#730-A

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Computer Services Division

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For Computer Services Division

Edith Bargar, Labor Relations Officer, Management Advocate
Aurelia Edwards, Computer Operator, Supervisor 2
Beth Lewis, Labor Relations Specialist
Mike Price, Computer Operator, Manager 2
Susan Schultz, Computer Operator, Supervisor 2
Barbara Thomas, Computer Operator III

For OCSEA
Jeff Hodges, Computer Operator/Analyst
Damon A. Minter, Grievant
John Porter, Project Director, OCSEA
Karen Vroman, Union Advocate

Case-Specific Data

Date of Hearing:	**August 8, 2000**
Date of Award:	**October 10, 2000**
Contract Year:	**1998-2000**
Type of Grievance	**Fifteen-Day Suspension**
Grievance No.	**02-00-99-11-04-086-01-14-S**

Robert Brookins

Robert Brookins
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I. Preliminary Statement

The Computer Services Division (CSD 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 hear this dispute. Accordingly, on August 8, 2000, the Undersigned held an arbitral hearing on this matter at the Office of Collective Bargaining in Columbus, Ohio. All parties relevant to the resolution of this dispute 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 by the opponent. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs and opted for the latter.

II. The Facts

CSD is one of five divisions in the Department of Administrative Services (DAS), which employs approximately 1,000 employees. CSD also provides DAS and other state agencies with several types of services, including network, system, hardware, and software support. Before delving into the facts that triggered this dispute, a brief description of several relevant CSD functions is indicated.

A. Disaster Recovery Back-up Plan

The Disaster Recovery Back-up Plan ("disaster recovery" or "the Plan") seeks to preserve essential computer-based data for DAS customers in the event of a catastrophe such as fire, flood, bombs, or sabotage. The integrity of the Plan depends on consistently retrieving specific magnetic reel or cassette tapes (tapes) that contain critical data (storage data or storage tapes) and depositing them in the Fireproof Recovery Center (FRC), an off-site depository. The production section's role in disaster recovery involves controlling, tracking, and maintaining the essential back-up data on the storage tapes in approximately nine

interconnected DAS silos. Each silo holds approximately 5,500 tapes and is linked to CSD's mainframe computer in the production section. Moreover, the silos can automatically locate any particular tape, read or write data thereon, and transfer tapes from one silo to another.

B. Eject Jobs

"Eject jobs" are a critical step in disaster recovery and involve frequent retrieval of storage tapes from silos. When performing eject jobs, computer operators (operators) in the production section use special codes (ATAPCELL) that instruct computer programs to eject designated storage tapes from silo tape drives (drives) and to mount clean ("scratch") tapes as replacements. Because they can hinder other work schedules and clog factory lines, eject jobs are strictly timed from inception to completion.

C. Data Storage Collection

As referenced earlier in this opinion, a principal aim of disaster recovery is protecting storage data from damage or destruction during catastrophes. Accordingly, each morning and afternoon, employees return scratch tapes to the production section, retrieve storage tapes, and deposit them in FRC. Should a catastrophe strike, these storage tapes would be sent to a site in Philadelphia, Pennsylvania where their data would be used to restart essential computer-based operations in DAS and related facilities.

D. Tape Management—Fetch\Mount Operations

Tape management involves fetching and mounting designated tapes on designated drives. Customers frequently need to run programs from specific tapes, which must be located, retreived, set up, and manually mounted on drives. The names of these tapes are printed on a list entitled "FETCH," and operators are often required to retrieve tapes listed on FETCH. The tapes must be available to mount on designated tape drives within ten minutes after FETCH is printed. This ten-minute window is called VOLWAIT. If for some reason tapes on FETCH cannot be mounted or the computer program is too large, the operator in question must place the job on hold, properly label it ("Unavailable" or "ISU"—Inquiry Set-up Unavailable que), and alert a supervisor to the problem. Because time is of the essence in fetch/mount operations, employees so

assigned must schedule their breaks and lunches around those operations. Given the tight-team effort involved in fetch\mount operations, one employee's failure can adversely affect the team's performance.

CSD employed Mr. Damon Minter (the Grievant) as a Computer Operator 3 in the production section of the Ohio Data Network Operations, which is a part of the State of Ohio Computer Center (SOCC). The Grievant's duties include, among other tasks, fetch/mount, storage, and eject jobs, and the Employer trained him in the performance of his duties.[1] Furthermore, although the Grievant never requested assistance in improving his job performance, his supervisor (Ms Susan Shultz) offered to "shadow" him—accompany the Grievant as he performed his daily tasks and suggest ways to elevate his job performance. The Grievant rejected that offer.

On August 8, 2000—at the arbitral hearing before the Undersigned—the Grievant's record contained four active disciplinary episodes: (1) a one-day suspension for "Neglect of Duty–Failure to notify supervisor when leaving the work area; Failure to complete tape assignments or inform supervisor of the excessive wait time on fetching and mounting tapes." (2) A five-day suspension for "Falsification of time sheet, Failure to call-in properly, Leaving the work area without authorization, [and] making personal phone calls instead of completing work assignments." (3) a second five-day suspension for "Neglect of duty and Unprofessional behavior—profanity." and (4) a ten-day suspension for "Unauthorized absence, Neglect of Duty, and Insubordination."

