#806

REVIEWED BY
OCT 1 8 2002
GRIEVANCE COORDINATOR

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF NATURAL RESOURCES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Richard Patton

Case No. 25-12-(04-23-01)-09-01-09

Date of Hearing: August 22, 2002

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Carrie Varner
2nd Chair: Don Conley

Witnesses:

Richard Patton
Rian Licht
Dave Domenick
Tim Koppert
Dave Johnson

For the Employer:

Advocate: Jon Weiser
2nd Chair: Andy Schulman

Witnesses:

Sue Johnson
Don Starr

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: October 16, 2002

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2000 through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the ten (10) day suspension of the Grievant, Richard Patton ("Patton"), for insubordination and failure to follow a direct order of a supervisor. The discipline was issued because the Grievant refused to release certain medical information as a result of an exam pursuant to Ohio Administrative Code ("OAC") 123:1-33-01.

The discipline of the Grievant was issued on April 6, 2001 and appealed in accord with Article 24 of the CBA. This matter was heard on August 22, 2002 and both parties had the opportunity to present evidence through witnesses and exhibits. Post hearing briefs were submitted by both parties, with the record being closed as of September 9, 2002. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Patton was employed as a radio operator for Ohio Department of Natural Resources ("ODNR") at the time the ten (10) day suspension was implemented. The Grievant worked at Cleveland Lakefront State Park ("CLSP") and had approximately fifteen and one-half (15 ½) years of service as a state employee. At the time the discipline was issued Patton had no active discipline. From 1987 until the mid 1990's the Grievant worked for ODNR in Columbus, Ohio as a radio operator. While in Columbus, Ohio the Grievant served as a key witness in a criminal investigation that resulted in a co-worker being indicted, and he also met Jim Schneider ("Schneider") who was working at CLSP at that time, due to their shared passion as amateur radio operators.

ODNR is responsible for maintaining and protecting Ohio's natural resources (i.e., parks, wildlife, water, etc.). To that extent ODNR currently operates seventeen (17) divisions and numerous offices within the state. The largest division is Parks and Recreation which is

responsible for seventy-three (73) state parks. Patton worked at CLSP as a radio operator at all times relevant herein. Patton's duties required him to transmit and receive communications regarding various operations of CLSP. As an example, Patton would communicate with park officer patrols and other area law enforcement entities for planning and/or emergency response(s). Radio operators duties also included maintaining written logs on activities such as towed vehicles; enforcement operation records; schedules and correspondence; operation of the Law Enforcement Automated Data System ("LEADS"); Cuyahoga Regional Information System; and respond to telephone inquiries by the public. The foregoing is illustrative not dispositive of the duties of Patton and the other radio operators at ODNR.

Patton's immediate supervisor was Dave Frank ("Frank"), Assistant Park Manager. On December 12, 2000 Patton was ordered by Greg Rees ("Rees") to attend a psychological evaluation based upon a series of events involving co-workers and Frank. The evaluation process included the execution of a medical release to enable ODNR to obtain the results of the evaluation. (JX 6(A)). The December 12, 2000 letter to Patton states in part "In accordance with the Ohio Administrative Code Article/Section 123:1-33-01, the Department is requiring you to submit to a psychological evaluation...[E]nclosed you will find a release of information form that is to be signed by you and returned to me prior to your scheduled appointment...." (JX 6(A)).

OAC 123:1-33-01 requires that the appointing authority prior to the examination provide the examiner with facts relating to the condition "...and shall supply additional information including physical and mental requirements of the employee's position; duty statements; job classifications; and position descriptions." (JX 4).

Sue Johnson ("S. Johnson"), Labor Relations Officer ("LRO") testified she acts as the coordinator for scheduling Independent Medical Examination ("IME") for ODNR and was familiar with the precedents required by OAC 123:1-33-01. S. Johnson indicated that the operating division within ODNR seeking an IME was required to provide some type of written justification which was provided to the doctor per OAC 123:1-33-01. The employee is required to submit to the evaluation and provide a medical release, however "...[An] employee's refusal to release the

results of an examination amounts to insubordination, punishable by the imposition of discipline up to and including removal." (JX 4). S. Johnson was one of three LROs in the Human Resources Office responsible for supporting the divisions and a review of the records supports that all ODNR employees when requested submitted to the exam and provided the medical records since 1994. (JX 16). Regarding Patton, S. Johnson indicated that the position description (JX 4B) and Frank's memo of October 20, 2000 (JX 4A) was forwarded to Dr. John G. Stratton, Ph.D ("Stratton") to provide the supportive information required by OAC 123:1-33-01.

