#809

REVIEWED BY
NOV - 1 2002
GRIEVANCE COORDINATOR

ARBITRATION

BETWEEN

OHIO DEPARTMENT OF COMMERCE

and

Grv.: #OCB Case No. 07-00(00-10-30)-0280-01-07
(Randolph M. Burley - 10 Day Suspension)

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

Appearances:

The Advocate For the Department:
Jason S. Woodrow
Department of Commerce
Columbus, Ohio
And
Kelly Foster
OCB, 2nd Chair

The Advocate For the Union:
William Anthony
Staff Representative
OCSEA
Columbus, Ohio
And
Donald Conley
Staff Representative, 2nd Chair

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case:

This case involves a 10-day suspension of Department of Commerce employee Randolph M. Burley, herein the Grievant. One or another of the parties makes reference to the following provisions of the parties' Collective Bargaining Agreement:

ARTICLE 2 - NON-DISCRIMINATION

2.01 - Non-Discrimination

> Neither the Employer nor the Union shall discriminate in any way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, . . . color . . .

ARTICLE 5 - MANAGEMENT RIGHTS

> Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such right shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights in The Ohio Revised Code, Section 4117.08 ©, Numbers 1-9.

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME . . .

13.03 - Meal Periods

> . . . Employees . . . who currently work eight (8) hours straight without a meal period shall continue to do so, except as otherwise mutually agreed. No other employee shall be required to take less than thirty (30) minutes or more than one (1) hour for a meal period. Meal periods will usually be scheduled near the midpoint of a shift.
>
> Employees shall not normally be required to work during their meal period. Those employees who by the nature of their work are required by their supervisor to remain in a duty status during their meal period may, with the approval of their supervisor, either shorten their workday by the length of the meal period or else have their meal period counted as time worked and be paid at the appropriate straight time or overtime rate, whichever is applicable. A supervisor will honor an employee's choice where reasonably possible.

13.06 - Report-In Locations

All employees covered under the terms of this Agreement shall be at their report-in locations ready to commence work at their starting time. For all employees, extenuating and mitigating circumstances surrounding tardiness shall be taken into consideration by the Employer in dispensing discipline.

Employees who must report to work at some site other than their normal report-in location, which is further from home than their normal report-in location, shall have any additional travel time counted as hours worked.

. . .

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. working suspension;
D. one or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB;
E. one or more day(s) suspension(s);
F. termination.

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

24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline Employer representatives who violate this section. . . .

24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. . . . Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The Employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut. . . .

ARTICLE 25 - GRIEVANCE PROCEDURE

25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

This section applies to all steps of the grievance procedure: The employer shall provide copies of documents, books and papers relevant to the grievance without charge to the Union, unless the request requires more than ninety (90) minutes of employee time to produce and/or copy, at which time the Union will be charged $0.10 per page.

ARTICLE 44 - MISCELLANEOUS

. . .

44.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

The Ohio Department of Commerce, Policy, Procedure and Information Manual provides in pertinent part as follows:

". . .

This handbook provides a summary of your benefits, rights, and responsibilities as an employee of the Ohio Department of Commerce. If you have any questions, please contact our Human Resources Office. . . .

Page 1 of 5
Policy Disciplinary Policy — Policy Number: 201.0
Issued/Revised: January 2000 — Section: 2

DISCIPLINARY POLICY

The department maintains a policy of progressive, constructive discipline, . . .

References

OCSEA/AFSCME Collective Bargaining Agreement
. . .
Ohio Revised Code, Section 124.34
Ohio Administrative Code, 123:1-31

Appeals: Bargaining unit employees shall follow applicable OCSEA/AFSCME . . . contract provisions . . .

Retention of Disciplinary Record: Bargaining unit employees should consult the contract for guidelines pertaining to the removal of any disciplinary action. . . .

Disciplinary Guidelines: The attached list is illustrative but not exhaustive of violations, and discipline recommended is a guideline. However, disciplinary action shall be commensurate with the offense. This means that more severe discipline may be imposed at any point if the offense warrants it. The Department may also choose to impose less severe discipline at its discretion. Discipline does not have to be for like offenses to be progressive.

* * *

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PROGRESSIVE DISCIPLINARY ACTION

Violations of Departmental Work Rules and Corresponding Disciplinary Measures

VIOLATIONS RECOMMENDED DISCIPLINARY ACTION

	1st Offense	2nd Offense	3rd Offense	4th Offense
. . .				
2. Insubordination	Severity of discipline depends on nature of offense			
3. Exercising poor judgment in carrying out and/or following assignments; written policies and procedures; and/or work rules	Oral Reprimand	Written Reprimand	Suspension	Removal
4. Failure of Good Behavior	Severity of discipline depends on nature of offense			

. . .

	1st Offense	2nd Offense	3rd Offense	4th Offense
19. Unexcused-tardiness	Oral Reprimand	Oral or Written Reprimand	Written Reprimand or Suspension	Suspension or Removal

. . .

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	1st Offense	2nd Offense	3rd Offense	4th Offense
21. Unauthorized Absence Without Leave (AWOL)				
a. Less than one day	Oral Reprimand	Written Reprimand	Suspension	Removal
b. One day	Written Reprimand	Suspension	Suspension or Removal	Removal
c. Two consecutive days	Suspension	Suspension	Removal	
d. Three or more consecutive days	Removal			

* * *

Policy: FLEXTIME POLICY — Page 1 of 8

Issued/Revised: January 2000 — Policy Number: 303.0
Section: 3

. . . An employee on a flexible schedule who works eight hours a day can have varying start times (from 7:00 a.m. to 9:00 a.m.) and ending times (from 3:30 p.m. to 6:30 p.m.). Prior approval is required by the supervisor and/or the division superintendent.

The employee or the supervisor may initiate the request to be considered for flexible schedule eligibility. The employee submits a completed copy of the standardized form to the immediate supervisor/designee.

Requests for flexible work hours status shall include the following specifications and justifications for each:

1. . . .

2. . . .

3. . . .

A. . . .

B. All disapproved requests for flexible work hours shall be returned to the initiating employee with the reason(s) for the disapproval.

Etc.

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Lunch Periods. (OVERTIME ELIGIBLE EMPLOYEES): Each work day in excess of five (5) hours must include an unpaid scheduled lunch period of a minimum thirty (30) minutes and a maximum of one hour as required by the collective bargaining agreement. . . . The lunch period shall be scheduled as close to the mid-point of the work day as practical. Lunches may not be scheduled at the beginning or ending of the work day (except pursuant to . . . Article 13.03 of the OCSEA Contract). OVERTIME ELIGIBLE EMPLOYEES SHALL NOT EAT LUNCH AT THEIR DESKS. LUNCH BREAKS MUST BE TAKEN OUTSIDE OF THE EMPLOYEE'S WORK AREA.

The following witnesses were called by the Department: Rick Selegue, former Enforcement Supervisor, Division of Real Estate; Greg McGough, Supervisor, Division of Real Estate; Robert W. Patchen, Assistant Superintendent; Blaine Brockman, Chief, Office of Human Resources; and John Downs, Labor Relations Administrator and Diana Jones, Fiscal Officer as rebuttal witnesses. The following witnesses were called by the Union: Pat McDonald, Assistant Director, Department of Commerce; Rebecca Hoffman, Administrative Assistant to the Superintendent of Real Estate and Professional Licensing; Laird Eddie, Supervisor of Education and Testing, Education Section; Jason Woodrow, Labor Relations Officer for the Department and the Department's Advocate in the instant case; Randolph M. Burley, Investigator, Division of Real Estate and Professional Licensing, and the Grievant in the case; Diana Jones, Fiscal Officer; Thomas E. Geyer, Assistant Director; Gordon Gatien,

former Chief, Office of Human Resources; Rick Selegue, former Enforcement Supervisor, Division of Real Estate; Greg McGough, Supervisor, Division of Real Estate; Robert Patchen, Assistant Superintendent; Dennis Broadnax, Investigator, Division of Real Estate; and Lynne Hengle, Superintendent of Real Estate and Professional Licensing. In its Opening Statement, the Union sets forth in summary fashion the tone and content of the bulk of its case, as follows:

> "The charges against [the] Grievant are punitive in nature; the punishment is not commensurate with the offense; the discipline was solely for punishment; this Grievant was not granted due process during the grievance procedures; he was treated disparately; he was [the] victim of discrimination and there was not just cause for the discipline. . . . The Union believes that . . . each charge against this Grievant must be dealt with specifically and individually on its merit and weight. . . . It is clear to the Union that Management engaged in the stacking of charges to create the impression that all of the alleged dates of violations are separate charges in and of themselves and the sheer volume indicates that this 10-day discipline was just. Additionally, the Union is . . . obliged to hold Management accountable for its total disregard to [the Grievant's Contract] rights as spelled out in the Collective Bargaining Agreement."

In its Opening Statement Management set forth in summary fashion the tone and content of the bulk of its case, as follows:

> "[The] Grievant . . . was given a 10-day suspension because of his actions. He was disciplined for many reasons. First, for being tardy and for being absent without approved leave. . . . AWOL . . . This was not the first time the Grievant did not show up for work on time. This was not the first time he was disciplined for being tardy. . . . The Grievant has received numerous warnings and disciplines. All of them were for AWOL or tardy. His progression includes counseling, reprimands, a fine, and today . . . his second suspension. [Clearly the Grievant] was well aware of the time policy and well aware that future late arrivals would be reason to deny a request for leave. . . . [The Grievant] was given a reasonable order, . . . that he deliberately and unexcusably refused to obey . . . The order to the Grievant was simple. Call your next

> appointment and tell them you will be . . . later than scheduled, go to lunch, and then go to the appointment. There was no option to deliberately and inexcusably refuse to obey a reasonable order. He was to do what he was instructed; fail to do so would be considered insubordination."

The hearings in the case were conducted over a ten (10) day period, to wit: September 11, 20, and 21, 2001; October 24, 2001; December 7, 2001; January 7, 8, and 9, and 29, 2002; and February 15, 2002. There was no transcribed verbatim transcript of the hearings. At this juncture the undersigned believes that an explanation for so many hearing days is in order. Obviously enough, no record evidence was received on September 11th; the hearing adjourned shortly after it commenced. What did occur, however, was significant. There was much wrangling and consternation concerning the Union's demands and subpoenas for documentary evidence. The Department asserted that much of it had already been provided to the Grievant and/or the Union, and in any event, the sweeping nature of the requests for documents and their lack of specificity, along with the sheer volume of the documents, rendered the Union's requests and/or subpoenas duces tecum "unreasonable," with the consequence that the Department was not contractually obliged to comply, a matter revisited hereinafter. The bulk of the documents requested by the Union were purportedly corroborative of its affirmative defenses of disparate treatment and discriminatory treatment of the Grievant vis-à-vis the discipline imposed on him, and the Union emphasized the purported "relevance" of the documents requested. And as the Department points out in its post-hearing briefs (as seen hereinafter), it is

noted that from September 11th onward, on each day of the hearing, the Grievant arrived at the hearing with several boxes of documents; boxes which required the use of a dolly to transport them from the street to the hearing room. Moreover, prior to the hearings in this matter the parties placed a conference call to the Arbitrator, seeking a ruling on the Union's documents requests and the Department's position it need not comply due to the unreasonableness of the request, a call which lasted well over an hour, as I recall. Suffice it to say that from the outset of the telephone conversation, the discussion degenerated into a shouting match, and it soon became apparent that no resolution would be possible at that juncture. Additionally, upon receipt of the Joint Exhibits on September 20, 2001, the first real day of hearing in this matter, Joint Exhibit No. 4A revealed that the Department's Advocate, Mr. Woodrow, heard the grievance at the 3rd step, and in his answer he noted that "the [3rd step] meeting was concluded rather abruptly. [The Grievant's] language became foul and abusive. He was instructed to refrain from using such language or the meeting would end. [The Grievant] did not refrain, therefore the meeting ended." Whether or not the Grievant was in fact "foul and abusive" at the third step was not of consequence at that juncture. Suffice it to say that what was of consequence at that juncture was the fact that it became clear that, from the Department's perspective, and more particularly from Mr. Woodrow's perspective, the Grievant behaved improperly at the 3rd step meeting. In light of this perception on the part of Mr. Woodrow,