The Grievant's problems in this dispute began after a temporary employee or coworker was fired on or about May 11, 1999. That termination left the Employer short-handed and obliged to divide the temporary employee's job assignments between the Grievant and another coworker (Ms. Tasha Custer). Also, on May 11, 1999, Ms. Shultz met with the Grievant and Ms. Custer to inform them that their work schedules would be adjusted to accommodate some of their former coworker's tasks. Then, on May 13, 1999 at approximately

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[1] *See* Joint Exhibits Nos. A-a through A-2.

10:40 a.m., Ms. Shultz sent the Grievant an e-mail which detailed his new work schedule.[2] A new task on the Grievant's work schedule involved sending storage data to an off-site location for collection by Mr. Badgley (Badgley storage data).[3] Although the Grievant had performed other storage tasks, it is unclear whether he had been assigned the Badgley storage job until May 13, 1999. Still, the record depicts no difference between that storage task and others that the Grievant had commonly performed.

The Badgley storage data was scheduled to be sent out no later than 10:00 a.m., on May 13, 1999. The Grievant never sent the data. The following morning (May 14, 1999) the Badgley storage data was found in the production section. Also, on May 13, 1999, the Grievant left work before completing his fetch and mount jobs.

On May 18, 1999, the Grievant was assigned fetch/mount responsibilities. His VOLWAITS on that day were 21, 34, 35, 56, and 67 minutes. As noted above, the normal VOLWAIT is 10 minutes. Nor did the Grievant request assistance with his fetch/mount duties on May 18, 1999. Finally, on May 20, 1999, the Grievant again failed to send the Badgley storage data to an off-site facility for collection.

A supervisor's disciplinary request alerted the Employer to the Grievant's alleged misconduct on or about May 20, 1999. Because that request contained incomplete information about the Grievant's alleged misconduct, the Employer had to conduct further investigations to verify the facts and circumstances surrounding the alleged misconduct. Also during this time, the Employer received and was obliged to investigate allegations that the Grievant had engaged in other misconduct. However, the Employer did not include the latter allegations in this dispute.

Due primarily to the incomplete information in the disciplinary request, the Employer did not notify the Grievant of the specific allegations against him until August 24, 1999, approximately 96 days after the

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[2] Joint Exhibit No. 2R.

[3] Joint Exhibit No. 2G.

Employer first learned of those allegations on May 20, 1999.[4] Also, on August 24, 1999, the Employer scheduled the predisciplinary hearing for August 30, 1999.[5] However, at the Union's request, the predisciplinary hearing was postponed until September 8, 1999.[6]

On October 12, 1999, the Predisciplinary Hearing Officer (Ms. Molly Staley) submitted her opinion and finding of just cause for discipline to the Director of DAS (Mr. C. Scott Johnson).[7] On October 21, 1999, Mr. Johnson signed (adopted) Ms. Staley's opinion and settled on a 15-day suspension as the appropriate disciplinary measure.[8] Finally, on October 27, 1999, Mr. Johnson notified the Grievant that he was suspended for 15 days beginning October 31, 1999.[9] The Employer cited neglect of duty as the general basis for the disciplinary decision. The components of that charge included: (1) failure to send the Badgley storage data out on May 13, 1999, (2) untimely initiation and completion of an eject job on May 16, 1999, (3) failure to complete or to monitor fetch/mount tasks on May 18, 1999, and (4) failure to send the Badgley storage data out on May 20, 1999.[10] The Union grieved the disciplinary decision on November 14, 1999.[11]

III. Relevant Contractual Provisions

Article 24.02

. . . . Disciplinary action shall be initiated as soon as *reasonably possible consistent with* the *requirements* of the *other provisions* of *this Article*. An Arbitrator deciding a disciplinary grievance *must consider* the timeliness of the Employer's decision to begin the disciplinary process.[12]

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4 Joint Exhibit No. 2U.

5 *Id.*

6 *Id.*

7 Joint Exhibit No. 2V.

8 *Id.*

9 Joint Exhibit No. 2W.

10 Joint Exhibit No. 2W.

11 Joint Exhibit No. 2X

12 (emphasis added).

Article 24.04

At the discretion of the Employer, in cases where *criminal investigation* may occur, the *predisciplinary* meeting may be delayed until after disposition of the criminal charges.

Article 24.05

The Agency or designated Deputy Director or equivalent shall make a *final decision* on the recommended *disciplinary action* as soon as *reasonably possible* but no later than *forty-five* (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply . . . where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.[13]

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

* * * *

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

IV. The Issues

A. Procedural Issue

Whether the Employer committed harmful procedural error either by: (1) waiting approximately 145 days after learning of the alleged misconduct to render a final disciplinary, (2) unreasonably delaying the predisciplinary hearing; (3) waiting more than 45 days after the predisciplinary hearing to render a final disciplinary decision.