Patton executed the medical release attached to the December 12, 2000 directive and on December 13, 2000, December 28, 2000 and January 11, 2001 he was evaluated by Dr. Stratton. Sometime prior to the completion of Dr. Stratton's report and findings, Patton revoked the medical release. Dr. Stratton informed LRO Rees of the revocation and as a result his completed report could not be released.

Rees informed Patton by letter dated February 15, 2001 that ODNR was scheduling a pre-disciplinary hearing on February 20, 2001 to consider his removal for insubordination and willful disobedience of a direct order, to wit – the release of the medical information. The pre-disciplinary meeting occurred on February 28, 2001 and Patton was given the same directive a second time to release the medical results and a second warning that discipline including removal could result, which was highlighted by Rees' proclamation that "[I] want to give you one final opportunity to release the results of the examination. You have until March 7, 2001 to comply with this direct work order...(JX 6c, emphasis added)."

Patton did not comply and on March 26, 2001 the pre-disciplinary meeting was reconvened with S. Johnson functioning as the hearing officer. ODNR considered Patton's refusal as insubordinate, warranting removal. Patton, on the other hand, had grave concerns as to the accuracy of the supportive and "back-up" information that was supplied by ODNR to Dr. Stratton.

Patton contends that the allegations listed in Frank's memo of October 20, 2000 were misleading at best, and as of December 12, 2000 Patton had not been disciplined for any conduct involving co-workers. Patton contends that his involvement in reporting allegations of past criminal activity involving Frank among others at CLSP created a hostile environment and was used as the justification for being harassed and the scheduling of the IME.

Patton points out that co-worker Schneider although a member of the Fraternal Order of Police ("FOP"), was never subjected to an IME despite a pattern of irrational behavior related to use of ODNR vehicles, threats to co-workers, yelling, cursing and physically intimidating conduct. Witnesses, David Domenick ("Domenick"), Rian Licht ("Licht") and Dave Johnson ("D. Johnson") testified to specific acts of behavior by Schneider that they consider either threatening or irrational. They also believed that Frank was vindictive and retaliatory towards Patton due to the filing of various complaints against Frank by the Grievant. However, Domenick and Licht were unaware of any bargaining unit member, i.e., OCSEA and/or FOP, who had not comply with the IME directives once ordered.

Patton further believed the employer used the IME as a punitive measure to silence his various protest against wrongdoings at CLSP. As an example, Patton and Tim Koppert ("Koppert") were scheduled for IMEs' on account of their complaints and prior attempts at discipline by ODNR were unsuccessful. The use of the IMEs' without a showing of just cause became punitive, against Patton and Koppert since Dr. Stratton was a "hired gun" for ODNR.

Regarding the examinations, Patton and Koppert testified that the unprofessional and intimidating manner of Dr. Stratton solidified their belief that he was nothing more than a tool used by ODNR to guarantee their removal. The credibility of Dr. Stratton is an issue when Patton was told to stop "bugging management" with complaints and grievances. Patton requested that Dr. Stratton provide documentation to support the IME due to the perception that Dr. Stratton's goal was to remove "problem employees" from ODNR.(JX 12).

At the conclusion of pre-disciplinary meeting, S. Johnson recommended a ten (10) day suspension as opposed to removal. Mitigation by S. Johnson included Patton prior work record, years of service and agreement to undergo another IME by a doctor other than Stratton.

ISSUE

Was the Grievant, Richard Patton, discipline of ten (10) days for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA, ORC AND OHIO ADMINISTRATEIVE CODE
ARTICLE 24 – DISCIPLINE

24.01 – Standard

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

OAC STANDARDS OF EMPLOYEE CONDUCT

123:1-33-01 Medical and psychological examinations.

(A) An appointing authority may require that an employee submit to medical or psychological examinations. Such examinations shall be conducted by one or more licensed practitioners selected by the appointing authority. Prior to any examination, the appointing authority shall supply the examining practitioner with facts relating to the perceived disabling illness, injury, or condition, and shall supply additional information including physical and mental requirements of the employee's position; duty statements; job classification specifications; and position descriptions. The cost of the examinations shall be paid by the appointing authority. Both the appointing authority and the employee shall receive the results of any examination and related documents subject to division (C)(1) of Section 1347.08 of the Revised Code.