whom the Department had assigned to advocate their case at the arbitration, such assignment did not serve to provide fertile ground for an amicable resolution of the parties' dispute with respect to the Union's documents requests. It also became apparent early on that, considering the matter in the light most favorable to the Grievant, the Grievant was "excitable" and anxious and became easily "upset" when, for example, Management's advocate would strongly take a position the Grievant disagreed with, or when the Arbitrator made an evidentiary ruling adverse to his case. It also became apparent early on that the Grievant would be hands-on when it came to the presentation of his case, notwithstanding the Arbitrator's suggestions indeed, admonition, since his case was in capable hands in the person of Advocate Anthony, the degree of activism of the Grievant in the presentation of his case, was unnecessary. Nevertheless the Grievant continued his particularly active role. It also became known early on that, following the suspension here under consideration, the Grievant had subsequently received another disciplinary suspension, and that following that suspension, the Grievant had been discharged. Self-evidently, these circumstances greatly increased the Grievant's stake in the outcome of this proceeding. Candor requires that I also note that the Union's Advocate had a deliberate and methodical manner and pace in presenting the Union's case. Frankly, he had little choice in the matter, given his reliance on a great volume of documentary evidence he sought to enter into the record, and by and large, no second chair to assist him in getting this evidence into the

record. In this regard, second Chair Conley was not present on most hearing days. Furthermore, it seemed clear to the arbitrator that pressuring Mr. Anthony to pick up the pace of his presentation would likely only serve to ultimately further slow down the presentation, the Arbitrator observing at the hearing that he'd seen some of the highest paid trial attorneys from the most prestigious of Wall Street law firms humbled and befuddled in the course of seeking to put into the record large volumes of documentary evidence, as here. Albeit the "boxes" of documents brought to each hearing were reduced to but one sizable box of documents ultimately put into the record by the Union, suffice it to say that that one box of detailed and often multipaged documents contributed greatly to the gargantuan record compiled in this case.

In light of all the foregoing considerations the Arbitrator made the judgment that any amicable agreement with respect to the documents the Union sought was unlikely. This circumstance, coupled with the Grievant's temperament, and the ultimate great stake he had in the outcome of these proceedings, and the undersigned became concerned that any adverse ruling with respect to the Grievant's and the Union's document requests at the commencement of the hearings, such as that made hereinafter, could likely set the groundwork for the aborted situation which existed with respect to the 3rd step meeting. A 3rd step-like result here, could only lead to <u>indefinite</u> delay in the resolution of this matter. In this regard I note that the Union in its reply brief's arguments, argues that the Department's refusal to provide

requested documents "taint this entire Arbitration," thereby affirming the validity of the Arbitrator's concern that an early-on adverse ruling with respect to the Union's document requests could indeed lay the groundwork for a 3rd step result and thereby sabotage the arbitration before it truly got under way. Accordingly, the Arbitrator in effect reserved ruling on the "reasonableness" of the Union's documents request, and decided to play-it-by-ear. Whether, as I suspect, the Department came to realize as the case progressed, that its intransigence with respect to the Union's documents request was contributing to the length of the hearings, and whether, as I suspect, the Union in effect acknowledged that, as the Department contended, the Union already had in its possession some of the documents it was requesting, eventually the parties reached an understanding that the great amount of documentation the Union managed to put into the record was sufficient "evidence" upon which the Union could ground its disparate and discriminatory treatment-of-the-Grievant arguments.

Needless to say the gargantuan record made virtually mandates that there be a serious distillation of the facts and evidence relevant to a disposition of the case in the written opinion. The record also presents some serious problems of organization and format for the written decision. Given the volume of testimony and documentary evidence that comprises the record here, the parties were instructed by the Arbitrator that in addition to post-hearing briefs, Reply Brief would be called for. Briefs and Reply Briefs in a case of this sort serve to focus the parties on the evidence

most important to their respective cases. By and large the parties' Briefs and Reply Briefs served to so focus the parties. Somewhat disappointing, however, was the fact that both parties did not always reference the Exhibit they were discussing in their briefs, or only cited an Exhibit number, failing to narratively identify the subject matter of the Exhibit.

And again, given the volume of evidence involved, in my judgment the most efficient manner of expressing the decisions made by the undersigned and of establishing the rationale for those decisions, was to simply address seriatim, the parties' contentions as chronologically set forth in their respective briefs. To that end the parties' positions as set forth in their opening statements, post-hearing briefs, and reply briefs are set forth in plenary fashion. This methodology serves to assure the parties that the points and contentions they have made in support of their respective cases have been duly considered.

The record reflects that the Grievant has worked for the Department of Commerce, Division of Real Estate and Professional Licensing as an Investigator for some eighteen (18) years at the time of his discipline under scrutiny here. The Division of Real Estate and Professional Licensing in which the Grievant worked, regulated real estate licensing, cemeteries, auctioneers, security guards, and private investigators. The Grievant's job was to make sure that businesses such as security guard companies and private investigators strictly followed the rules and regulations applicable to those businesses established in the Ohio Revised

Code. To that end the Grievant frequently conducted audits in the "field," i.e., outside the Headquarters building in Columbus.

In the interest of the serious distillation of the record evidence necessary in the written decision, only the most significant testimony is set forth. In this regard, suffice it to say that the representations of "fact" found in both parties' respective opening statements and briefs, set forth herein in their respective "Positions," are essentially correct. Still further in this regard, notwithstanding the great number of witnesses and their, by and large, voluminous testimony, most of the critical evidence in the case is to be found in the documentary evidence. Thus some of these documents will be summarized herein. Others will simply be appended to the Opinion & Award in order to avoid their needless reproduction in the body of this "Statement of the Case."

Some witnesses were called as witnesses by both parties in support of their respective cases-in-chief. Accordingly the testimony of witnesses deemed significant is set forth in the chronological order in which the witness testified. In this regard the record reflects that Division of Real Estate Enforcement Supervisor Rick Selegue oversaw the Division's investigations such as the Grievant and the inspector's immediate supervisors, such as Mr. McGough, the Grievant's immediate supervisor. Selegue testified that on July 6, 2000, he met with the Grievant and "counseled" the Grievant concerning his manner of taking his lunch break. Selegue acknowledged that such "counseling" is not regarded

as "discipline." This counseling was recorded in a memo of the same date to the Grievant, copy to Assistant Superintendent Patchen. It read in pertinent part:

> "The purpose of this meeting is to council (sic) you . . . of the Meal Period policy (13.03) as described in the State of Ohio and OCSEA contract. Your timesheet (period of June 16 through June 30, 2000) reflects lunch periods less than an entire hour as well as times not taken during the midpoint of your shift.
>
> [The memo goes on to quote section 13.03 of the parties' Contract, and concludes:]
>
> Future violations of this policy may result in disciplinary action taken."

Supervisor McGough indicated that the Grievant was scheduled to work five (5) eight (8) hour days, Monday through Friday 8:00 a.m. to 5:00 p.m. with a one (1) hour unpaid lunch period. McGough acknowledged that "generally" the Grievant followed, his, McGough's, instructions. McGough testified that on July 18th, 2000, the Grievant telephoned him, indicating he was running late and asking for permission to take his lunch period at the end of the day. According to McGough, he told the Grievant that he, McGough, did not have authority to grant him such permission and that he needed to call his next appointment and advise them that you are going to be late. McGough denied telling the Grievant to donate his lunch hour to the State or that he could take his lunch at the end of the day. McGough also indicated that there was no "operational need" which required him to work through his designated lunch period on July 18, 2000. McGough testified concerning a written reprimand he gave the Grievant for tardiness

on January 26, 2000 (not a matter under scrutiny here), and the memo thereof dated February 4, 2000 (Joint Exhibit No. 3X). This memo recites that "Management gave you ample time to submit written verification regarding the emergency nature of your [sick] condition," and, failing to provide same, and having no leave, the Grievant was given a written reprimand for AWOL. McGough points to this incident to justify the Grievant's discipline for his July 19, 2000 tardy/AWOL, that is, that the Grievant was disciplined because there was no documentation of the emergency nature of need to be tardy, i.e., the alleged vandalizing of his van. The record shows that the Grievant's request for leave to cover his July 19, 2000 tardy was denied due to "habitual tardiness."

Assistant Superintendent Patchen testified that on July 18, 2000, he told the Grievant to go to lunch and go to his second appointment afterwards. He testified that the Grievant subsequently left him a voice mail message indicating he'd not done so and that he was donating his lunch period to the State. Patchen testified that it was his understanding that the Fair Labor Standards Act (FLSA] did not permit such a donation and that, to the contrary, the State was obliged to pay the Grievant and other employees who worked through their lunch hour. Accordingly, Patchen checked the Grievant's timesheets, and seeing numerous instances of taking less than an hour of lunch, instructed that the Grievant be paid for such time. Patchen also acknowledged that the Department emphasizes providing "customer satisfaction" with the workforce, which perforce includes timely appointment keeping.

Patchen also noted that as an enforcement agency "one can't always please." Concerning the incident on July 18, 2000, the following exchange occurred between the Union's Advocate and Mr. Patchen:

Anthony: Q - As an experienced auditor, could the Grievant conclude it was best to take no lunch and go to his next appointment and be on time?

Patchen: A - No. Because he can't not take his lunch break.

H.R. Office Chief Blaine Brockman testified that given the five (5) charges leveled against the Grievant, and his recidivism with respect to some of them, and the inherent seriousness of others of them "clearly the disciplinary grid allowed for a ten (10) day suspension." Brockman also testified that Joint Exhibit No. 3A, the actual imposition of discipline, "was drawn from Joint Exhibit No. 3B," the Pre-Discipline Meeting Report of John P. Downs, and that he concurred with [Down's] recommendation. These documents are appended hereto as Appendix "A" and "B" respectively. Brockman indicated he looked to the Department's disciplinary grid (#201.0) with respect to how much weight to ascribe to the Grievant's offenses and that for insubordination he ascribed "significant weight" because the order to the Grievant of July 18, 2000 was clear. He also indicated that at that time, October 13, 2000, the Grievant had previously been disciplined for insubordination. It is noted that effective August 13, 2001, that discipline was voided by Panel Arbitrator Robert G. Stein in case #07-00-08-00-271-01-07, involving the Grievant. Brockman also indicated that a first time offense of insubordination could result

in a "major suspension," i.e., 5 days and up; that in the instant case the Grievant was suspended 10 days for 5 offenses.

Assistant Director Pat McDonald was the first witness called by the Union in its case-in-chief. The Department objected to his being called and said objection was overruled. At this point I am constrained to note that this objection and others made with respect to managerial witnesses called by the Union, was a direct consequence of the Department's decision to remain steadfast in its decision to not be forthcoming with respect to the Union's documents request. Indeed most managerial personnel called to the stand were in large measure called by the Union because of the Department's unwillingness to be forthcoming with said documents. As will be seen and elaborated upon hereinafter the Department was within its rights to resist the Union's document demands, but having done so it could not then proceed to challenge the Union calling to the stand those managers who were ostensibly in a position to testify as to matters which might well be self-evident in documents. In other words the Department was not entitled to have its cake and eat it too, i.e., resist providing documents, and also resist the testimony of those managers who ostensibly could testify as to what the documents would reflect. This is so because the data the Union sought was clearly relevant to its disparate and/or discriminatory affirmative defenses, albeit they were in my judgment "unreasonable" within the intendment of the Contract, as elaborated upon hereafter. Another point to be made is that, as a tactical matter, although justified, the Department's resistance to

furnishing many documents necessitated the testimony of live witnesses, which, in turn, and obviously enough, prolonged the length of the hearing. In any event Assistant Director McDonald explained that the decision-making process for imposing discipline involves Mr. Brockman making the decision, and his relying on Brockman's expertise, and approving said Brockman-determined discipline.