B. Merit-Based Issue

Whether the Employer disciplined the Grievant for just cause.

V. Summaries of the Parties' Arguments

A. The Union's Arguments

1. The Employer committed procedural error by waiting approximately 145 days after learning of the alleged misconduct to impose discipline on the Grievant.

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[13] Joint Exhibit No. 1, at 84. (emphasis added).

2. The Employer committed procedural error by rendering its final disciplinary decision more than 45 days after the predisciplinary hearing.
3. The 15-day suspension is without just cause.
   a. The Grievant performed his assignments as he understood them and as he was directed.
      i. Extenuating circumstances—rather than negligence or some other deficit—caused any episodes of subpar performance by the Grievant.
   b. The Employer targeted the Grievant for discipline and ultimately based the discipline on perceived rather than actual work-rule infractions.
   c. The Employer methodically built a record against the Grievant in order to justify disciplining him.
   d. The Employer never attempted to correct any of the Grievant's alleged performance-related shortcomings.
4. The penalty imposed was disproportionate to the alleged misconduct.

B. The Employer's Arguments

1. The Employer rendered its final disciplinary decision within the 45-day limit of Article 24.05
2. Beyond the 45-day limitation of Article 24.05, reasonableness governs the grievance procedure.
3. Under the circumstances of this case, the Employer disciplined the Grievant within a reasonable time after discovering the misconduct in question in this dispute.
4. The 15-day suspension is for just cause.

VI. Discussion

A. Procedural Issue

The Union contends that the Employer committed a procedural error in derogation of the spirit of Articles 24.02 and 24.04 and Article 24.05, which warrants mitigation of the 15-day suspension.[14] Specifically, the Union points to the 145-day gap between May 20, 1999—when the Employer learned of the Grievant's alleged misconduct— and October 21, 1999—when the Union deems the final disciplinary decision to have been rendered. The Union's allegation of procedural error rests on two arguments: (1) the sheer length of the 145-day delay, and (2) the elapse of more than 45 days between the date of the predisciplinary hearing and the final disciplinary decision. Having raised this procedural issue, the Union also has the burden of persuasion thereon and must adduce preponderant evidence in the arbitral record as a whole, demonstrating the existence of this error and the causal nexus linking that error to any harm that the Grievant suffered.

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[14] The Union's Opening Statement asserts: "[A] 145-day *delay in bringing disciplinary action* resides outside of the intent of the contract language. . . ." Opening Statement, at 1.

1. The 145-Day Procedural Error

Before assessing the alleged procedural error, clarification of some points in the Union's allegation is indicated. In its opening statement, the Union states in relevant part: "Incidents leading to the 15-day suspension . . . [ended] May 20, 1999. The pre-disciplinary meeting was held on *October 12, 1999.* A 145-days time period elapsed before *'disciplinary action'* was implemented."[15]

Observe first that the predisciplinary hearing was held on September 8, 1999 and not on October 12, 1999. Thus, 111 days elapsed between May 20, 1999 and September 8, 1999 the date of the predisciplinary hearing.

Second, a semantic error plagues the Union's allegation of procedural error. If indeed the Union calculates the 145-day delay in implementing "disciplinary action" by counting from May 20, 1999 to October 12, 1999, then the Union implicitly assumes that the date of the predisciplinary hearing is also the date that the "disciplinary action was implemented."[16] In other words, on the face of its allegation of procedural error, the Union seems to equate the predisciplinary hearing with either the implementation of "disciplinary action" or with "disciplinary action" in the abstract. Neither assertion is correct, however. The date of the predisciplinary hearing is not the proper terminal point for determining when a "disciplinary action was implemented."

2. The Meaning of "Disciplinary Action"

"Disciplinary action" and "disciplinary process" are the ambiguous terms in Article 24.02. Fortunately, other provisions in Article 24.02 serve as interpretative lenses for "disciplinary action." For example, Article 24.02 also states: Disciplinary action shall be *commensurate with the offense.* . . . "Disciplinary action to include *several disciplinary measures* ranging from oral reprimands to termination." These passages reflect an intent to define "disciplinary action" as the quantum of discipline actually imposed

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[15] Union Opening Statement, at 1. (Single quotation marks added) (emphasis added).

[16] Union's Opening Statement, at 1.

on a grievant.

Also, a quick juxtaposing of the context of "disciplinary action" in Article 24.02 with that of "disciplinary measures" in Article 24.05 reveals an intent to use those phrases synonymously. As pointed out above, Article 24.02 provides in relevant part: "Disciplinary action shall be *commensurate with the offense*." Similarly, Article 24.05 provides: "Disciplinary measures imposed shall be reasonable and *commensurate with the offense* and shall not be used solely for punishment." Therefore, the parties probably intended for "disciplinary action" as well as "disciplinary measures" to refer to the type of discipline actually imposed on a grievant.

