

According to the Agents, however, the Grievant did not arrive at Tillers until 9:30 a.m., (instead of 9:00 a.m.) and left Tillers at 9:37 a.m. The Agents did not remain at Caprine Estates long enough to determine when the Grievant left there.

The Grievant's time sheet for May 11, 1999, also indicates that he collected samples at Reiter from 11:30 a.m. to 3:30 p.m., after which he went to his home office. Although the Agents did not see the Grievant arrive at Reiter, they observed him leave at 12:45 p.m. instead of 3:30 p.m. From 12:49 p.m. to 1:27 p.m., the Agents saw the Grievant inside Applebees Restaurant on Bethele Avenue in Springfield. Finally, they saw his vehicle parked in his driveway from 3:35 p.m. to 5:10 p.m.

The grievant testified that, on the morning of May 11, 1999, he did finished product reports at home for approximately 25-30 minutes before leaving en route to Tillers. He says he arrived at Tillers at approximately 9:00 a.m. and denies that he was at Tillers for only seven minutes, since he could not have performed his tasks there in that short period of time. Also, the Grievant testified generally that he left Tillers and went to Bellbrooke to collect samples, completed the remainder of his tasks, and then went to Applebees for lunch. Afterwards, he went back to Tillers to collect more samples and thereafter went to Reiter for chemical pesticides but the trucks were not there. The Grievant said that the trucks possibly would not arrive at all that day. He then stopped at Friendly's to ascertain its scheduled closing and went home early to perform the ususal tasks.

Again the Grievant's time sheet is at substantial odds with the Agents's observations. First, he

arrived at Tillers at 9:30 a.m. instead of 9:00 a.m. as his time sheet states. Second, he left Reiter at 12:45 p.m. instead of 3:30 p.m.—a two hour-and-forty-five-minute difference—substantially sooner than his time sheet indicates. For reasons discussed earlier, this discrepancy is both false and material.

9. May 12, 1999

According to the Grievant's time record, on May 12, 1999, he was at Dannon in Minster performing chemical/pesticide tests from 8:00 a.m. until 4:00 p.m. The Agents said he did not arrive at Dannon until 8:48 a.m., left at 11:40 a.m., returned to Dannon sometime before 12:35 p.m., left again at 1:25 p.m., and arrived home at 1:45 p.m. Moreover, the Agents deduced that he did not return to Dannon between 2:05 p.m. and 5:00 p.m because at 5:20 p.m. his vehicle was in the same spot it did at 1:45 p.m.

When testifying, the Grievant generally explained that he got pesticides from Dannon, went to lunch, finished getting the pesticides, mailed them, and went home.

Clearly, the Grievant was not at Dannon performing tests from 8:00 a.m. to 4:00 p.m., as his time sheet indicates. In fact, according to the Agents, he spent two hours and fifty-two minutes there during the morning and approximately fifty minutes there during the afternoon. Thus, instead of the eight hours indicated in his time sheet, he spent a total of approximately three hours and forty-two minutes at Dannon. For reasons discussed above, his time sheet contains misrepresentations of material facts.

May 17, 1999

On May 17, 1999, the Grievant's time sheet says he conducted chemical/pesticide tests at Springfield from 9:00 a.m. to 4:00 p.m. However, ODA telephone records show the Grievant made a call from his home at 3:35 p.m.

The Grievant did not explain how or why he could have made a telephone call from his home at 3:35 p.m. when his itinerary indicates that he was in Springfield conducting tests from 9:00 a.m. to 4:00 p.m. For reasons discussed above, the telephone records are competent to show that the Grievant could not have performed chemical/pesticide tests at Springfield from 9:00 a.m. to 4:00 p.m. as represented on his time sheet

when he made a telephone call from his home at 3:35 p.m. Again, this discrepancy misrepresents a material fact.

10. May 19, 1999

The Grievant claims he inspected the H. Meyer Dairy plant from 10:30 a.m. to 2:30 p.m. However, H. Meyer's sign-in/sign-out sheet shows the Grievant arrived at 10:30 a.m. and left at 11:30 a.m. While testifying, the Grievant offered no explanation for the apparent discrepancy between his time sheet and the sign-in/sign-out sheet. The sign-in/sign-out sheet is, of course, hearsay. However, as is the case with the telephone records, the sign-in/sign-out sheet was introduced as a joint exhibit. Consequently, for reasons discussed above relating to the telephone records, the Arbitrator will accord the sign-in/sign-out sheet the probative value of any other piece of circumstantial evidence. Moreover, the sign-in/sign-out sheet tends to corroborate a pattern established by relevant, competent evidence throughout the arbitral record—the Grievant's being one place when his time sheets indicate that he was elsewhere. Ultimately, then, the Arbitrator holds that the Grievant spent one hour rather than four hours at the H. Meyer Dairy Plant. And, for reasons discussed above, this is a misrepresentation of a material fact.