Rebecca Hoffman supervised one Helen Hendershott, an elderly Caucasian woman of 84 years, and an employee of the Department some 47 years. Hendershott was late for work and stayed too long over at the end of the day with some frequency. She was not disciplined by Hoffman. Hoffman testified that she often had to talk to and did talk to Hendershott about coming in late or staying over late; Hendershott took the bus to work; and, most significantly, she testified that "it was difficult with Helen; she didn't always understand what she was to be doing." The Union also elicited from Hoffman the fact that she changed Hendershott's work schedule (start and end times) and allowed her to flex her lunch period. This information was irrelevant inasmuch as the Grievant's claim that he was being treated disparately and/or discriminatorily by his request to change his work schedule to assist with his tardiness problem being denied, was pending arbitration before another Arbitrator. Despite the undersigned's ruling to that effect, the Union's Advocate and the Grievant, who as indicated was active in the presentation of his case, kept attempting to put evidence of such into the record, a tactic which put the Department

to objecting and put the Arbitrator to repeat again and again the same irrelevant ruling, i.e., that that matter was simply not before the undersigned for disposition. The point to be made is that this tactic is but another factor which served to protract this proceeding, both by the time it took to simply keep going over the same ground again and again, and, more importantly, the ground work it served to lay for the Department to, understandably, not be as cooperative as it might otherwise have been. In any event, Hoffman explained that she was doing a lot of Hendershott's job for her and she talked to her about retiring which "she finally agreed to do . . ."

Supervisor Laird Eddie from the Department's Education Section testified that it was his understanding that one had to stay over 6 minutes or more to be entitled to overtime. Eddie also indicated that secretarial employee Diane Hellman under his supervision was given a change in her scheduled hours to accommodate her childcare needs. Hellman was also allowed to make time up when she was 15 minutes late. An African-American female under Eddie's supervision, Toya Johnson, has worked past her end time and not been disciplined.

Labor Relations Officer Jason Woodrow, the Department's advocate, called by the Union, testified that he was the Agency's designee at the 3rd step of the instant grievance, and that no evidence of discrimination was submitted at third step. He indicated that his reference to the Grievant using foul and abusive language at 3rd step, and so set forth in the third step answer, was

a reference to the Grievant telling him twice, as that third step designee, to "go to hell."

It was the Grievant's testimony that "he could not discern which statement of facts went with what violation of policy"; that he "knew what they said I was doing wrong, but they didn't say which violation went with which dates." The Grievant also indicated that some five years ago taking lunch was a professional thing and you just told the supervisor you were heading for lunch; and that in the field "lunch was your own baby." He indicated he "felt singled out" vis-à-vis his alleged lunch hour issues.

Blaine Brockman was called to the stand by the Union. Brockman indicated that Disciplinary Policy #201.0 #4 - Failure of Good Behavior "generally encompasses all of the conduct that occurred" and that Patchen probably charged it, along with the AWOL charge. It was Brockman's testimony that Joint Exhibit No. 3A, Appendix "A", the imposition of discipline, was "based on" Downs's Pre-Discipline Meeting Report, Joint Exhibit No. 3B, Appendix "B"." Brockman explained that the Disciplinary Policy 201.0 #3 - Exercising Poor Judgment, etc. allegation referred to the lunch hour infractions. Asked if any of the 10 day disciplinary layoff was because of the "Failure of Good Behavior" - 201.0 #4, Brockman answered "Yes." Brockman indicated when asked how much of the 10-day disciplinary layoff was attributable to the Grievant's alleged Failure of Good Behavior, that "how much" was not how it worked; that, rather, "overall," the Grievant's conduct warranted a 10-day disciplinary layoff. It "doesn't work that way," i.e., the

quantity of 10-days of a disciplinarylayoff is not arrived at by a process 10% of the ten (10) days was due to the Grievant's tardiness, etc., asserted Brockman. Brockman indicated that he was aware of no contract provision nor any provision in Ohio law that would require such a percentage allocation. Brockman further testified that there was no weighting of each offense by the Department in arriving at the decision to discipline the Grievant by way of a ten (10) day suspension. Brockman indicated in essence that he looked at the disciplinary grid and saw that it would easily support a ten-day suspension for all of the Grievant's offenses. It was Brockman's testimony that if a leave request for tardiness is denied, the tardiness can properly be regarded as both a tardy and an AWOL, i.e., absent without leave. Brockman also indicated that the Grievant's most significant offense was his insubordination on July 19th.

It was further Brockman's testimony that his decision was grounded within the four corners of the Ohio Department of Commerce Policy, Procedure & Information Manual. Brockman indicated that he did not recall in his discussions with McDonald and others discussing whether or not the contemplated quantum of discipline for the Grievant was consistent with that imposed on others.

It was further Brockman's testimony that in light of the fact that <u>after</u> the Grievant was counseled to take a full hour lunch period he often failed to do so, such conduct constituted "Failure of Good Behavior," and a Failure of Good Judgment, etc., as well.

As for the Grievant's twelve minute tardy on July 10, 2000, once his request for approved leave to cover the twelve minutes was denied, he was AWOL, i.e., "absent with approved leave," as well as tardy, testified Brockman.

Brockman also indicated that in light of the five charges against the Grievant and his previous discipline, his choice was a 10-day disciplinary layoff or termination; the he could not recall anyone receiving a disciplinary layoff greater than ten (10) days.

In the course of Jason Woodrow's testimony on December 7, 2001, it was stipulated that Melanie Braithwaite (a Department Attorney not in the Division of Real Estate and Professional Licensing) was a Caucasian female whose initial removal did not include any charge of a Failure of Good Behavior. Woodrow, who advises supervisors on disciplinary matters, indicated that he tells supervisors that if an employee is habitually tardy, they should commence discipline.

Fiscal Officer Diana Jones indicated that an employee under her direct supervision--Kaela Edgerton--when tardy under six (6) minutes was not docked because the Department's Policy gave a six (6) minutes grace period. She also indicated that other of Edgerton's were excused and/or some form of leave approved to cover the tardy due to mitigating circumstances. Jones further indicated that if tardy, you could also be AWOL if leave to cover the tardy is not approved. Jones indicated that Edgerton is an African-American female. According to Jones, Edgerton was unofficially warned on a couple of occasions and issued an oral reprimand on one

occasion for tardiness. Edgerton works only at Headquarters and does not work out in the field.

Gordon Gatien, Superintendent of the Department's Division of Labor and Worker Safety, and former Chief of Human Resources for the Department, and Brockman's predecessor, explained that whereas Policy No. 313.0, page 2 of 2 definitively provided what constituted AWOL [i.e., "Absence beyond 30 minutes is not considered a tardiness issue but is considered absence without approved leave and should be addressed as such"], yet under the Discipline Grid Policy No. 201.0, #21 - AWOL (p. 4 of 5) an employee can be charged with AWOL for anything less than one day, and thus tardiness does not have to go beyond thirty (30) minutes before it can be regarded as an AWOL. The record reflects that this interpretation of the Policy on AWOL was never "clarified" in writing and disseminated to the work force or to supervisors, nor was there any training of supervisors or employees at which this interpretation was espoused.

Superintendent of Labor and Safety, Gatien oversees compliance with the Fair Labor Standards Act (FLSA). It was his testimony that under the FLSA the Employer is obliged to pay an employee for all hours he/she is in pay status, such as hours worked; vacation; personal leave; or sick leave. When no lunch is taken all one's hours on the job are regarded as in pay status. Moreover, asserted Gatien, an employee cannot waive his right to pay, or pay at overtime rates, if applicable, under the FLSA, and thus the Grievant was not empowered to "donate" his lunch hour to the State.

Chief Inspector, Division of Industrial Compliance, and former Enforcement Supervisor Richard P. Selegue testified concerning Joint Exhibit No. 3U, the memorandum of his counseling of the Grievant was generated by the fact that the Grievant was taking less than an hour for lunch and was taking lunch other than at the midpoint of his workday, both contrary to Department Policy. Selegue also identified an exchange of Emails between Real Estate and Licensing Division inspector-employee Ted D. Williams and himself on December 14, 1999. On that date Williams asked Selegue: "when working out of the office, does the assigned lunch times apply?" Selegue answered: "When working out of the office (i.e, compliance exams), this would not apply. In situations like these you need to complete the assignment. That may require you to alter your lunch break. Let me know if there are any other questions." This was under the Subject, designated initially by Williams, entitled: "Lunch Policy Question." Williams' question and Selegue's response to Williams was copied to fellow Division inspectors and/or inspector supervisors, including perforce the Grievant. Selegue also identified Union Exhibit No. 27, wherein supervisor McGough allowed an adjustment to the Grievant's lunch hour to allow him to attend an "All Hands" Director's Meeting. It was Selegue's testimony that he "allowed the Grievant to adjust his lunch hour because the 'All Hands' Director's Meetings were mandatory and important." Selegue indicated that 10:00 a.m. to 3:00 p.m. for lunch would be okay.

Selegue also testified concerning the Grievant's July 10, 2000 tardy and AWOL. Selegue could not recall his recommending discipline for AWOL or Failure of Good Behavior, but he did recall recommending discipline for tardiness. Selegue testified that he did not accept the Grievant's excuse for being late for work, namely, that he woke up to find his van had been vandalized in the night, without any further explanation. At that juncture, Union Advocate Anthony brought to Selegue's attention that the parties' Contract at Article 13, Section 13.06 did not call for a "call-in." Selegue testified that the Grievant presented no evidence of vandalism. Selegue acknowledged that employee Paul Bryant had once sought to excuse a tardy because of vandalism, or more specifically theft, of his car. On that occasion Management asked Bryant to provide a Police Report of such. The record fails to reveal that the Grievant was ever asked to produce any Police Report to support his claim that his van had been vandalized. Finally, Selegue also recalled reviewing the time sheets of other employees under his supervision at or about the time he counseled the Grievant. Selegue testified that he did not become aware of any other employee who needed counseling concerning the manner in which they took their lunch period.

The Grievant's immediate supervisor, Greg McGough testified that he had three inspector employees under his supervision: John Wiles, a Caucasian male; Ted D. Williams, a Caucasian male; and Randolph Burley, the Grievant, an African-American. McGough was confronted with time records showing that Williams did not always

take precisely one hour for lunch, sometimes taking five or fewer minutes then one or more than one hour on several dates in July 2000. McGough acknowledged that he had no discussion with Williams regarding the times of his lunch hour, because Williams' variations were "within the realm of normalcy." It's noted that the Grievant's variations were typically ten to thirty minutes shy of an hour for lunch and self-evidently, therefore, not within the realm of normalcy.

McGough also indicated that he could only "recommend" discipline and that he did not recommend that the Grievant be disciplined for AWOL. Asked if, prior to July 2000, an employee late less than thirty minutes for work could be charged with both "tardy" and "AWOL,' McGough indicated that an employee could not be charged with both.

McGough acknowledged that although the Grievant was charged with being tardy, relying on the Grievant's submitted time sheet, for July 31, 2000, in point of fact he was on sick leave on July 31st. McGough acknowledged that he made a mistake and missed that the Grievant was on sick leave, and that Department Policy required him not to accept an inaccurate time sheet. McGough further indicated that in these circumstances he should not have approved the Grievant's time sheet; that, rather, he should have returned it to the Grievant for correction.

Assistant Superintendent and Legal Counsel for the Division of Real Estate and Professional Licensing Robert Patchen testified that he'd held such position since June 2000. In the course of his

testimony the State stipulated that July 30, 2000 was a Sunday and that the Grievant was not expected to be at work. Patchen indicated that he was present at the Prediscipline Meeting, and acted as the Division of Real Estate and Professional Licensing's representative to present "the facts" (as Management viewed them). It was Patchen who was the chief spokesperson for Management. Patchen acknowledged that his memo of August 7, 2000, to Superintendent Lynne Hengle recommending discipline of the Grievant (Joint Exhibit No. 3L) did not reference any alleged violation of Policy No. 201.0 #4 - Failure of Good Behavior; and that neither did McGough's memo to Hengle dated August 18, 2000, Subject: "Recommendation/Result of Investigatory Interview of August 16, 2000 with Randy Burley, Investigator," recommending disciplinary action be taken (Joint Exhibit No. 3K). Patchen testified that it's the job of the Manager conducting a Prediscipline meeting (here, Downs) to decide if the facts presented at the meeting serve to support the notice's alleged Policy violations.