"Disciplinary process" represents a change in terminology relative to "disciplinary action." Article 24.02 (and one part of Article 24.05[17]) uses "disciplinary action" to reference the quantum of discipline imposed. A common canon of contract interpretation is that unless otherwise indicated, a change in terminology reflects an intent to change the meaning of the term in question.[18] Therefore, one can reasonably interpret the abrupt change from "disciplinary action" to "disciplinary process" to indicate an intent to distinguish the purpose for which these phrases are used.

The next task is to interpret the meaning of "disciplinary process." "Process" refers to a series of steps, actions, or operations that lead to a result, rather than to one decision or step within that series.[19] Accordingly, "disciplinary process" reasonably references all steps or components within a given disciplinary course. This reasoning suggests that "the Employer's decision to begin the disciplinary process" reasonably refers to a decision to take the very first step in the disciplinary process after learning of alleged

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[17] Article 24.05 refers to making "a final decision on the recommended *disciplinary action*." Joint Exhibit No. 1 at 84.

[18] FRANK ELKOURI AND EDNA ASPER ELKOURI, HOW ARBITRATION WORKS, (Marlin M. Voltz & Edward P. Groggin (citations omitted).-Editors 490, 1985).

[19] "A series of actions, changes, or functions bringing about a result. . . ." The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1445 (3rd ed. 1992).

misconduct, e.g., conducting a preliminary investigation to decide whether to submit a disciplinary request. Thus, as pointed out earlier, Article 24.02 reflects no intent to define a "disciplinary action" in terms of a predisciplinary hearing; instead it views "disciplinary action" as the quantum or type of discipline actually imposed. The 15-day suspension is, therefore, the "disciplinary action" in the instant case, and that "disciplinary action" was actually imposed on October 31, 1999 when the Grievant began serving the 15-day suspension.[20] Finally, the foregoing reasoning shows that 164 (rather than 145) days elapsed from May 20, 1999—the date of the last alleged misconduct—to October 31, 1999, when the "disciplinary action" was imposed or "implemented."

3. The Employer's Responses to the Union's 145-Day Allegation

a. Impact of the Rule of Reasonableness

The Employer offers a three-pronged response to the Union's general allegation that the145-day delay is actionable procedural error. First, it contends that the reasonableness standard in Article 24.02 obliges the Arbitrator to examine the relevant circumstances surrounding the alleged procedural untimeliness, when assessing the existence of the alleged procedural error.

The Employer is correct. Reasonableness is the touchstone in Articles 24.02, 24.04, and 24.05, all of which factor prominently into the instant procedural dispute. First, Article 24.05 requires the Employer to make "a *final decision* on the recommended *disciplinary action* as soon as *reasonably possible* but no later than *forty-five* (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply . . . where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges."[21] On its face Article 24.05 addresses when the Employer must finally select—as distinguished from actually impose—a measure of discipline. The Employer must finally select a disciplinary measure

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[20] Joint Exhibit No. 2W.

[21] Joint Exhibit No. 1, at 84. (emphasis added).

within 45 days after a predisciplinary hearing, unless a criminal investigation of the alleged misconduct is likely. In the Arbitrator's view, the "criminal investigation" exception suspends the 45-day limit but not the reasonableness standard.[22] Instead that exception implicitly requires the Employer to make a final decision on a "disciplinary action" within a reasonable time after the criminal investigation is completed, or in light of the criminal investigations.[23]

Article 24.02 requires the Employer to actually initiate—as distinguished from finally select—a "disciplinary action" "as soon as *reasonably possible* consistent with the requirements of the other provisions of this Article."[24] Thus, the rule of reasonableness also governs when the Employer must actually impose "disciplinary action," in light of the provisions in other sections of Article 24. Furthermore, the explicit reference to "other provisions" within this Article [Article 24.04] implicitly incorporates the "criminal investigation" exception in Article 24.05.

Finally, Article 24.04 provides: "At the discretion of the Employer, in cases where *criminal investigation* may occur, the *predisciplinary* meeting may be delayed until after disposition of the criminal charges." Article 24.04 also incorporates the "criminal investigation" exception by allowing the Employer to delay a *predisciplinary hearing,* in the face of a probable criminal investigation. Also, in the Arbitrator's view, the reasonableness standard governs when the Employer must hold predisciplinary hearings in the absence of probable criminal investigations.

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[22] Article 24.05 actually places three time limits on the Employer regarding final disciplinary decisions. First, as a general proposition the Employer is expected to make final disciplinary decisions within a reasonable time. Second, the Employer must render final disciplinary decisions within 45 days after predisciplinary hearings. Third, the Employer may disregard the 45-day limit when criminal investigations are likely to occur.

[23] There must be a reasonable chance that a criminal investigation will occur. Otherwise, the "criminal investigation exception" could eviscerate the reasonableness standard. Additionally, it is not unreasonable to argue that the 45-day limit is resurrected after the completion of the criminal investigation. In short, the Employer may be reasonably held to finally selecting a "disciplinary action" within 45 days after a criminal investigation.