11. May 20, 1999

The Grievant's time sheet, for May 20, 1999, says he inspected the Dairy Farmers of America's (DFA) plant from 8:30 a.m. to 4:00 p.m. In contrast, the Agents' records show that the Grievant did not arrive at DFA until 8:49 a.m., left at 11:25 a.m., and was in the vicinity of the Fireside Pub from 11:27 to 11:48. Finally, at 1:15 p.m. the Agents saw the Grievant's vehicle parked in this driveway.

At the arbitral hearing, the Grievant explained that there were no Grade A products available for him at DFA, on May 20, 1999. So he did an inspection there, finished early, and went home where he cleaned his vehicle and completed some reports. The Grievant's time sheet represents that he spent approximately 7.5 hours at DFA when he spent approximately one hour and thirty-four minutes there. For reasons discussed above, this is a misrepresentation of a material fact.

12. May 24, 1999

Based on the Grievant's time sheets for May 24, 1999, he collected samples at United Dairy Farmers of America from 11:00 a.m. to 12:00 p.m., traveled to H. Meyer Dairy from 12:00 p.m. to 1:00 p.m., where he collected samples from 1:00 p.m. to 2:30p.m. Conversely, H. Meyer's sign-in/sign-out sheet shows that the Grievant arrived there at 11:50 a.m. and left at 12:45 p.m. When testifying, the Grievant offered no explanation of this apparent albeit de minimis discrepancy. For reasons set forth above, the sign-in/sign-out sheet is accorded probative value in this dispute and establish that the Grievant collected samples at H. Meyer Dairy for approximately fifty-five minutes instead of the 1.5 hours represented in his time sheet. As set forth above, this misrepresentation is one of material fact.

13. June 2, 1999

The Grievant's June 2, 1999-time sheet shows that from 8:00 a.m. until 5:00 p.m. he collected samples and did chemical pesticide tests at Dannon in Minster, Ohio. Nevertheless, Mr. Wenning, told the Agents that the Grievant arrived at the Dannon plant between 8:30 a.m. and 9:00 a.m., took a reclaim sample, and visited the laboratory. In addition, Mr. Weinning told the Agents that the Grievant must have left Dannon sometime before 11:00 a.m. because Mr. Wenning returned from a meeting at approximately that time and the Grievant was gone. In contrast, Dannon's sign-in/sign-out sheet for June 2, 1999 do not reflect the Grievant's signature or name, suggesting that the Grievant's did not visit Dannon at all, on June 2, 1999.

When testifying at the arbitral hearing, the Grievant did not address this conflict between his time sheet, Mr. Wenning's alleged observation and the sign-in/sign-out sheet. The latter two pieces of evidence conflict and, therefore, have little probative value. Consequently, the Arbitrator holds that the record does not show that the Grievant's time sheet contains misrepresentations of material fact for June 2, 1999.

14. June 3, 1999

The Grievant's time sheet for June 3, 1999 states that from 8:00 a.m. to 5:00 p.m. he performed equipment tests at the Dannon plant in Minster, Ohio and then drove home. However, the Grievant was not

at the plant between 1:30 p.m and 4:30 p.m., when the Agents were there. Also, Mr. Wenning said the Grievant arrived at the Dannon plant between 8:30 a.m. and 9:00 a.m., conducted HTST tests on No. 1, left a copy of the report on Mr. Wenning's desk, and left the Dannon plant at 11:00 a.m.

The Grievant testified that he received a telephone call from Dannon on May 5, 1999, informing him that a seal would be broken on a homogenizer for inspection of that machine on Monday, May 31, 1999, which was a holiday. Plant supervision suggested that the Grievant perform Dannon's work on Tuesday, June 1,1999. However, the Grievant's supervisor instructed him to perform the work on Wednesday, June 2, 1999. However, Dannon wanted the Grievant to come back the next day, Thursday, June 3, 1999. On June 3, 1999, Dannon had equipment problems until approximately 12:45 p.m., after which the Grievant claims he did the inspection, wrote the report, and placed it on Mr. Wenning's desk. After that, the Grievant says he drove to DFA, then returned to Dannon's raw milk section, and finally went home early because he worked two extra hours the day before.