(B) Employee's failure to appear for examination. An employee's refusal to submit to an examination, the unexcused failure to appear for an examination, or the refusal to release the results of an examination amounts to insubordination, punishable by the imposition of discipline up to and including removal.

OHIO REVISED CODE § 4117.10(A)

In part:

(A) Where no agreement exists or when an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wagers, hours, and terms and conditions of employment for public employees.

OHIO REVISED CODE § 124.09(A)

In part:

The Director of Administrative Services shall do all of the following:

(A) Prescribe, amend, and enforce administrative rules for the purpose of carrying out the functions, powers, and duties vested in and imposed upon the director by this chapter. Except in the case of rules adopted pursuant to Section 124.14 of the Revised Code, the prescription, amendment and enforcement of rules under this division are subject to approval, disapproval, or modification by the state personnel board of review.

POSITION OF THE PARTIES

POSITION OF THE UNION

The Grievant's performance as an employee for over fifteen (15) years was exemplary and no active discipline was on the record when the ten (10) day suspension occurred. The requirement that the Grievant submit to an IME and release the results pursuant to OAC 123:1-33-01 exceeds the lawful authority under R.C. § 124.09 (A) of the Director of Department of Administrative Services ("DAS").

The authority to adopt a regulation requiring IMEs' must be expressed and not implied. OAC 123:1-33-01 application to Patton violates privacy rights under federal and state laws. By engaging in policy-making as oppose to rule-making, the Director of DAS usurped the authority of the general assembly. In sum, the Director not having the authority promulgated an illegal regulation-hence the Order is void.

In the alternative, if OAC 123:1-33-01 is a lawful regulation, bargaining unit members of the union are immune from its requirements. No provision in the CBA, in comparison to the FOP

agreement, provides for an IME that was bargained collectively by the parties. The IME was a pretext of retaliation due to prior complaints alleged by Patton against Frank. Further, buttressed by an ineffective attempt by ODNR to discipline Patton, the scheduling of the IME was a pretext for discipline. Additionally, the application of the IME was used in a disparate manner and testimony from Patton, Licht, Domenick and D. Johnson indicates that a co-worker with irrational and threatening behavior was not subjected to an IME. Moreover, Dr. Stratton was not provided the "classifications specifications" of Patton prior to the IME as required by the administrative rule.

The pretextual use of the IME process on the Grievant was underscored by Dr. Stratton's abrasive and unprofessional conduct exhibited during the evaluations of Patton and Koppert. Dr. Stratton threatened to remove the Grievant unless he stopped filing various complaints against management. Dr Stratton's role in this case is consistent with an IME involving Koppert, in that Dr. Stratton's "hired gun" approach was pretextual, resulting in retaliation, disparate treatment, harassment and discipline in violation of Articles 2 and 24 of the CBA.

Patton's refusal to release the medical information was due to Dr. Stratton's behavior and Supervisor Frank's desire to "get rid" of him and "... an evaluation of the facts does not even support a finding of just cause that Patton is even guilty of the allegations made by Frank in the rationale for the psychological examination." (Union, Post Hearing Brief, p.11). In short, just cause was absent to require an IME of Patton based upon the incidents contained in Frank's memo of October 20, 2000.

The remedy sought includes the rescission of the discipline as well as a cease and desist order to prohibit similar unlawful conduct of ODNR.

POSITION OF THE EMPLOYER

The Grievant admitted refusal on two occasions to release the results of the IME as directed by ODNR, supports the ten (10) day suspension for insubordination and failure to follow a direct order.

The December 12, 2000 and February 28, 2001 letters are unambiguous as to what is expected of Patton regarding the IMEs. The orders from ODNR requiring the release of the medical information were intentionally disobeyed despite two notices that discipline up to removal could occur. ODNR established that Patton knew and understood the directives; the orders were clear; and he intentionally disobeyed the orders.

The employer's right to schedule an IME is contained in ORC § 4117.10(A) which provides the authority for the application of OAC 123:1-33-01 to ODNR employees. The presumption of constitutionality attaches to legislative enactments and no judicial demonstration to the contrary exists herein. Moreover, the finding that a legislative enactment is unconstitutional exceeds the authority and jurisdiction of the Arbitrator.