Patchen also testified that it was his understanding that field employees were to stick to their assigned lunch periods to the extent practicable. Patchen indicated that on July 18, 2000, he received a call from the Grievant seeking to move his lunch because he did not have enough time to take his lunch and be at his next appointment on time. Patchen indicated he told the Grievant he couldn't make an exception and that he was to call his next appointment (his afternoon appointment) and tell them he'd be late and to go ahead and take his full lunch period. (See Joint Exhibit

No. 3N for a more detailed account). Patchen further testified that at 3:00 p.m. he listened to his voice mail and that the Grievant had left the message that he was going to his afternoon appointment as scheduled, and he'd donate his lunch hour to the State. (Again, see Joint Exhibit No. 3N for a more detailed account.)

With respect to employee Hendershott, Patchen testified that he counseled Hendershott's supervisor, Hoffman, to make sure that she left work on time. He also testified concerning "perfect" time sheets vis-à-vis time sheet filling out and time policies, that he told his supervisors that if they had employees submitting perfect time on their timesheets, they were to counsel them, and they continued, "do more," that is, discipline them. In this regard Patchen testified that he himself had counseled employee Celluca over whom Patchen had direct supervision and was directly responsible for monitoring Celluca time keeping.

Patchen acknowledged that he had recommended that the Grievant be disciplined for violation of Policy 201.0 #20. "Failure to notify supervisor of absence within 1/2 hour of start time; working in excess of scheduled hours without required authorization," but that the ten day disciplinary layoff of the Grievant (Joint Exhibit No. 3A) did not include any allegation of #20 being violated by the Grievant.

It was Patchen's testimony that the Grievant's conduct on July 18, 2000, was "insubordination" because the Grievant did not do what he was instructed to do, i.e., take lunch and notify the

afternoon client that he'd be late; and because the time sheet he submitted for July 18th did not reflect any lunch in fact being taken that day.

Next to testify was Dennis Broadnax, an Inspector employee in the Division of Real Estate and Professional Licensing, who investigated violations of Ohio law by real estate agents and brokers. Broadnax served on behalf of the Union and the bargaining unit employees on the Labor/Management Committee. It was Broadnax's testimony that Joint Exhibit No. 2B, the Policy, Procedure & Information Manual was handed out at an All Hands Meeting and later discussed in the Labor/Management Meeting. With respect to Policy 201.0 #4 Failure of Good Behavior, Joint Exhibit No. 2A, dated February 2, 2000, Broadnax testified that it resulted from discussions in Labor/Management meetings to the effect that the predecessor #4 was being used as a "catch all" and being added where other numbered rules clearly applied. The "adding" of #4 to other alleged violations was characterized by the Union Labor/Management members as unfair "stacking" of charges. It was felt that the "new" #4 of February 2, 2000, would eliminate the stacking of charges.

Broadnax testified that he attended the Grievant's Pre-Discipline Meeting and that the Grievant asked Downs, who was presiding over the disciplinary meeting, if he could question the witnesses, and that Downs told him that he could not question the witnesses; that the meeting was his, Downs's, meeting, so "we backed off."

Broadnax further testified that if there is disagreement in Labor/Management meetings, Management implements their Policy and the Union has to grieve it as soon as possible. According to Broadnax, Joint Exhibit No. 2B was handed out in January and later discussed at the next Labor/Management meeting and not thereafter discussed in Labor/Management meetings.

Next to testify was Lynne Hengle, Superintendent of Real Estate and Professional Licensing Division since June 1, 1999. Hengle testified that Patchen reported directly to her and that he had authority to investigate and put a case together, and to recommend discipline of an employee, which she then approves or disapproves.

Hengle explained that the Division's Time Sheets and Payroll Report Changes Policy of April 7, 1998 (Union Exhibit No. 34) designed to facilitate compliance with the Fair Labor Standards Act (FLSA) were not being followed, and, that, accordingly, on June 29, 2000, she distributed a revised Policy (Union Exhibit No. 33) in order to be in compliance with the FLSA. This Policy required supervisors to send inaccurate time sheets back to the employee for correction. More specifically, this Policy provided in particularly pertinent part as follows:

> "Managers and/or Supervisor have the following duties and obligations regarding the processing of time sheets submitted to them for their signature:
>
> . . .
>
> 4. DO NOT accept any time sheet that is inaccurate or incomplete in any manner. A missing signature or other

variance on the time sheet from the requirements of this policy constitutes an incomplete submittal by the employee.

5. Return any inaccurate or incomplete time sheet to the employee with specific instructions to complete a replacement time sheet in accordance with this policy.
6. Signature of the manager and/or supervisor is for review purposes only. It does not constitute approval of the information submitted by the employee. . . .

Hengle also testified concerning a meeting she had on March 2, 2000, with all the Real Estate Division investigators. The Grievant perceived this meeting to be an "oral reprimand" of all investigators in attendance concerning customer complaints about the investigators, including perforce the Grievant. The Grievant grieved. It was denied on June 23, 2000, at the 2nd step by Hengle, acting as Intermediate Administrator "after full consideration of all the applicable facts and positions," along with the notation that "Article 25, Section 25.01 (G) of the contract only permits grievances involving an oral reprimand to be taken through Step Two of the Grievance Procedure." (Union Exhibit No. 61). It is further noted that in a memo to investigator Williams dated March 3, 2000 from Assistant Director Jon Allison, who had attended the March 2, 2000 meeting, copies to Hengle and Department Director Suhadolnik (Union Exhibit No. 60), setting forth the following pertinent statements:

> ". . . My impression of the meeting was that no single . . . investigator was accused of any specific wrongdoing.
>
> The customer complaints brought to the attention of the Director and Superintendent Hengle did not include enough specificity to warrant or justify a discussion with or disciplinary action against any single employee. . . . [I]t is not proper . . . to bring specific disciplinary action against an employee without the appropriate evidence.

. . . [Hengle] could either ignore the customer complaints or make a <u>general</u> statement to all investigators. . . . [Hengle] chose the correct [latter] option.

. . . I was in the room yesterday and know that neither you nor any other individual investigators was singled out. I will not ask [Hengle] to apologize, for there is no legitimate reason for her to do so." (Emphasis supplied).

In my view reading these two memos together, it can only be concluded that the grievance was denied because no oral reprimand was imposed on any of the Real Estate Division investigators nor indeed any form of discipline, on March 2, 2000. Hence the grievance protesting an oral reprimand had "no merit" and was, for that reason, properly denied.

At this juncture it is noted that by memo dated April 19, 2000, from then Chief of Human Resources Gatien (Management Exhibit No. 2), the Grievant was advised he was being disciplined as follows:

". . .

A one (1) day fine will be given for violation of Policy 201.0 #21 Absent Without Leave.

On March 24, 2000 you were out due to illness, and you did not have sufficient sick leave time to cover your request. You requested emergency vacation. Your request was denied. On March 27, 28, and 31, 2000, you were tardy in arriving at work. You requested emergency vacation . . . and your requests were denied. Therefore you were absent without leave for a total of 4.5 hours. . . ."

Management Exhibit No. 2 was withdrawn, however, and the parties entered into the following joint stipulation on January 7, 2002, as Joint Exhibit No. 11:

"Delete Management Exhibit 2 and replace with this statement:

The 1-day Fine was relating to charge #21, however the NTA process is not precedent setting.

The 2-day Fine was withdrawn prior to the NTA hearing but documented with the required settlement agreement."

Other joint stipulations are set forth in Appendix "D".

The Grievant indicated that he was an eighteen (18) year employee of the Department of Commerce, having been hired in on October 31, 1982. It appears that all of this service has been as an investigator for the Department. The Grievant has also held various positions with the Union, namely, Statewide Executive Board Member; Negotiating Team Member; Steward; Chapter President; and Labor/Management Committee member. As Steward, the Grievant sat in on Pre-Discipline Meeting and 3rd Step Grievance Meetings.

With respect to the tardiness allegations the Grievant asserts several extenuating and mitigating factors, which were improperly not taken into account. He also claims disparate treatment in that, unlike himself, others who were late 3 to 4 minutes were not disciplined, whereas he was. On other dates he was allegedly tardy he did not work at all, asserted the Grievant, and hence he cannot be properly regarded as being "tardy" on those occasions. Moreover, states the Grievant, the discipline imposed improperly fails to allocate how much of said discipline is attributable to the tardiness allegations, as is also the case with all of the specific allegations against him. Then too, asserts the Grievant, the Department, contrary to the Contract's provisions, failed to take into account the mitigating and extenuating circumstances, which led to his tardiness. As can be seen, this testimony is in

great measure "argument," espousing the Grievant's and the Union's defenses against the Department's allegations, thereby affirming the point made earlier to the effect that the Grievant was "hands on" with respect to the presentation of his case from start to finish.

The Grievant also testified that as of July 7, 2000, he was "still unclear" as to how Management wanted him to take his lunch break. In this regard he testified that he understood that while out-of-town in the field, lunch was part of your travel time. The Grievant also testified that he challenged Management to show where the FLSA provided as it claimed and that Management did not do so.

The Grievant indicated that on July 19, 2000, he claimed no time for lunch because he ate while he completed his audit and didn't put it down as lunch. Concerning July 26, 2000, the Grievant stated that he left ten minutes late for lunch (12:40 p.m.) and thought he had to be back by 1:30 p.m., the end of his assigned lunch period, or be regarded as ten minutes late. Another explanation offered was that his time sheet for August 1, 2000 was in error (lunch = 12:50 to 1:30) inasmuch as he was at an "All Hands" meeting within that time frame and lasting an hour and a half. As for July 26, 2000, the Grievant testified he was not sure what happened to cause him to be tardy.

With respect to July 19, 2000, the date his van was vandalized and he was late for work, the Grievant stated that he had not filed a police report concerning this vandalism. It is noted that

nothing in the record indicates that he was ever asked about having filed a police report or confronted about not having done so.

As for leaving the floor late at the end of the work day, the Grievant pointed to Union Exhibit No. 16, which reflects that other employees also left early, but were not disciplined for doing so.

As for the events of July 18, 2000, the Grievant testified that he had a morning exam and an afternoon exam scheduled. He testified that completion of his morning exam, which the client desired, would have required him to work through his lunch period and that his second exam was scheduled to commence at 1:30 p.m. Accordingly, he telephoned his immediate Supervisor, McGough, and asked if he could work through his lunch and take lunch at the end of the day. According to the Grievant, McGough told him he, McGough, could not approve him doing so, and that McGough had "recommended" that he go ahead and take his lunch at that time. The Grievant noted in his testimony at this point that he had once been disciplined for being late for an exam. The Grievant went on to testify that he finished the morning exam and then called Patchen, asking Patchen if he could work through lunch and take lunch at the end of the day. Patchen, according to the Grievant, told him that he could not make any exceptions for the Grievant and that he should have called the afternoon client sooner. The Grievant testified that he had previously been disciplined with respect to how he had dealt with the public, and now I've got to stop and take lunch and tell the afternoon client that I was going to lunch, even though I said that I would be at his site to

commence the exam at 1:30 p.m. As the Grievant explained, his reference to prior discipline with respect to how he dealt with the public was a reference to the purported oral reprimand that he and other investigators received for mistreatment and threats to clients, found hereinabove to not be an oral reprimand nor any other discipline. The Grievant also noted at this juncture in his testimony that Patchen was "new" to his position of Assistant Superintendent, with responsibility for the investigators in the Division of Real Estate and Professional Licensing under McGough's direct supervision, such as the Grievant.