The Grievant's explanation fails to explain the discrepancy between his time sheet for June 3, 1999 and the Agents' observations that he was not at the plant from 8:00 a.m. to 5:00 p.m. In addition, the entries in the time sheet conflict with Mr. Winning's statement. Instead of performing equipment tests from 8:00 a.m. until 5:00 p.m. as his time sheet indicates, the Grievant left Dannon at least before 1:30 p.m. (and perhaps as early as 11: a.m., according to Mr. Winning). Thus, instead of working nine hours at Dannon, the Grievant work there for approximately 5.5 hours at most, assuming he left just before the Agents' arrived. And according to Mr. Wenning, the Grievant was at Dannon no more than 2.5 hours—from 8:30 a.m. to 11:00 a.m. Although Mr. Wenning's statement is hearsay, here, it substantially jibes with the independent, corroborative, and direct observations of the Agents. Therefore, for reasons discussed above, this is a misrepresentation of a material fact.

C. Concluding Remarks and Observations

While surveilling the Grievant, the Agents observed that he seldom arrived at the sites in question

when his time sheets indicated. The Grievant's standing explanation for this discrepancy is that instead of traveling to the designated site for the day as his time sheets indicated, he worked at home in the morning. Nevertheless, his time sheets repeatedly misrepresent material facts: During his work day, the Grievant was neither where he said he was nor performing the tasks he claimed. Here, the Arbitrator wishes to stress that although there was much hearsay in the arbitral record, the ultimate conclusions on the record as a whole that the Grievant falsified his time sheets and misrepresented material facts are based on (and fully sustainable from) the Agents's direct observations which independently established a pattern of conduct born out in the hearsay evidence. In short, it was the agents' direct observations that resulted in and were the basis for the Arbitrator's holding that the Grievant engaged in the above-mentioned misconduct.

Also, the Grievant argued that at least some of the Agents' surveillance reports are inaccurate because several times the Agents lost him in traffic and because they could hardly have observed him while he was working in his home office. This argument ties into the Grievant's general argument and position that although he may not have been where his time sheets indicated or performing the tasks indicated therein, he was, nevertheless, giving ODA 40 honest hours of work.

However, this contention suffers from three crippling difficulties. First, it misses the thrust of a charge of falsification, which focuses on misrepresentation and, ultimately, trust. Although misrepresentation might commonly encompass some type of theft or dishonesty—indeed it does in this case—loss of property is neither a precondition for nor even an element of a prima facie case misrepresentation. Falsification and misrepresentation extend beyond the boundaries of theft and dishonesty, encompassing its essence—intentional misrepresentation or falsification of material facts. Second, the Grievant's argument ignores the essential element of trust that must exist between any employer and employee, especially where, as here, an employee is clothed with substantial autonomy. The material inaccuracies in the Grievant's time sheets regarding his whereabouts and the time spent on specific tasks are manifestly false and misleading, and seriously compromises his trustworthiness in the eyes of his employer

or any other reasonable person.

Third, the Grievant's argument overlooks an essential functional dimension between any employer and employee: The right to exercise direct supervision over its employees, which is the absolute undisputed right of ODA or any other employer. To exercise that right, however, ODA must have accurate information about employees' whereabouts and on-duty activities.

The autonomous nature of the Grievant's position effectively prevents—or severely hampers—ODA's ability to supervise the Grievant at all. His two-week-in-advance itinerary and his time reports are the only "windows" through which ODA may gain some sense of the Grievant's daily whereabouts and daily, job-related activities. To the extent that those documents are inaccurate, ODA virtually loses its only opportunity to supervise the Grievant. These conditions place an even greater premium on truthfulness and accuracy.

Under these condition, the argument that the Grievant gives 40 hours work for 40 hours pay is wholly irrelevant. Undoubtedly, there is an element of "honest" in giving "a day's work for a day's pay." Nevertheless, as the instant case demonstrates, this "honesty" can conceal considerable dishonesty and dysfunction, which ODA should not have to tolerate.

Finally, there is the critical element of intent in charges of falsification and misrepresentation as they relate, in the instant case, to dishonesty and theft. Here, the Grievant's best argument was that he somehow assumed he was properly completing his time sheets because prior to the surveillance no one voiced any objections thereto. Three responses are indicated here. First, until it was informed, ODA was most likely unaware that the Grievant was falsely completing his time sheets. Moreover, to the extent this argument suggests that the Grievant somehow did not intend to say he was at locations for substantially longer periods than he actually was, the argument flirts with frivolity. Second, when ODA changed the format of its time sheets, it explained to its employees, including the Grievant, how to complete the document. Third, even absent such training or explanations, commonsense and reasonableness would quickly caution any employee

that falsifying facts about time spent performing work-related tasks on designated work sites is likely to trigger disciplinary consequences. It is virtually inconceivable that the Grievant did not intentionally and consciously misrepresent the above-discussed facts in this time sheets.

The upshot is that when completing the time sheets and performing several of his duties, the Grievant engaged in falsification and misrepresentation of material facts and thereby committed theft by stealing time from ODA , which also establishes the Grievant's dishonesty. Finally, the discussion, in this case, also establishes that the Grievant had unauthorized absences due to his early departures from work as well as poor performance by not performing some of his out work assignments at all.