[24] (Emphasis added).

Ultimately, then reasonableness is the cornerstone of Articles 24.02, 24.04, and 24.05. And the Employer, under Article 24.02, may delay the implementation of a finally selected measure of discipline for only a reasonable time, absent a pending or probable criminal investigation. Viewed in this light, the Union's argument that a 145-day delay violates the intent of Article 24.02 implicitly states that the 145-day delay is unreasonable.

b. Sufficiency of Evidence Supporting the Procedural Allegation

The Employer points out that the Union failed to offer any specific evidence in support of its allegation of procedural error. Instead, the Union merely stresses the dates of: (1) the Grievant's misconduct, (2) the pre-disciplinary hearing, and (3) the arbitration.

There is a paucity of specific evidence corroborating the Union's procedural claim. Still that deficiency is not outcome-determinative in the instant case, given the nature of the evidence that the Union does proffer as well as the nature of the evidence in the arbitral record as a whole. Not withstanding the Union's erroneous calculations, evidence in the record demonstrates that the Employer rendered a final decision on October 21, 1999, approximately 154 days after discovering the alleged misconduct on May 20, 1999, and imposed "disciplinary action," on October 31, 1999, approximately 164 days after May 20, 1999. Standing alone, the magnitude of the 164-day delay in imposing "disciplinary action" raises a rebuttable presumption of impermissible delay or abuse and, hence, of procedural error. This is especially true where, as here, reasonableness is the procedural sine qua non in the parties' Collective-Bargaining Agreement. The presumption satisfies the Union's initial burden of establishing its procedural claim, obliging the Employer to demonstrate that: (1) the delay was not the Employer's fault; (2) even with due diligence, circumstances rendered the delay unavoidable, or (3) some other credible circumstance justifies the delay.

4. Reasonableness of Delaying the Predisciplinary Hearing for 111 Days

The Arbitrator will apply the reasonableness test, under Article 24.04, to assess the propriety of the 111-day delay from May 20, 1999 to September 8, 1999, when the predisciplinary hearing was held. In

defense of the 111-day delay, the Employer identifies several "legitimate" circumstances, which allegedly hampered the imposition of discipline, thereby shielding the Employer from procedural error and its consequences.

First, a Labor Relations Officer (Ms. Edith Bargar) credibly testified for the employer that insufficient information in the disciplinary request was pivotal in the delay and, hence, in the initial scheduling of the predisciplinary hearing. Ms. Bargar specifically stated that the informational deficiency prolonged her investigation of the Grievant's alleged misconduct. Ms. Bargar also established that disciplinary requests originate within managerial ranks and filter up through the managerial hierarchy to her office. The Union apparently has no part in this particular process.

Absent extenuating circumstances, it is unreasonable to delay a predisciplinary hearing for approximately 111 days primarily because of an informational deficiency in management's disciplinary request. Permitting either managerial or union oversights to substantially delay the predisciplinary hearing would undermine (if not thwart) the very purpose for imposing reasonable contractual time limits in the first instance. Nor does the arbitral record reveal any evidence suggesting that with due diligence the Employer could not have held a predisciplinary hearing much sooner than 111 days. In fact the very reason for the delay—insufficient information in the disciplinary request—suggests a lack of diligence. Accordingly, the Arbitrator holds that the 111-day delay of the predisciplinary hearing is unreasonable and, thus, constitutes procedural error under Article 24.02, which places a premium on initiating disciplinary actions "as soon as reasonably possible. . . ."[25]

Although the dearth of information in the disciplinary request was the primary culprit in delaying the predisciplinary hearing, Ms. Bargar also testified that before proceeding to a predisciplinary hearing, she had to investigate other allegations of misconduct by the Grievant, apparently involving violence or threats of violence. The Union argues that these investigations should not have delayed the processing of the

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[25] Joint Exhibit No. 1.

allegations in the instant dispute. In other words, the Union discounts these investigations because they resulted in no additional charges against the Grievant and because neither the Union nor the Grievant were ever notified of any other alleged misconduct by the Grievant. The problem here is that the arbitral record offers no clue as to how long these investigations delayed the predisciplinary hearing. Without some sense of that fact, the Arbitrator has no basis for assessing the reasonableness of the investigations.

Still a word of caution is warranted regarding the tension between waiting to simultaneously bring all supportable charges on the one hand, and avoiding undue delay in bringing charges for which there is already supportable evidence, on the other. Efficiencies and equities lie on both sides of this situation. In one sense, asserting all supportable charges at once is efficient and fair for both parties because it avoids piecemeal disputes and the accompanying difficulty and inefficiency of defending a string of charges extending over a period of time. On the other hand, by tarrying too long to investigate subsequent allegations of misconduct, the Employer risks compromising the probative value of its in-hand evidence as well the Union's. In short, the need to investigate subsequent claims of misconduct should not unduly delay the processing of present claims for which there is adequate evidence. Ultimately, however, as held above, the 111-day delay was unreasonable and warrants some adjustment of any valid disciplinary measure.