The Grievant also testified that the sign-in, sign-out time sheets were needed to show compliance with the FLSA only; and not as evidence in support of discipline. The Grievant also argued that the certification language of the time sheets called for certification of the number of hours in active pay status, as opposed to be a certification of the accuracy of the hours recorded. In this regard the time sheet the employee signs states: "My signature certifies that this is an accurate account of the number of hours in active pay status." The Grievant pointed out that in Joint Exhibit No. 33 (Appendix "B") John Downs, at page 3, top, indicated that Policy 201.0 #3 - "Exercising poor judgment in carrying out and/or following assignments, etc., . . . is "all inclusive," and argued that in effect Downs asserted that being "all inclusive" Downs was asserting that all of the allegations against him constituted a violation of Policy 201.0 #3. The Grievant also stated that it was the Union that successfully sought

the Joint Exhibit No. 2A amendment of Policy 201.0 #4 - Failure of Good Behavior and argued that without it, any violation of Policy 201.0 rules could result in a violation of #4, and an employee could thereby be disciplined as Management liked.

The Grievant also testified that Union Exhibit No. 71 reflects that fellow inspector Williams was, on June 27 and 28, 2000, doing the same kind of work the Grievant was doing on July 18, 2000, and that Williams was allowed to adjust his lunch schedule, whereas he, the Grievant was not. Such constituted disparate treatment, argues the Grievant.

It was further the Grievant's testimony that at the Pre-Discipline Meeting, the July 18, 2000 incident was what the Department identified as "insubordination." The Grievant also testified that he was not allowed to question witnesses at the Pre-Discipline Meeting, nor was he allowed to review or rebut. Nor did he ever get a list of witnesses or documents to be relied upon by Management at the pre-discipline. The Grievant at first testified that the pre-discipline packet he received was Joint Exhibit No. 3C (Appendix "C") only. Later he acknowledged that at the end of the Pre-Disciplinary Meeting he received Joint Exhibit No. 3L II (Appendix "E"). He asserted that Downs read from Appendix "E" at the Pre-Discipline Meeting. Downs asserted that Joint Exhibit No. 3L II (Appendix "E") is the pre-disciplinary packet in the case. The Grievant testified that he should have received the pre-discipline packet three days before the Pre-Discipline Meeting. Downs testified that the Grievant received Appendix "E" at the end

of the meeting and for this reason, he gave the Grievant three days to respond, but that the Grievant did not do so. The Grievant claimed he did not get Appendix "E" until some date subsequent to the Pre-Disciplinary Meeting.

Fiscal Officer Diana Jones testified that L. B. Hodge was a black male; Diane Hillman was a black female; Bev Frabot was a white female; and Lisa Caldwell was a white female. These employees had leave requests granted to cover tardiness. The Grievant and Union argue this establishes disparate/discriminatory treatment of the Grievant. Jones also testified that on eighteen (18) occasions in the year 2000, leave requests of the Grievant were granted.

With respect to the 3rd step grievance meeting, it was the Grievant's testimony that he told Woodrow that he didn't appreciate the way Woodrow was addressing him and that Woodrow said he didn't care how I addressed him; that when he raised a "due process" issue Woodrow nastily stated: "Get to the point," whereupon he, the Grievant stated "go to hell," pointing out that after all, Woodrow had said he did not care how he was addressed. The point, argued the Grievant, was that they both were entitled to mutual respect.

Asked on cross why he didn't take his lunch when told to on July 18, 2000, the Grievant testified that he "figured that if I did not meet my second appointment on time I would be disciplined; if on time this second employer would not complain."

The Parties Positions:

a.) The Department's Post-hearing Brief

The Department takes the position that the Grievant's 10-day suspension for violation of the Department's Policy, Procedure, & Information Manual, Section 201.0, #2 - Insubordination; #3 - Exercising poor judgment in carrying out and/or following assignments; written policies and procedures; and/or work rules; #4 Failure of Good Behavior; #19 - Unexcused Tardiness; and Absent Without Leave (AWOL), was for just cause. The Department contends that the Grievant repeatedly arrived at work after his scheduled start time and he repeatedly ignored directives given to him by his supervisors and managers. Indeed the Department contends that the Grievant "chose to be late for work" and "chose to ignore the direct orders and instructions given to him by his managers," thereby being "knowingly and willingly insubordinate," and undermining and destroying the employer/employee relationship. As for the propriety of a "ten" day suspension, the Department asserts that it simply followed progressive discipline, and, where, as here, a suspension is warranted, the Department only issues suspensions of five (5) or ten (10) days. Here, a ten (10) day suspension is fully warranted, asserts the Department, pointing to the Grievant's substantial prior substantial disciplinary record, namely numerous reprimands, a fine, and a previous suspension. In light of this prior discipline dealing with tardiness and/or AWOL, any further violations, especially for tardiness or AWOL, would result in a suspension. Indeed, argues the Department, in light of

the severity of the Grievant's misconduct, the discipline could have been elevated to removal. Being as that the Department does not issue suspensions larger than ten (10) days, the Department only had two options. The Department could issue a ten (10) day suspension, or separate the employee from his position. The Employer chose to attempt to rehabilitate the Grievant and to correct his undesirable behavior, and thus only suspended him.

In paragraph I. A. of its formal "Argument," the Department asserts that on July 19, 2000, the Grievant was not authorized to take any form of leave, however he was not at work when he was scheduled to be there, namely, at 8:00 a.m. Therefore, he was AWOL. Article 13.02 of the contract addresses leave requests: *"It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time, including persons on leave (excluding disability leave)."* It also defines "work schedules": *"For purposes of this Agreement, 'work schedules' are defined as an employee's assigned work shift (i.e., hours of the day) and days of the week and work area"* (Joint Ex. 1).

The Grievant's established work schedule was 8:00 am to 5:00 pm, Monday through Friday, excluding a one-hour lunch break to be taken at the midpoint of the day. There was no flexibility or option to deviate from this schedule without pre-approval from a supervisor. However, the Grievant failed to follow his assigned work schedule when he took unapproved leave from 8:00 am to 8:12 am on July 19, 2000. The Grievant did submit a request for personal

leave in order to cover the time he had been away from work. However, this request for leave was denied and the Grievant is considered to be absent without approved leave (AWOL).

Additionally in paragraph I. B. of its formal "Argument," the Department asserts that the Grievant repeatedly arrived at work after his scheduled start time and hence was habitually tardy. The Department notes that Princeton University defines tardy as follows: "Occurring, arriving, acting, or done after the scheduled, expected, or usual time; late. Adj: not excused; <u>too many unexcused absences</u>. (Emphasis supplied). (Word Net ® 1.6, © 1997 Princeton University). The Department states that the Grievant repeatedly violated the tardiness policy, as well as his contractual obligations when he thereby failed to follow his work schedule. The Grievant was not disciplined for tardiness because he was a few minutes late one or two times. The Grievant had a history of being tardy; and he had a history for having excuses as to why; and the Grievant continued a pattern of tardiness even after he was disciplined for tardiness numerous times.

The Department notes that the Grievant submitted time sheets that clearly show that he arrived to work after his scheduled start time on eight (8) different occasions between the pay period starting on June 18, 2000 and the pay period ending on August 12, 2000 (June 21 - 3 minutes, June 27 - 35 minutes, July 10 - 10 minutes, July 18 - 3 minutes, July 19 - 12 minutes, July 26 - 3 minutes, July 31 - 3 minutes & August 2 - 5 minutes (Joint Ex. 3J, 3I, 3G, & 3F)). Out of this two-month period, there were only

twenty-eight (28) days where the Grievant was available to work at the 8:00 am start time.

Anticipating that the Union will allege that the Grievant might not have been tardy every one of the days that the Department is claiming, the Department asserts that it "is only disciplining the Grievant for the days that reflect tardiness on the time sheets and the accuracy of the time on the forms is not in question." The Department believes that all of the times reflected are true and accurate: the forms were prepared, signed, and dated by the Grievant, documenting the time that he arrived at work. Moreover, asserts the Department, the tardiness reflected on these forms is in the face of previous discipline for tardiness, the point being that the Grievant had to have known that he'd be disciplined for these more recent tardies, argues the Department. Noting that the disciplinary grid for unexcused tardiness calls for "suspension or removal" following a "suspension" for tardiness, and seeing as how the Grievant had already received a suspension, the Grievant knew that further acts of tardiness would result in a major suspension or removal. Accordingly, asserts the Department, the Grievant's discipline was progressive and for just cause.

In paragraph I. C. of its formal "Argument" the Department contends that the Grievant used poor judgment in daily job activities, which led him to ignore simple policies, procedures and directives, and accordingly the Grievant was disciplined for just cause. In this regard the Department points to the fact that on July 6, 2000 the Grievant was formally counseled concerning the

proper procedure for taking a lunch break (Joint Ex. No. 3U). This counseling, asserts the Department, addressed the expected time frame of the lunch break, namely, one full hour to be taken at the midpoint of the day. It also addressed Article 13.03 - Meal Periods, of the parties' Agreement, and the fact that the Grievant had not been taking a full one-hour lunch break and that the lunch break was not always taken at the midpoint of his shift. This counseling was given to the Grievant on the third day of the pay period. However, the very next day, the Grievant failed to take the full one hour for his lunch break. Furthermore, he failed to take a full one-hour lunch break every day that he worked throughout the rest of that pay period.

Out of the thirty days that followed the counseling, the Grievant only worked sixteen full days and one partial day (the partial day was only one hour and therefore he would not have taken a lunch break). Out of those sixteen days, the Grievant only took a full lunch break on six occasions. This would mean that the Grievant failed to follow the policy on ten different days. Those days were July 6, 7, 10, 11, 18, 19, 26 and 28 and August 1 and 2. By dividing the number of days the Grievant failed to follow the policy, by the number of days that it was possible for the Grievant to follow the policy, one can calculate that the Grievant only followed the policy 62.5% of the time [*(10 days failed / 16 days possible) X 100 = 62.5%]*.

In paragraph I. D. of its formal "Argument," the Department asserts that the Grievant was insubordinate when on July 18, 2000

he failed to call his last appointment and when he failed to go to lunch after being instructed to do so by two separate Managers, namely, the Grievant's immediate supervisor Greg McGough, and, Assistant Superintendent Rob Patchen. The Department contends that when the Grievant telephoned Supervisor McGough and asked if he could take his lunch period at the end of the work day, McGough told the Grievant that he could not approve his request and gave the Grievant instructions on the proper way to handle the situation. It is the Department's contention, that, not agreeing with McGough's instructions as to how to handle his lunch situation, the Grievant decided to telephone Assistant Superintendent Patchen; that the Grievant was attempting to find someone to approve his request for taking lunch at the end of the work day. However, Patchen did not approve the Grievant's request, rather, he instructed the Grievant to call his next appointment and tell them that he would be later than scheduled; that he was to go to lunch and then go to his appointment. The Grievant did not follow either McGough's or Patchen's instructions. Rather, he took it upon himself to go directly to his afternoon appointment. The Department asserts that the Grievant left a voicemail message for Patchen informing Patchen that he'd decided not to do what he was instructed to do and that the Department could "donate his lunch back to the State." The time sheet which the Grievant filled out for July 18, 2000 (Joint Ex. No. 3G) documents that not only did the Grievant fail to go to lunch as instructed, but he failed to go to lunch at all. The Department asserts that at the arbitration

hearing herein the Grievant admitted that he did not do what he was instructed to do because he did not agree with either one of his managers' decisions. Regardless of the reason, asserts the Department, the Grievant was insubordinate. By not taking his lunch break the Grievant also violated Department Policy No. 303.0, and his July 6, 2000 counseling.

In paragraph I. E. of its formal "Argument" the Department asserts that the Grievant demonstrated that he is unwilling to submit to authority and hence has failed to maintain good behavior, rendering his discipline for Failure of Good Behavior for just cause. The Grievant's unwillingness to submit to authority was inconsistent with the Department's rightful expectations of professional behavior. In support of its contention that the Grievant's conduct constituted a Failure of Good Behavior, the Department points to Ohio Revised Code Section 124.34, and asserts that this Section reflects that "failure of good behavior" is generalized, addressing all acts of poor, or otherwise "non-good" or unfavorable behavior. The Grievant, asserts the Department, exhibited in a number of ways and almost every day, a failure of Good Behavior. Thus the Department contends that he demonstrated Failure of Good Behavior when he refused to follow a simple directive and take a full one-hour lunch break (62.5% of the time); when he refused to fill out a time sheet the way his supervisors wanted, and by his acts of habitual tardiness. He was late to work at least 1/3 of the time. The best example is when he blatantly disregarded a direct order and then followed that up by leaving a

voicemail. The only purpose of this voicemail was to show the supervisor that he could not force the Grievant to do anything that the Grievant did not want to do.