VII. Penalty Decision

Having held that the Grievant engaged in the misconduct as charged, some measure of discipline is warranted, and the Arbitrator turns now to the issue of penalty assessment. In reviewing the propriety of the Employer's penalty, the Arbitrator must determine whether the measure of discipline is arbitrary, capricious, or unreasonable. Application of these standards require a balancing of the aggravating and mitigating factors in this case.

A. Aggravating Factors

1. Seriousness of the Misconduct

Although not numerous, the aggravating factors in this case are nonetheless momentous. The paramount aggravating factor is the seriousness of the Grievant's misconduct, which is magnified by two factors. First, the inherent autonomy of the Grievant's position as a field representative for ODA obliges that agency to place a high degree of implicit trust in him. Because of the lack of continual direct supervision, trustworthiness is at a premium.

Indeed, as a general proposition, the degree and role of trustworthiness attendant to a particular any position is inversely proportional to the amount of direct supervision associated with that position. It is often the case in labor/management relations that employees who occupy positions of greater trust must be held to higher standards than their coworkers in positions subject to greater supervisory control. Heightened trust

tends to magnify episodes of otherwise pedestrian misconduct, rendering it wholly intolerable. Second, as pointed out earlier, the nature of the Grievant's misconduct inherently, strongly, and directly impugns his trustworthiness.

These two factors dovetail and essentially feed on each other. Given the extent, impact, and nature of the Grievant's misconduct, it is unreasonable to assume that ODA ever can be sure that future entries on the Grievant's time sheets are accurate. Nor is it feasible or efficient for ODA to attempt to exercise greater supervision over the Grievant as a Sanitarian Program Administrator I because the very nature of that type of work is highly likely to frustrate such efforts.

2. Intent

The second aggravating factor in this case is that the Grievant clearly intended to make the false entries in his time sheets. Perusal of the arbitral record leads to the inescapable conclusion that the Grievant knew exactly what he was doing when he repeatedly: (1) claimed to have performed specified tasks in one location while in reality being somewhere else, and (2) allegedly performed other tasks, without ever listing in his time sheets when or where he performed those tasks. Moreover, the tasks that the Grievant claimed to have been doing at home are not susceptible to verification by independent, impartial observers, thereby requiring even more implicit trust. Even if ODA had not explained the new time report forms to the Grievant, commonsense would inform any reasonable employee that such falsification is wholly unacceptable.

B. Mitigating Factors

1. Long-term Tenure

The most salient mitigating factor is the Grievant's long tenure with ODA. It is usually troubling to terminate a long-term employee, especially where, as here, there is not even a wisp of progressive discipline. However, the nature of some misconduct is so corrosive to the foundation of an employee-employer relationship as to overshadow even long-term tenure. Such misconduct essentially removes the prospect of progressive discipline from the realm of reasonable consideration in the penalty decision.

And so it is in the instant case. The Grievant's misconduct has reasonably and severely compromised an essential, foundational, and functional criterion of his position: Trustworthiness. Therefore, even the Grievant's long-term tenure with ODA cannot shelter him in this particular case.

2. Acceptable Job Performance

The second mitigating factor is the Grievant's job performance. Unfortunately the nature of his misconduct also tends to overshadow this mitigative criterion. Given the autonomy of the Grievant's position, when assessing the Grievant's job performance, ODA has been historically obliged to rely to some substantial degree on the representations in the Grievant's time sheets. Yet, the nature of his established misconduct in this case raises considerable doubt as to how much of his past job performance might have been tainted by falsifications in his prior time sheets. Even if the Grievant had falsified only those time sheets in the instant case, the resulting erosion of trustworthiness remains unmitigated.

VIII. The Award

For all the forgoing reasons the Arbitrator holds that the Grievant engaged in unauthorized absences, theft, dishonesty; neglect of duty; failure of good behavior, and poor performance. For all the foregoing reasons stated and discussed in this opinion, the Grievant is hereby DENIED.

Notary Certificate

State of Ohio)
)SS:
County of Madison

Before me the undersigned, Notary Public for Madison County, State of Ohio personally appeared Robert Brookins who swears under oath and under penalty of perjury that the contents of this document are true and accurate and were prepared solely by Robert Brookins who hereby acknowledges the execution of this instrument this 24th day of August 2000.

Signature of Notary Public: Judy M. Crain

Printed Name of Notary Public: Judy M. Crain

JUDY M. CRAIN
Notary Public, State of Ohio
My Commission Expires April 27, 2003

My commission expires:

County of Residency: CLARK

Robert Brookins
Robert Brookins