The application of OAC 123:1-33-01 to the Grievant, according to S. Johnson was consistent with past practice. Prior to the examination Dr. Stratton was provided certain information on Patton. A position description delineating the specific job duties of a radio operator including the mental and physical requirements were provided to Dr. Stratton. The failure to provide "classification specifications" to Dr. Stratton is ancillary in that classification specifications contains all potential general duties of the radio operator in contrast to the position description which contains the specific duties performed by the Grievant.

The Frank e-mail dated October 20, 2000 was also provided to Dr. Stratton. Examples of Patton's behavior in Frank's October 20, 2000 included: a pushing incident with Kevin Erskine; shouting incident with Schneider; failure to communicate with dispatchers Carol Arkley and George Iski; refusal to talk or relay information to co-workers if he disliked them; he would sign

the LEADS newsletter with the proviso that his signature was due to threats from the park manager; made unsupported charges of harassment and criminal activity against Frank; made charges of harassment against Frank when advised that portable radios could not be used when working a special event at CLSP; disregard management's direction on how things should operate at CLSP; and at a civic event told an individual that the office is full of corruption and criminal violations.

That document (October 20, 2000) contained incidents of behavior with co-workers and management that provided the foundation for seeking an IME. IMEs' are used to assess an employee after a series of observable incidents of disruptive and/or confrontational behavior occurs. Discipline is used to address specific conduct, i.e., work rule violations, as opposed to an IME which address a pattern of behavior. IME's are not required to have and do not possess a cause standard to trigger the evaluation(s) only that some justification exists.

Regarding the disparate treatment, the employer points out that no ODNR employee required to undergo an IME has failed to release the medical information based upon records maintained since 1994 (JX 16). On the other hand, Employee Schneider is a Park Officer at CLSP represented by the Fraternal Order of Police ("FOP") and is not a similar situated employee for comparative purposes. However, Schneider was disciplined on two (2) occasions for specific instances of disruptive conduct and required to participate in anger management classes for specific conduct. (ODNR Exhibit A & B).

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the ODNR burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of the evidence in this matter, I find that the grievance is denied. My reasons are as follows:

Prior to an analysis of the issues involving Patton's conduct in relationship to the IME the legality of the order will be addressed first.

OCSEA argues the following: OAC 123:1-33-01 application does not apply to any of it's members since the CBA is silent and no specific Ohio Revised Code ("ORC") provision mandates this procedure upon the members and whether the Director of the Department of Administrative Services ("DAS") under ORC § 124.09(A) has the unfretted authority to promulgate a regulation which impacts upon protected privacy rights. However, OSCEA concedes that ORC § 124.09(A) grants the DAS specific power to adopt and implement rules governing removals, suspensions and reductions from classified service.

ORC § 124.09(A) as a legislative enactment by the general assembly is a manifestation of public policy. See, Chamber v. St. Mary's School, 82 Ohio St. 3d 563 (1998). The enactment by the Director of DAS of Administrative Rule OAC 123:1-33-01 as applied to OCSEA members is the issue. The union opines that the rule exceeds the authority conferred by the General Assembly and that the application infringes upon privacy rights is justification to declare the order(s) illegal in this matter. I disagree.

The legality of OAC 123:1-33-01 involves the Director of DAS' right to adopt such an administrative rule.[1] The power to adopt the rule is lawful and the distinction between "policy and/or rulemaking" will not be addressed as being superfluous to the issues herein. This record is void of any evidence or suggestion that infers DAS failed to comply with ORC § 119.01 et. seq. in adopting OAC 123:1-33-01. Moreover, whether the Administrative Rule is constitutional or the Director exceeds the express authority to adopt an administrative rule regarding mental and medical examinations that allegedly invades the privacy and liberty of OCSEA bargaining members lies in forums other that this arbitral proceeding. See, Chambers, Id, 587, and Redman v. Department of Indus. Relations, 75 Ohio St. 3d 399 (1996). For the rational contained below, the application of OAC 123:1-33-01 to Patton in the opinion of this arbitrator is appropriate in light of no ambiguity or conflicting provisions in the CBA, and the "merger clause" principle contained in ORC § 4117.10(A).

Ohio Revised Code § 4117.10 (A) states in part:

> Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state of local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.