The Grievant was argumentative with the people in authority. This type of behavior was demonstrated in the step 3 meeting (Joint Ex. 4A). During the meeting the Grievant told the meeting officer, Jason Woodrow, to "go to hell." The Grievant was warned not to make offending comments and that if he continued the meeting would end. However, the Grievant told the meeting officer to "go to hell" a second time which caused the meeting to end immediately. The Grievant was charged with failure of good behavior because he does not promote or act in good behavior on a regular basis. This disruptive, disrespectful, bad behavior was also demonstrated at the arbitration hearing states the Department. Thus the Department contends that on more than one occasion the Grievant became disruptive and discourteous to others present in the arbitration. The Arbitrator must understand that the Grievant was disciplined for failure of good behavior because the Grievant repeatedly acts in a way that reflects bad behavior.

In paragraph II of its formal "Argument" the Department asserts that it does not discipline employees based on the color of their skin and accordingly is not in violation of Article 2 - Non-Discrimination of the parties' Agreement in disciplining the Grievant, as alleged. The Union did not produce any evidence to support its claim of discrimination. Rather, the Union only made a bold, unsubstantiated claim that the Grievant was treated

differently based on him being a black male. However, the Union did not show how other employees, of different skin color and/or sex, were treated differently. The Union did not show that other employees were not disciplined for being AWOL. The Union did not show that other employees were approved leave, other than the ones who actually followed the leave policies. The Union submitted hundreds, if not thousands of leave requests and payroll summary sheets. This voluminous amount of paper only reflected that other employees had to follow the same policies and procedures as the Grievant. There are numerous examples of this, but to identify a limited amount: Dee Jones testified about Karla Edgerton, a black female employee, who was allowed "emergency leave" when she could verify it was a true emergency (e.g., July 11, 17 and 24, 2000). Ms. Jones also testified about how Karla Edgerton was denied emergency leave and disciplined for AWOL when she could not substantiate a true emergency (Union Ex. 19). Diane Hillman, a black female, had COTA (public bus system) write a letter stating that Ms. Hillman was late to work because the bus broke down (Union Ex. 16, pg. 17). Frank Celluca, a white male, was counseled for time sheet violations on July 17, 2000, and he was counseled for violating the lunch break policy on December 18, 2000 (Union Ex. 54 and 85). This is the same counseling that the Grievant received on July 6, 2000 (Joint Ex. 3U).

The Union did not produce any evidence that supported a claim of either discrimination or disparate treatment. The Union did not show how the Grievant was treated differently than any other

similarly situated employee. The Union did not produce any evidence to show that other employees, regardless of color or sex, were not disciplined for violating the same policies and procedures. The Union did produce numerous documents and hours of testimony. However, the documents and testimony only support the fact that other employees are treated the same way. The Union showed that other employees, regardless of skin color or gender, are all treated the same way and subject to the same type of discipline. Therefore, the Employer's actions were neither disparate nor discriminatory in nature.

In paragraph II. B. of its formal "Argument" the Department takes the position, contrary to the Union's allegations, that in disciplining the Grievant, the Department did not operate outside of the scope of its managerial rights outlined in Article 5 - MANAGEMENT RIGHTS, and Ohio Revised Code, Section 4117.08 (C) 1-9, referenced therein. Furthermore, asserts the Department, the Union did not produce any evidence that the Department did so. The Department assigned the Grievant a work schedule that reflects the contractual definition of a work schedule (Article 13) and then simply disciplined the Grievant when he failed to follow that assigned work schedule.

In paragraph II. C. of its formal "Argument," the Department asserts that, contrary to the Union's allegations, the Department was in compliance with the Agreement's requirement at Article 24 - Discipline, Section 24.02, that discipline be progressive and commensurate with the offense. In this regard the Department notes

that prior to the discipline under scrutiny here, and within calendar year 2000, the Grievant was issued the following disciplinary actions: oral reprimand (Joint Ex. No. 3Y); written reprimand (Joint Ex. No. 3X); one (1) day fine (Management Ex. No. 2); and a two (2) day suspension (Joint Ex. No. 3V). All of this previous discipline dealt with issues of AWOL and/or tardiness. The only distinguishing factor, asserts the Department, with the discipline under scrutiny here is that discipline was issued for more than just AWOL or tardiness. And these additional violations for which the discipline under scrutiny here was imposed, involve misconduct considered to be much more severe and detrimental to the employee/employer relationship. Arbitrator Robert G. Stein provided a decision on one of the previous disciplinary actions (Union Ex. 1). Arbitrator Stein's decision addressed the Grievant's actions as they pertained to insubordination. He stated: *"in spite of the outcome of this case, the Grievant needs to be cautioned that a workplace is not a debating society. The Employer has the right to issue operational directives in spite of the fact that Grievant may not agree with them. Disobeying a direct order is a serious matter and it frequently leads to discipline. The 'obey now grieve later' strategy is a much wiser course of action."* Furthermore, the arbitrator found there to be just cause for tardiness and therefore maintained discipline. The Grievant did not "obey now grieve later." The Grievant repeatedly chose to not obey and the Grievant repeatedly chose to be tardy. Therefore, the discipline issued to the Grievant was progressive.

In paragraph II. D. of its formal "Argument," the Department asserts that the Union never provided any evidence that Article 44 - Miscellaneous, Section 44.03 - Work Rules, was violated. Thus the Department notes that the Union claims that the employer violated the contract when it issued the "Division time sheet policy" without first talking it over with the Union (Union Ex. 33). However, the arbitrator can clearly see, asserts the Department, that the policy in question is a clear reflection of the policy that was in effect since 1998 (Union Ex. 34). This was not a new policy. It was just a reiteration of a policy that was already in effect. The employer does not have to discuss old policies with the Union before re-distributing them. Therefore, the employer did not violate Section 44.03 of Article 44 of the parties' Agreement.

As for the Union's contentions that the Department has failed to comply with the terms of Article 25 - Grievance Procedure, Section 25.08 - Relevant Witnesses & Information, the Department asserts that to the contrary, it has complied with this Section, in that it complied with all "reasonable" requests for documents made by the Union. In this regard the Department asserts that the Union made voluminous and unreasonable requests for documents, requests that were broad and non-definitive, in order to make it impossible for the Employer to comply with the Union's documents request. The Union also requested numerous witnesses with redundant requests for documents in order to waste time and to attempt to create hardship to the employer. Therefore, the Union did not follow the

contractual language covering document requests. The contract covers requests for relevant witnesses and information. *"The Union may request* ***specific*** *documents, books, papers or witnesses* ***reasonably available*** *for the Employer and* ***relevant*** *to the grievance under consideration. Such requests shall not be unreasonably denied"* (Joint Ex. 1, Article 25.08).

The Union's requests were neither specific nor relevant to this grievance. There were over twenty subpoenas issued within just two or three working days of the arbitration. All of the subpoenas were issued at the last minute and almost half of those subpoenas arrived with a subpoena *duces tecum* (Joint Ex. 8). The arbitrator can see how the *duces tecum* requests were unclear and irrelevant to the grievance. The Union was requesting "any and all correspondence" on dozens of different subject matter headings. The Union was requesting the "any and all correspondence" as far back as May 1998. For example, the subpoena *duces tecum* for Greg McGough stated, *"A copy of any and all correspondence, documents, notes and/or email messages you prepared or received relating to the development and implementation, and/or clarification of the Time Sheet Policy Superintendent Lynne C. Hengle and Assistant Superintendent Robert W. Patchen . . ."* This request is neither specific nor relevant to the witness that was subpoenaed. Mr. McGough is not the individual that authorized or distributed the policy, so he would not have access to records on how the policy was developed. Furthermore, the grievant already had the

information he was requesting and it was evident when he submitted the original time sheet policy into evidence (Union Ex. 34).

The grievance at hand deals with a suspension that covered incidences in June, July and August of 2000 (Joint Ex. 4). Anything prior to that date had already been addressed in previous arbitrations and it was not relevant. Furthermore, the Grievant had already received most of the documents through other arbitrations and the corresponding document requests. On more than one occasion throughout this arbitration, the Grievant demanded that the witness honor the *duces tecum* requests. When the witness failed to provide the documents, the Grievant stated, "*then you can refer to my copy.*" This would prove that the Grievant was only asking for documents in order to cause confusion and hardship to the employer. It would also show that there was no hardship to the Grievant when the witnesses failed to provide all of the documents requested under the *duces tecum.* The grievant had all the documents in his possession. Furthermore, he brought the six or seven boxes of documents with him each and every time the arbitration convened.

As for the Union's lack of due process contentions with respect to the Pre-Disciplinary Meeting, the Department asserts no such due-process shortcomings exist. The Department asserts that any due process error as may be argued was in any event "cured" when the meeting officer left the record open for an additional three days. The Department notes that the Grievant alleged that he did not receive the necessary supporting documents at the Pre-

Discipline Meeting. The Pre-Disciplinary Meeting Officer, John Downs, testified that he did not remember if the documents were provided prior to the meeting. He also testified that the claim was brought forward during the meeting, so he chose to keep the record open for three business days in order to cure any procedural flaw in the hearing. The Grievant was given those three days to review the documents and then to refute and rebut any information that he did not agree with. The Grievant did not refute or rebut anything during that time period.

By way of conclusion the Department contends that it did not violate the parties' Agreement by issuing a ten (10) day suspension to the Grievant. On the contrary, the Department followed the negotiated, clear, and unambiguous terms of the contract. The Agreement provides the terms for how work schedules will be issued, how lunch breaks will be taken and how leave will be requested and approved. It also covers the way discipline will be imposed when employees fail to follow the policies and procedures that are protected and enforced by the Agreement. The Department followed these terms. If there was a violation of the Agreement, then it was done by the Grievant in his negligence to follow the established policies and procedures of the Ohio Department of Commerce.

The grievant, Randolph M. Burley, was disciplined for just cause. Therefore, the Employer respectfully requests the Arbitrator deny this grievance in its entirety.

b.) The Union's Position

The Union takes the position at the outset that the Arbitration hearing was not, and is not intended to be an open forum for the Department to reform an inadequate pre-discipline report/recommendation and decision with testimony and evidence presented for the first time at arbitration, but framing the issue as the Department suggests, namely, whether the Grievant was disciplined for just cause and if not, what shall the remedy be, would improperly turn the instant arbitration into such a forum. The Union asks rhetorically, without addressing each charge for which the Grievant was disciplined, how would it be determined whether there was just cause for disciplining him for the violations/charges expressed in Blaine Brockman's October 13, 2000 notice of discipline? Thus the Union asserts that in addition to there being no just cause for finding the Grievant in violation of the five (5) Department policies the Department alleges he violated, the Union asserts that in addition thereto, the Department engaged in: disparate treatment in violation of Article 24 - Discipline of the Parties' Agreement, Sections 24.01 - Standard and 24.02 Progressive Discipline; discriminatory treatment of the Grievant in violation of Article 2 - Non-Discrimination; and, by virtue of the manner in which it exercised its authority, the Department engaged in conduct violative of Article 5 - Management Rights; Article 13 - Work Week - Schedules And Overtime, at Section 13.06 - Report-In-Locations; Article 24 - Discipline, Sections 24.01 - Standard, 24.02 - Progressive Discipline (and evidently 24.04 - Pre-Discipline and 24.05 -

Imposition of Discipline); Article 25 - Grievance Procedure, Section 25.08 - Relevant Witnesses and Information; and Article 44 - Miscellaneous, Section 44.03 - Work Rules. The Union takes the position that if the grievance merely involved alleged misconduct of the Grievant, then the issue could properly be framed as the Department suggests. However, asserts the Union, the instant grievance involves allegations of Managerial misconduct, which go beyond the inappropriate imposition of disciplinary action. The Union contends that framing the issue here as the Department suggests would limit the Union's ability to specifically address each of the alleged charges against the Grievant and each of the Agreement's articles violated by the Department. Furthermore, argues the Union, framing the issue as the Department suggests, gives the Department enormous latitude in sustaining the alleged violations against the Grievant, without having to specifically prove each allegation of misconduct and how such conduct violates existing departmental policies. Accordingly, argues the Union, the issues should be framed as follows:

1. Whether the Employer violated Article 2 of the Collective Bargaining Agreement? If so, what should the remedy be?
2. Whether the Employer violated Article 5 of the Collective Bargaining Agreement? If so, what should the remedy be?
3. Whether the Employer violated Article 13 of the Collective Bargaining Agreement? If so, what should the remedy be?
4. Whether the Employer violated Article 24 of the Collective Bargaining Agreement? If so, what should the remedy be?