5. The 45-Day Limit in Article 24.05

The Employer denies having violated the explicit 45-day time limit in Article 24.05. Specifically, in its Post-Hearing Brief, the Employer cites arbitral precedent for the proposition that: "[T]he date of the Director's signature on the *notice of discipline* indicates when he/she has made a decision to impose discipline. This is the date used to determine whether the Employer has complied with the forty-five-day time limit outlined in Section 24.05."[26]

The arbitral record establishes that the predisciplinary hearing was held on September 8, 1999 and that the Director of the Department of Administrative Services (Mr. C. Scott Johnson) signed Ms. Stalely's

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[26] Employer's Post-Hearing Brief at 8.

predisciplinary opinion on October 21, 1999, approximately 43 days after the date of the predisciplinary hearing. The Union's opening statement focuses on the date the "disciplinary action" was imposed but offers no specific evidence about when a final disciplinary decision is made, i.e., whether such a decision is made when the Director selects a "disciplinary action" and signs the opinion of the predisciplinary hearing officer. Nevertheless, the Arbitrator will assess this issue in light of evidence in the record.

Perusal of Article 24.05 together with a reference to the facts in this dispute support the Employer's position. The first paragraph of Article 24.05 states: "The Agency or designated Deputy Director or equivalent shall make a *final decision* on the recommended *disciplinary action* as soon as *reasonably possible* but no later than *forty-five* (45) days after the conclusion of the pre-discipline meeting." In the Arbitrator's view, a "final decision on recommended disciplinary action" (final disciplinary decision) occurs when the Agency Head settles upon a measure of discipline that is ultimately imposed. Evidence in the record establishes that the final disciplinary decision was rendered, on October 21, 1999, when Mr. Johnson selected a 15-day suspension and signed Ms. Staley's opinion. Forty-three (rather than 46) elapsed from May 20 to October 21.[27] Accordingly, the Arbitrator holds that the Employer did not violate the 45-day deadline in Article 24.05.

The third paragraph of Article 24.05 provides that, "if a final decision is made to impose discipline, the employee and the Union shall be notified in writing."[28] Mr. Johnson issued that written notification, on October 27, 1999.[29]

6. Application of the Doctrine of Harmful Error

Having held that the Employer violated Article 24.04 by waiting approximately 111 days before

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[27] If one subtracts the Union-initiated, nine-day postponement of the predisciplinary hearing, then only 34 days separate these dates.

[28] Joint Exhibit No. 2W.

[29] Joint Exhibit No. 2W.

holding the predisciplinary hearing, the Arbitrator now considers whether that procedural error constitutes harmful procedural error (harmful error). A claim of harmful error effectively screens out frivolous and trivial claims of procedural error, thereby helping to preserve notions of fundamental fairness that are integral to procedural due process.[30] To establish harmful error, the Union must show not only that the Grievant was harmed but also that the procedural error caused the harm.[31] In short, but for the procedural error the final disciplinary decision would have more favorable to the Grievant.

The Union seeks to establish harm in this case by alleging that the procedural error adversely impacted the Grievant. Specifically, in its Post-Hearing Brief, the Union correctly points out that the Grievant was first notified of the asserted misconduct approximately 96 days after it allegedly occurred. According to the Union, the Grievant was thereby deprived of the capacity either to recall or to defend the facts. In effect, the Union implies that the facts surrounding the Grievant's alleged misconduct—on May 13 and 20, 1999—were stale by August 24, 1999, when the Employer notified him about the allegations of misconduct and even staler by September 8, 1999, when the predisciplinary hearing was held.

Conversely, the Employer contends that even assuming, arguendo, the existence of a procedural

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[30] At least one agency has defined harmful error as "[e]rror by the Agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant [grievant] to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights." *See, e.g.,* Marine Corps Air Ground Command Center, USMC, Morale, Welfare v. American Federation of Government Employees (AFGE), Local 2018, 1998 WL 409536 (March 30, 1998,Gentile, Arb.).

[31] Arbitrators do not always explicitly apply harmful error, they implicitly apply it. *See, e.g,* In re Springfield Underground, Inc. and Teamsters Local 245, 114 BNA 65 (March 3, 2000, Pratte, Arbitrator) stating, "The distinction is significant. The essential question for an arbitrator is not whether disciplinary action was totally free from procedural error, but rather whether the process was fundamentally fair. He must find in order to overturn the employer's action on procedural grounds, that there was at least a possibility, however remote, that the procedural error may have deprived the grievant of a fair consideration of his case." Engelhard Corporation -and- IBEW Local 1430, 1999 WL 1584863, (December 22, 1999, Eischen, Arb.), Stating, "The Company adequately proved its charges against this Grievant and I find no fatal procedural errors in the investigation which would require reversal of management's conclusions that M violated the Substance Abuse Policy and engaged in calculated acts of insubordination to cover up that violation on August 21, 1998."

error, the Union failed to establish that the procedural error either harmed or prejudiced the Grievant. Specifically, the Employer points out that the Union offers no independent evidence to support its claim of harmful error.