ORC § 4117.10 (A) is a merger clause. Essentially the language of ORC § 4117.10 (A) incorporates all laws pertaining to the terms and condition of public employment into a CBA that are not in conflict. Where a conflict exists between the CBA and the external law, the CBA governs. See, Olin Corp., 103 L A 484, 483 (Helburn, 1994). Specifically, ORC § 4117.10(A) incorporates OAC 123:1-33-01 into Patton's CBA. Even though Patton's CBA makes no reference to OAC 123:1-3301, its silence allows the merger under ORC § 4117.10(A). The FOP agreement [2] offered by the union contained specific language for an IME that the parties

[1] Administrative rulemaking is governed by Ohio Revised Code Annotated §§119.01 to 119.13. Namely, notice must be given and affected persons may comment and/or present evidence pertaining to objectionable aspects of the rule. The rule is reviewed by the Joint Committee on Agency Rule Review. The rule is still subject to further review(s) by the General Assembly for invalidation. If not invalidated by the General Assembly at it's next regular session, then the agency may issue an order adopting the rule. see, Ohio Revised Code Annotated §§ 119.01-119.13.

[2] The comparison of the IME provision contained in the FOP agreement has little relevancy to this matter for the obvious reasons, i.e. different parties, bargaining history, different provision, etc. The reference to the FOP-IME

negotiated collectively. That fact alone defeats the applicability, if any, of the FOP contract and its IME provision to this matter. In short, the failure of the union to approve OAC 123:1-33-01 does not invalidate its effectiveness upon its member or invalidates its merger under ORC § 4117.10(A).

The next area of considerable evidence thru testimony and exhibits was Patton treatment as compared to a co-worker. The union contends that disparate treatment is evident in that Schneider, although not a bargaining unit member of OCSEA, was comparable to Patton under the guise of common supervision and that the IME process applied to all employees at CLSP regardless of their union affiliation. The employer disagrees that Schneider is "similarly situated" in that he's represented by a different union and has a different contract. S. Johnson credibly testified that she and three (3) other LRO's were involved in scheduling all of the IME for employees of ODNR. In fact, JX-16 contains a comprehensive list of all employees since 1994 who were schedule IMEs at ODNR. JX-16 includes FOP, OCSEA as well as non-bargaining unit employees. S. Johnson indicated the same process applied to any employee of ODNR scheduled for an IME. No evidence suggests any distinction or differences existed between OSCEA, FOP or other employees regarding IME's within ODNR. The conduct of the parties has blurred any line of distinction regarding the IME process along union lines or otherwise. The clear inference is that the IME process applied to all ODNR employees similarly, and for the disparate treatment analysis to reflect the evidence all ODNR employees will be deemed similarly situated. Therefore, Schneider, Patton and all ODNR employees will be treated as similarly situated regarding the IME process.

The subcomponents of an IME are the following: notice to the employee; providing of background data by the employer to the physician; attending the exam(s) and executing the release of the medical information by the employees. The disparate treatment analysis regarding the IME for this arbitrator rotates on a single question, namely, what evidence supports that the December 12, 2000 and March 26, 2001 directives were inconsistent with

---

process is for demonstrative purposes only, and OCSEA position that in absence of a negotiated IME provision its members were not subject to OAC 123:1-33-01 is not well founded based upon the reasons cited above.

orders given to employees in the past? In other words, despite the directives what employees refused to release the medical results to ODNR?

A review of the testimony and exhibits by both parties agree upon at least the following facts: no employee other than Patton requested ODNR to provide validation for the pattern of conduct submitted to the examining practitioner (Testimony of S. Johnson, Domenick and Licht JX 16); no employee other than Patton has refused to release the IME results (Testimony of S. Johnson, Domenick and Licht. JX 16); and that IMEs have been conducted since 1994 on ODNR employees (Testimony of S. Johnson, Domenick, JX 16). The weight of the evidence supports that Patton had clear notice of what ODNR expected and the exact penalty for failure to comply. No comparable employee of ODNR was proffered to show disparate treatment based upon an employees refusal to release the IME results from 1994 to the present.

The clarity and certainty contained in both letters are not in dispute and Patton was aware the ODNR could discipline him if he failed to release the medical results. In this matter ODNR provided the definiteness required including the adverse consequences. Simply Patton's conduct following the December 12, 2000 and March 26, 2001 was insubordinate and he failed to follow the clear directives and under these facts ODNR has satisfied its evidentiary burden under Article 24 on both charges.