5. Whether the Employer violated Article 25 of the Collective Bargaining Agreement? If so, what should the remedy be?
6. Whether the Employer violated Article 44 of the Collective Bargaining Agreement? If so, what should the remedy be?
7. Whether the Employer had just cause to discipline the Grievant for allegedly being Insubordinate? If so, should the discipline have been a ten-day suspension? (Policy 201.0 #2)
8. Whether the Employer had just cause to discipline the Grievant for allegedly exercising poor judgment in carrying out and/or following assignments; written policies & procedures; and/or work rules? If so, should the discipline have been a ten-day suspension? (Policy 201.0 #3)
9. Whether the Employer had just cause to discipline the Grievant for an alleged failure of good behavior? If so, should the discipline have been a ten-day suspension? (Policy 201.0 #4)
10. Whether the Employer had just cause to discipline the Grievant for allegedly being Tardy? If so, should the discipline have been a ten-day suspension? (Policy 201.0 #19)
11. Whether the Employer had just cause to discipline the Grievant for allegedly being AWOL? If so, should the discipline have been a ten-day suspension? (Policy 201.0 #21)

With respect to the Union's allegations of Due Process failures on the part of the Department, the Union asserts in support thereof that the principle of arbitral Due Process requires that an employee accused of wrongdoing be given "meaningful" notice of the charges and allegations being made against him. And where, as here, alleged multiple policy violations are involved, the alleged misconduct should be specifically stated in a way which gives notice of what conduct is being alleged as violative of which policy. Each statement of alleged misconduct must be directly associated with a specific claim of which policy was violated by that conduct, asserts the Union. For example, argues the Union, an AWOL allegation should specifically state the date on which the Grievant is being accused of being AWOL. Additionally, Mr. Brockman's disciplinary notice of October 13, 2000 suggests that the Grievant was disciplined for violating Policy 201.0 #4 - Failure of Good Behavior, yet there is no specific statement in either Brockman's disciplinary notice or John Downs' August 30, 2000 Pre-Discipline Notice, which describes what conduct allegedly violated this policy. The Union asks rhetorically, how can the Union/Grievant be asked to respond to a charge which has not been explained? The Union argues that to date, the Department has not presented testimony or other evidence as to which date the Grievant was AWOL in violation of Department Policy 201.0 #21 - AWOL, nor has it presented any evidence as to which date the Grievant engaged in a failure of Good Behavior in violation of Department Policy 201.0 #4. Moreover, with respect to the latter, Mr. Brockman

testified that two of the charges, 201.0 #3, i.e., Exercising poor judgment in carrying out and/or following assignments; written policies & procedures; and work rule 201.0 #4, i.e., Failure of Good Behavior are, in his own words, "catch all charges." This confirms the Union's belief that the Department has engaged in the practice of "stacking of charges." His comments also add credence to our request of framing the issue more specifically, asserts the Union. This was further proved through Joint Exhibit 2-A (Addendum to policy manual) in effect at the time of the imposition of discipline, wherein it clearly states Policy 201.0 #4 "Failure of good behavior, BEHAVIOR NOT ALREADY SPECIFIED WITHIN THE POLICY MANUAL." Clearly this work rule violation was never intended to be a "catch all charge." It was so testified to by the following individuals: Gordon Gatien (the author of the exhibit), Dennis Broadnax (the union member of the Labor Employer team), Robert Patchen, Randy Burley, the Grievant, who was also a member of the Labor Employer team which drafted and discussed the policy. Therefore, what conduct did the Grievant engage in that amounted to a violation of Department Policy 201.0 #4, Failure of Good Behavior?

Another Due Process contention made by the Union is that the person who recommended disciplining the Grievant for being AWOL/Tardy, was not present at the Pre-Discipline Meeting, in violation of Article 24 - Discipline, Section 24.04 - Pre-Discipline, calling for "a list of witnesses to the event or act known [. . . when the predisciplinary notice is sent]" and the

presence at the Pre-Discipline Meeting of the Employer representative recommending discipline. Thus while the Union asserts that Mr. Brockman drafted the Pre-Discipline Notice (Union Exhibit No. 75), it should be noted that neither Mr. Brockman nor any Supervisor has admitted to recommending the Grievant be disciplined for being AWOL/Tardy.

The Union also asserts that Article 24, Section 24.04 requires that the Union and/or the Grievant be given the opportunity to ask questions. Yet the Department's Advocates have conceded that the Grievant was not allowed to question the Department's witnesses at the September 5, 2000 Pre-Discipline Meeting. The Union contends that Union Exhibits Nos. 72 through 80, and Union Exhibit No. 85, show the full extent that the Department has violated both the letter and spirit of both the parties' Agreement provisions at Article 24, Section 24.04, and his Due Process rights. Moreover, asserts the Department, Union Exhibit No. 76B clearly establishes that all of the records or information requested by the Grievant should still have been available to the Department, if they existed. Yet the Union's and the Grievant's request for documents and materials have been denied.

In sum, asserts the Union, when considered in its totality, the Department's disregard of the Grievant's contractual rights and [unidentified] constitutional rights, amount to a wrongful deprivation of both Procedural and Substantive Due Process.

The Union specifically addresses the allegations set forth in the Notice of Pre-Discipline Meeting, of John Downs, Labor

Relations Administrator of August 30, 2000, Joint Exhibit No. 3C. It first addresses the allegation that the Grievant "did not take the required one hour lunch break" on: July 3, 5, 6, 7, 10, 11, 19, 26, 28, and August 1 and 2, 2000." It notes that the allegation for July 3, 5, and 6, 2000, was withdrawn at the Pre-Discipline Meeting.

With respect to the allegation concerning July 7, 2000, the Union asserts that as the Grievant explained without contradiction at the hearing herein he was on the floor and using part of his lunch hour preparing his response to discipline imposed prior to the discipline under consideration here, and this is why he did not claim this time as time worked.

With respect to the allegation concerning July 10, 2000, the Union asserts that the Grievant explained why he took but a thirty (30) minute break to his immediate supervisor, McGough, in a memo (Joint Exhibit 3H) to wit: on assignment in Cleveland, it was the Grievant's understanding that he was to return to Columbus on his own time, and that since lunch was being taken on the way back to Columbus, he regarded it as lunch on his own time; the Grievant did not think it was an issue of, or could even be construed as, overtime.

With respect to the allegation concerning July 11, 2000, the Union asserts that the Grievant was in Cleveland when he received word that his Grandfather was seriously ill and not expected to live; that the Grievant informed his Supervisor by memo that he would be returning to Columbus as soon as possible; and that had

the Grievant taken an hour for lunch "it would have been an overtime issue anyway because he was in Cleveland and travel time from Cleveland could have been construed as time worked" (Joint Exhibit 3H).

With respect to the allegation concerning July 19, 2000, the Union asserts that the lunch time the Grievant recorded for that date, 12:30 to 1:10 p.m. merely reflected the fact that when the Grievant returned to the Licensee's premises it was raining, so he waited to resume work "inside" and did not claim the time as time worked. The Union disagrees with the Department's contention that notwithstanding the above circumstances, the Fair Labor Standards Act (FLSA) considers such time recording as requiring pay for the 20 minutes not reflected as "lunch" and thereby making out the Grievant's "lunch hour."

With respect to the allegations concerning July 26th, July 28th, and August 2nd, 2000, the Union asserts that the lunch times the Grievant recorded: 12:40 to 1:30 p.m.; 12:30 to 1:20 p.m.; and 12:30 to 1:30 p.m., respectively, merely reflect the fact that the Grievant arrived at his work area ten minutes too early, according to the Division's new policy regarding being on the floor too early; that the Grievant did not start back to work ten minutes early; and that the Grievant did not claim these ten minutes as time worked. The Union also disagrees with the Department's interpretation of the FLSA to the effect that the FLSA requires that said ten minute periods must be regarded as "time worked."

With respect to the allegation concerning August 1, 2000, the Union asserts that the lunch time the Grievant recorded for that date, 12:50 to 1:30 p.m. was erroneous in that the Grievant attended the "All Hands" meeting held at 1:00 p.m., and arrived on time, with the consequence that he clearly was not at lunch between 1:00 and 1:30 p.m., a matter explained to Management prior to the issuance of the disciplinary recommendation and decision.

The Union points to the Department's own Policy 310.0, at page 2 of 5 under "Overtime Work" (Joint Exhibit No. 2B), which provides that:

"Policy OVERTIME & COMPENSATORY TIME Page 1 of 5

Issue/Revised: January 2000 Policy No. 310.0

Section: 3

Page 2 of 5

* * *

OVERTIME COMPENSATION - DEFINITIONS: The following definitions apply when establishing compensation for authorized overtime worked.

- WORK WEEK. . . .
- OVERTIME WORK: Overtime work is authorized time worked in excess of 40 hours time in active pay status in the calendar week for which the employee is entitled overtime compensation. No overtime can accrue during an employee's lunch hour or for work completed at home without obtaining prior approval.
- Time In Active Pay Status: For overtime purposes, time in active pay status will include:
    - Time worked

• Non-work: Time for which the employee is paid (vacation, personal, military, and court leave; holiday leave; compensatory time off; and excused paid absence, with the exception of sick leave). To simplify reference, the term "paid leave time" is used throughout the overtime instructions."

The Union asserts that while the Department's own policy at Policy 303.0 page 2 of 5, says an employee would not be paid for working through his lunch hour, yet, to justify disciplining the Grievant, he was paid for working through his lunch hour, despite the Department's Policy. Moreover, asserts the Union, according to the Department's own Policy 303.0, the Grievant was not in an active pay status for overtime purposes, because the times do not meet the criteria expressed in the Policy.

The Union also appears to assert that any charge that the Grievant's alleged faulty time recording conduct led to the necessity that he be paid additional monies was not in any event set forth in the Grievant's Pre-Discipline Notice (Joint Exhibit No. 3C) nor in the Notice of Discipline (Joint Exhibit No. 3A), nor did these Notices indicate any discipline for such conduct.

The next matter addressed by the Union concerns the allegation in the Notice of Pre-discipline Meeting of John Downs, Labor Relations Administrator, of August 30, 2000, to the effect that "on July 18, 19, 26, 31 and August 2, 2000, the Grievant failed to report to work prior to [his] 8:00 a.m. start time" and "on July 17, 31 and August 2, 2000, you worked past your 5:00 p.m. end time without prior authorization from your supervisor." The Union notes that the allegation concerning July 18, 2000, was

withdrawn at the pre-disciplinary hearing.

With respect to the Grievant's tardiness of July 19, 2000, when he did not report to work until 8:12 a.m., as the Grievant explained that he was delayed in reporting to work because his van had been vandalized, and inasmuch as his other vehicle was having overheating problems, he needed to address that issue in order that his wife would have transportation while he was out of town for his grandfather's funeral. Moreover, having nonetheless left for work earlier than any of his supervisors would have reported to work, there was no one to call at that time. No police report was filed, asserts the Union, because the Grievant's focus was on getting to Florida to his grandfather's funeral. When he got back from Florida, no one told him that his leave request had been denied.