The Employer is correct. The arbitral record lacks direct, corroborative evidence that the procedural error caused the Grievant's diminished capacity to recall and defend the facts in this case. During his direct testimony at the arbitral hearing, the Grievant stated that he could not recall whether two charges relating to May 18, 1999 were correct. First, the Grievant said he could not recall if he started eject jobs on time. He also suggested that if in fact he did not, then his having to work overtime might have been the culprit. Second, he claimed that he could not recall whether he completed his storage duties, but if he did not, a system breakdown might have prevented him from doing so. Because the Employer elected not to cross-examine the Grievant and because nothing in the record rebuts his testimony regarding his loss of recall, the Arbitrator deems the testimony credible. Even so, standing alone this testimony only establishes *that* the Grievant suffered a lapse in memory and not *why* he suffered that lapse. In other words, the testimony does not show that but for the 96-day gap in notification, the Grievant would have recalled the facts surrounding the above-mentioned events of May 18, 1999. Moreover, the memory lapse was limited to the facts surrounding only one of four episodes of alleged misconduct.

The Union's argument that the procedural error caused the Grievant's memory lapse relies solely on the length of the 96-day interlude. Therefore, the issue is whether on its face that interlude supports an inference of harm in the form of a memory lapse. That is, whether the interlude is per se harmful in that sense.

Even absent direct corroborative evidence of a causal nexus between the procedural error and the Grievant's memory lapse, one could reasonably conclude that more likely than not the mere existence of a 96-day delay would smudge one's recall of certain facts. Here the Grievant could not address the accuracy of two charges on May 18, 1999. Furthermore, assuming arguendo that the charges are correct, he was

uncertain about the reasons for his subpar job performance. This evidence supports a holding that more likely than not the procedural error was a causal factor in the Grievant's memory lapse about the accuracy of the above-mentioned charges on May 18, 1999. Consequently, the Arbitrator holds that the procedural error was a causal factor in the Grievant's inability to recall facts surrounding those specific charges.

Finally, there is the issue of whether the limited impact of the procedural error harmed the Grievant in either of two senses: (1) caused or contributed to the decision to discipline the Grievant in the first instance, or (2) enhanced the magnitude of discipline actually imposed. Even if the Grievant had perfect recall of the facts surrounding the two charges on May 18, 1999, one cannot reasonably conclude that he would have gone discipline-free, given the existence of three other episodes of misconduct. Therefore, the Arbitrator holds that the Grievant's memory lapse here would not have shielded him against all discipline. Similarly, had the Grievant been able to recall the facts surrounding the charges of May 18, 1999, perhaps he would have been able to mount a challenge sufficient to persuade the Employer to remove them from the list of charges. Still, assuming arguendo that the charges of May 18 were dropped, the Arbitrator finds no evidence in the record to show that the Employer would have reduced the measure of discipline imposed, given the Grievant's prior disciplinary record and the three remaining charges. Consequently, the Arbitrator holds that whatever impact the procedural error had on the Grievant's memory lapse, that error was unlikely to alter either the decision to discipline the Grievant or the measure of discipline ultimately imposed.

VII. The Merits

A. Failure to Send Badgley Storage Data—May 13 and 20, 1999

The record clearly establishes that the Grievant did not send the storage tapes that Mr. Badgley was scheduled to collect on May 13, 1999. As a result, the only issue remaining is whether any other circumstances justify that failure.

None do. The Grievant denies responsibility for sending the Badgley storage data on May 13, 1999, claiming he did not realize that his work schedule had been changed until he received Ms. Shultz's e-mail

on May 13, 1999, at approximately 10:40 a.m., much too late to send out the Badgley storage data, which was due to be sent out at 10:00 a.m.

Although the Arbitrator is persuaded that Ms. Schultz sought to verbally inform the Grievant about his altered job tasks on May 11, 1999, the analysis hardly ends there. For example, nothing in the record establishes that the Grievant either understood or had reason to understand the full content of Ms. Shultz's message. The first fully verifiable evidence of the content of Ms. Shultz's message is the e-mail she sent to the Grievant at approximately 10:40 a.m., on May 13, 1999. However, the Employer admits—and the record corroborates—that the Badgley storage data was scheduled to be shipped out by 10:00 a.m., on May 13, 1999.[32] Therefore, the e-mail that Ms. Shultz's sent at 10:40 a.m. did not timely notify the Grievant of his altered work schedule. Nor is there any evidence that the Grievant was normally responsible for sending out the Badgley storage. Consequently, the only evidence suggesting that the Grievant knew or should have known that he was assigned to handle the Badgley storage data on May 11, 1999 is the Grievant's initials on the "Outgoing Storage Completion Form" (storage form).[33]

Indeed, the Employer argues that those initials demonstrate that the Grievant was aware of his new assignment to and responsibility for the Badgley storage data. One key to this issue is whether the storage form listed only the Grievant's job duties. If so, then he must have known of his responsibility for the Badgley storage data, which is prominently listed on the face of the storage form.