Having decided that ODNR met the quantum of proof required to prove insubordination and failure to follow a direct order, the only remaining inquiry involves mitigation. Patton contends that he was treated differently than other employees similarly situated in the application of the rule as well. Patton testified that Frank was out to get him fired and used the IME as a pretext for discipline. Furthermore, the use of Dr. Stratton as a tool would guarantee his removal based upon an unfavorable medical report. In weighing the foregoing factors in evaluating the ten (10) day suspension dueling concepts of disparate treatment and pretext are at issue.

Disparate treatment is not per se unjust and mitigation evidence regarding consistency and enforcement of rules in a nondiscriminatory manner is important. See, In re Ohio Department of Rehabilitation and Corrections and O.C.S.E.A, Local 11, AFSCME. 93CA1186,1187 (Riveria 1990) "[To] prove disparate treatment, the "different treatment" must have no reasonable and contractually appropriate explanation or be motivated by discrimination or ill purpose. " In re State of Ohio and A.F.S.M.E Local 11, 99 LA 1169, 1173 (Riveria 1992).

In this matter Patton was asked to submit to an IME by ODNR in the same manner as all other employees since 1994. No evidence suggest otherwise. ODNR's ability to require employees to submit and release the results is an invaluable aide in obtaining professional guidance regarding potential irrational workplace behavior so the appropriate intervention can occur. Patton contends that Schneider although engaged in a pattern of irrational conduct, was never required to submit to an IME, should mitigate his suspension, is without merit. Simply no evidence indicated that Schneider once ordered or any other employee had failed to provide the medical exams. The Grievant's argument rests upon why Schneider wasn't scheduled as oppose to evidence demonstrating Schneider's failure to comply to OAC 123:1-33-01. Moreover, the emphasis upon establishing some level of cause prior to an IME to the satisfaction of an employee is troublesome to this Arbitrator.

To envision lay personnel designing a standardized common cloth of conduct or behavior to initiate IMEs among ODNR employees, would be ineffective at best and render this process moot. The administrate rule in place requires ODNR to provide certain information to the examiner prior to the IME. The rule does not require that the employee agree with or have the right to explain the basis for the conduct prior to the exam. On its face the process is fair. If it is not, change the rule in accordance with Ohio Revised Code Annotated §§ 119.01-119.13.

Regarding Dr. Stratton's involvement, if Koppert and Patton testimony regarding the anti-employee bias has a semblance of creditability ODNR should be concerned. I would hope that all examiners demonstrate only the highest sense of professionalism in dealing with potentially fragile employees. Dr. Stratton is only one of more than a dozen (12) doctors utilized to conduct

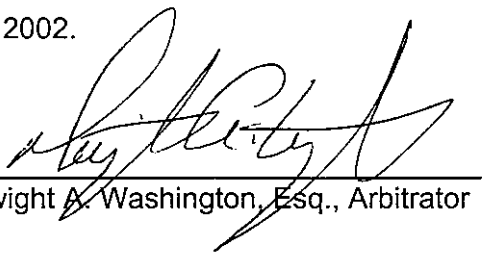
IMEs by ODNR. (JX 16). A review of Dr. Stratton's record shows that he conducted eighteen (18) IMEs since 1994 and only three (3) were removed. Therefore, approximately 90% of the time Dr. Stratton determined that the employees were able to perform their duties in an appropriate matter. Despite the foregoing, Patton had an acute aversion to Dr. Stratton for whatever reason. S. Johnson decided that due to Patton's past work record, length of service with ODNR and his willingness to see another examiners-10 days as opposed to removal was appropriate. S. Johnson was aware of the disciplinary grid, which allowed up to removal, but mitigated the discipline to 10 days in recognition of Patton's past service and work record. I agree that the 10 day suspension as oppose to removal was mitigated fairly under these facts.

The facts and evidence taken in the light most favorable to Patton regarding mitigation will not lessen the suspension. ODNR under the circumstances acted even handed in this matter, and the Arbitrator will not substitute its judgment in this area. For all the reasons contained above, the suspension will stand.

AWARD

The grievance is denied.

Respectfully submitted this 16th day of October 2002.



Dwight A. Washington, Esq., Arbitrator