The Arbitrator is convinced that the storage form listed only the Grievant's job duties, since only his initials appear on the form, albeit only once. The absence of other employees' initials infers either that no other employee performed their assignments on that list or that the Grievant simply did not initial the jobs on the storage form, after he completed them. The latter inference is clearly more plausible than the former, especially given the Employer's credible testimony that the Grievant had failed to initial other documents

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[32] *See* Joint Exhibit No. 2Q-R.

[33] Joint Exhibit No. 2G.

that were supposed to be initialed.[34]

Finally, the Grievant testified that when work schedules changed, he would customarily follow the previous day's schedule. However, the Grievant's initials on the work schedule for May 13, 1999 suggests that he was following that schedule and not one for a previous day. Finally, prior to May 13, 1999, the Grievant had performed storage operations, and thus should have had at least a basic knowledge of how to prepare documentation associated with that task.

Ultimately, then, preponderant evidence in the record shows that the Grievant knew or had reason to know that he had been assigned responsibility for the Badgley storage data; yet, he failed to send out the storage data as scheduled. Furthermore, testimony in the record and corroborative statements therein show that the Grievant did not inform a supervisor of this problem.[35]

The foregoing reasons and rationale persuade the Arbitrator that the Grievant failed to complete the Badgley storage on May 20, 1999.

B. Tardy Initiation/Completion of Eject Job—May 16, 1999

The testimony and written statement of Ms. Shultz show that, on May 16, 1999, the Grievant failed to complete his eject job at 3:00 p.m. as scheduled. Instead he did not begin that task until approximately 3:30 p.m. While testifying before the Undersigned at the arbitral hearing, the Grievant offered no justification for his tardy completion of the eject job. Nor does the Union's Post-Hearing Brief contain a plausible explanation for this delay in the Grievant's job performance. Consequently, the Arbitrator is obliged to sustain this charge against the Grievant.

C. Failure to Complete/Monitor Fetch/Mount Task—May 18, 1999

The testimony and written statements of Ms. Shultz establish that, on May 18, 1999, the Grievant had VOLWAIT times of 21, 34, 35, 56, and 67 minutes. Ms. Barbara Thomas credibly testified that she as

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[34] *See, e.g.,* Joint Exhibits Nos.

[35] Joint Exhibit No. 2C.

well as other operators occasionally exceed the 10-minute, VOLWAITE window. However, these operators notify their supervisors of the problem, but the Grievant failed to notify anyone about his VOLWAITE problem. Moreover, the Grievant testified that he was not sure what could have caused this magnitude of tardiness but ultimately surmised that overtime might have been the culprit. In other words, the Grievant neither denies this charge nor explains it adequately. Again, this record obliges the Arbitrator to sustain the charge.

VIII. Penalty Assessment

Because the Employer established all four of its charges against the Grievant, some disciplinary measure is appropriate. In assessing the proper measure of discipline, the Arbitrator considers both aggravative and mitigative factors in that order.

A. Aggravative Factors

The most salient aggravative factor is the Grievant's disciplinary record, which has two remarkable components. First, it reveals a series of increasingly stronger disciplinary measures, which standing alone is not especially remarkable, given the character of progressive discipline. Second, and much more remarkable, most of the incidences of misconduct are either directly (or very closely) related to the Grievant's job performance. This worrisome consistency in the nature and character of his misconduct suggests a certain resistance to the corrective, rehabilitative sway of progressive discipline.

The second aggravating factor is that the Employer established all of its charges against the Grievant, which militates against a reduction of the prescribed measure of discipline.

B. Mitigative Factors

The procedural error is the major mitigative factor in this case. Fundamental notions of procedural fairness are contravened if the Employer's own oversights are effectively equated with that amorphous set of legitimate circumstances that serves to justifiably extend the time within which an employee is notified of alleged misconduct.

The second mitigative factor is the Grievant's nine years of service with the Employer. However, the limited number of years prevents this from being a particularly strong mitigative factor, especially in light of the Grievant's regrettable disciplinary history.

This balance of aggravative and mitigative factors persuades the Arbitrator to reduce the suspension from 15 to 10 days. The procedural error factors prominently in this decision. In this case, it is difficult to imagine why either the Employer or the Grievant should escape unscathed, since both carry their own genre of culpability—the Employer, procedural; the Grievant, substantive—though the Grievant's far outweighs the Employer's.

IX. The Award

For all the foregoing reasons, the Employer is hereby ordered to reduce the 15-day suspension to a 10-day suspension without pay and to make the Grievant whole for the five-day difference between these suspensions. Finally, the Grievant's seniority is to remain undiminished by the 10-day suspension.

Notary Certificate

State of Indiana)
)SS:
County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, 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 6th day of November, 2000.
Signature of Notary Public: Anita Jones
Printed Name of Notary Public: Anita Jones
My commission expires: May 2, 2007
County of Residency: Boone

Robert Brookins
Robert Brookins