With respect to the Grievant's tardiness on July 26, 2000, when the Grievant did not report to work until 8:03 a.m., the Union notes that the Grievant explained that it was due to ongoing traffic backups on Brice Road. The Union also cites this as an instance of disparate treatment in that, purportedly, no other Department employee was disciplined for being five minutes late. The Union also asks rhetorically: was this occurrence considered an AWOL/Tardy?

With respect to the Grievant's tardiness on July 30, 2000, when the Grievant did not report to work until 8:12 a.m., the Union claims the Grievant was not late on that date. Moreover, asserts the Union, this allegation was added at the Pre-

Discipline Meeting itself. Accordingly, argues the Union, notice of this allegation of tardiness was not provided to the Grievant and the Union three (3) days prior to the Pre-Discipline Meeting, contrary to the Agreement's provisions at Article 24 - Discipline, Section 24.04 - Pre-Discipline to the effect that Pre-Discipline Meeting "shall be scheduled no earlier than three (3) days following the notification of the employee."

With respect to the Grievant's tardiness on July 31, 2000, when the Grievant purportedly did not report to work until 8:03 a.m., the Union asserts that, as the Grievant explained in his testimony, his immediate Supervisor McGough and Assistant Superintendent Patchen knew the Grievant was not at work on July 31st, such that the allegation is simply false and erroneous. Management therefore knew that the Grievant's entry of a start time of 8:03 a.m. on his timesheet was inaccurate and erroneous, argues the Union, and accordingly, pursuant to Division policy the timesheet should have been returned to the Grievant for correction, rather than be used to support disciplinary action. Moreover, argues the Union again, the Grievant was treated disparately in that no other Department employee was disciplined for being [three (3)] minutes or less late in arriving to work. And again, the Union asks rhetorically, was the occurrence considered AWOL/Tardy?

With respect to the Grievant's tardiness on August 2, 2000, when he purportedly did not report to work until 8:05 a.m., the Union notes that the Grievant did not recall arriving late to

work on August 2nd, with the consequence that "the timesheet is obviously incorrect." The Union makes the same arguments as it made with respect to the Grievant's July 31st tardy, as set forth hereinabove. It also alleges that this charge was not stated as part of either the Pre-Discipline Notice (Joint Exhibit No. 3C) or the Notice of Discipline (Joint Exhibit No. 3A).

The next matter addressed by the Union concerns the allegation in the Notice of Pre-Discipline Meeting of John Downs, Labor Relations Administrator, of August 30, 2000, to the effect that "on July 17, 31 and August 1, 2000, you worked past your 5:00 p.m. end time without prior authorization from your supervisor."

With respect to the Grievant working five (5) minutes past his end time on July 17, 2000, the Union asserts that this discipline is an example as to how Department Policies and Work Rules were being enforced differently and more stringently against the Grievant in that other Division of Real Estate and other Department employees have not been disciplined for being on the floor of their work area after their established end time. In this regard, asserts the Union, it was the Grievant's uncontroverted testimony that he personally witnessed other employees being on the floor after their established end time. Finally, asserts the Union, in an apparent reference to Joint Ex. No. 3S, the Division's own Policy purportedly allows for a five (5) minute grace period. In this regard I note that Joint Exhibit No. 3S is a memo to Division Managers & Supervisors dated July 28, 2000, subject: Report In Time

Procedure Clarification. The Memo reads in pertinent part as follows:

> "There have been some questions raised in light of the procedure that requires that our staff not report to work any earlier than five (5) minutes prior to the start of their scheduled shift. The question is whether the time restriction applies to them being at their workstation or on the floor. . . . I have determined that the proper procedure is that <u>overtime eligible staff members</u> should not be on the Floor any more than five (5) minutes prior to the start of their shift. This procedure will hopefully . . . coordinate well with the procedure that requires them to document their arrival time, for timesheet purposes, arrival time on the floor is what is required to be documented. . . . Each manager or supervisor is to document the time and manner in which they conveyed this clarification to their effected (sic) staff members. This documentation is to be maintained by the manager or supervisor for use as necessary. Failure on the part of a manager and/or supervisor to properly follow this directive and/or enforce this procedure will subject the offending manager and/or supervisor to potential discipline, up to and including removal."

It appears that the Union urges that it be inferred from this memo that there is a five-minute grace period at the <u>end</u> of the workday as well.

With respect to the Grievant's working five (5) minutes past his end time on July 31, 2000, the Union asserts that this charge is unfounded inasmuch as, even though July 31st was recorded as worked and paid, the Grievant did not in fact work that date. The Grievant had informed the Department that some of the entries on his record of hours paid were inaccurate before the recommendation and/or decision to discipline had issued. Under the Division's policies, his record of hours paid should have been returned to him.

With respect to the Grievant's working six (6) minutes past his end time on August 1, 2000; the Union contends that this is incorrect in that the Grievant was actually loading his car in preparation for a field assignment in Toledo the next morning. The Union notes that the Grievant indicated that it was not until Assistant Superintendent Patchen told him on August 4, 2000, that he could load his car during his normal hours, did he even know he could have started and finished preparing to go to Toledo on State time. The Union takes the position that this is another example of the Grievant being treated disparately inasmuch as no other Department employee has been disciplined for being on the floor after his or her established end time. Additionally, argues the Union, as heretofore noted, the Division's own policy purportedly allows for a five-minute grace period. Then too, argues the Union, Department Advocate Woodrow represented that the Grievant was not disciplined as a result of this allegation. (Union Exhibit #13, para. #1.) However, asserts the Union, it should be noted that Mr. Woodrow, as in the past, decided to claim no discipline was issued relating to this August 1st charge, when the Employer was called upon to produce records of when any other employee was charged and disciplined for the same alleged conduct. Then too, the Union claims (erroneously) that the charge of the stay-over of August 1, 2000, was not stated in the Pre-Discipline Meeting Notice. The Union also notes (correctly) that the specific charge of a stay-over on August 1, 2000, was not set forth and stated on the Notice of Discipline (Joint Exhibit No. 3A), nor was the specific

discipline for this stay-over charge vis-à-vis August 1, 2000, set forth or stated on either the Pre-Discipline Meeting Notice (Joint Exhibit No. 3C), nor the Notice of Discipline (Joint Exhibit No. 3A).

The next matter addressed by the Union concerns the allegation in the Notice of Pre-Discipline Meeting to the effect that the "Grievant was instructed on July 6, 2000, to call his afternoon appointment and tell them that he would be late so he could take his lunch break [which the Grievant did not do]." The Union notes that on the day of the Pre-Discipline Meeting, September 5, 2000, the Department withdrew the reference to July 6, 2000, and in effect substituted the date of July 18, 2000, the date of the Grievant's misconduct. Accordingly, the Union correctly asserts that neither the Pre-Discipline Notice (Joint Exhibit No. 3C) nor the Notice of Discipline (Joint Exhibit No. 3A) states that the Grievant was in effect insubordinate on July 18, 2000, nor do either of these documents set forth the specific discipline contemplated for said conduct (the Pre-Discipline Meeting Notice) nor the specific discipline in fact meted out for this specific purported offense. The Union in effect characterizes the amendment or correction from July 6th to July 18th in the course of the September 5, 2000 Pre-Discipline Meeting as in effect a "new" allegation, which was "added" at the September 5, 2000 Pre-Discipline Meeting. This being so, the Union, apparently relying on the reference in Article 24 - Discipline, Section 24.04 - Pre-Discipline, to the effect that "this [pre-discipline] meeting . . .

shall be scheduled no earlier than three (3) days following the notification to the employee . . .," asserts in effect that inasmuch as the Grievant received notice of the allegation of purported insubordination on the same day as the prediscipline meeting "notice of the allegation [was] not provided to [the] Grievant three days prior to [the] Pre-Discipline Meeting," in violation of Section 24.04 of the Agreement. Additionally, the Union asserts that "the initiation of discipline action relating to this [July 18th, 2000] incident was untimely." In this regard it appears that the Union is relying on the provision in Article 24 - Discipline, Section 24.02 - Progressive Discipline, to the effect that:

> "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 discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

The point the Union appears to be making is that since the Grievant was not notified until September 5, 2000, at the Pre-Discipline Meeting, that the Department contemplated discipline for his conduct on July 18th, 2000, said notice and subsequent discipline October 13, 2000, was not "initiated as soon as reasonably possible," in violation of Section 24.02 of the parties' Agreement.

Still further with respect to disciplining the Grievant for insubordination on July 18, 2000, the Union states that in his September 22, 2000 Pre-Discipline Report (Joint Exhibit No. 3C), the Appointing Authority's Designee conducting the meeting, John

Downs, suggests that this July 18th insubordination charge is sustained because the Grievant admitted to the insubordination charge. But upon receiving Downs' Report, and prior to any disciplinary decision being made, the Grievant Emailed the Department's Director (Union Exhibit No. 78) to inform him that Downs' Report was false and misleading. (The point apparently being that in light of said Email, it cannot be said that the Grievant admitted to insubordination on July 18th, 2000.) The Union further notes that Mr. Brockman was also sent a copy of this Email. Mr. Downs provided the initial response to this Email to the Director, suggesting that if the Grievant had a problem with the content of his, Downs' Pre-Discipline Report, the Grievant should use the grievance process (Union Exhibit No. 79). And, states the Union, according to Mr. Brockman, the disciplinary decision was made based upon Mr. Downs' unaltered Pre-Discipline Report.

The next matter addressed by the Union concerns the allegation in the Notice of Pre-Discipline Meeting that the Grievant "failed to properly fill out [his] time sheet as instructed." The Union takes the position that the charge was apparently abandoned prior to the September 5, 2000 Pre-Discipline Meeting inasmuch as it was not mentioned during the Department's presentation at said Meeting, and no evidence was presented to support it. The Union also notes that Mr. Downs' September 22, 2000 Pre-Discipline report and recommendation does not make reference to this charge or state a finding that this charge had been proven. In any event, argues the Union, the time sheet form was faulty and could not be accurately

or honestly completed and has since been corrected. The Union further argues that this specific charge is not specifically stated and set forth in the Notice of Discipline (Joint Exhibit 3A) and that the contemplated or meted out discipline for this offense is not specifically stated and set forth in either the Notice of Pre-Discipline Meeting (Joint Exhibit No. 3C) or the Notice of Discipline (Joint Exhibit No. 3A), respectively.

The next matter addressed by the Union concerns the allegation that the Grievant was treated disparately with respect to discipline for infractions of the Department's Policies, which the record reflects were applicable to all approximately eight hundred (800) Department employees. The Union's post-hearing brief at pages twenty (20) through twenty-six (26) set forth the evidence and arguments the Union makes to support its claim of disparate treatment, and such is set forth in Appendix "I", attached hereto.

The next matter addressed by the Union concerns a renewal of its objection to the receipt into evidence of Management Exhibit Nos. 1A, 1B, 1C, 1D, and 1E. In this regard the Union asserts that these Exhibits were not provided to the Grievant as part of his pre-disciplinary packet, nor were there documents discussed at the Pre-Discipline Meeting. The Union takes the position that Management Exhibits 1A through and including 1D, and, indeed, any other Management Exhibits which were not presented at the September 5, 2000 Pre-Discipline Meeting, should not be given any consideration by the Arbitrator. The issue, asserts the Union, is whether the evidence presented at the Pre-Discipline Meeting

support a finding of "just cause." Moreover, asserts the Union, the Department's Advocate, Mr. Woodrow, represented that the Grievant was not disciplined for working unauthorized overtime, thereby rendering said Exhibits irrelevant. The Union takes the position that these Exhibits are just an attempt to discredit the Grievant and to paint him as an uncooperative employee, not willing to follow the work rules.

The Union asserts that Department witnesses such as Mr. Patchen, testified that pursuant to the Fair Labor Standards Act, the Department was obliged to compensate employees, including perforce the Grievant, for any overtime they worked, whether or not the employee claimed overtime pay or not. The Union notes that other employees had come in hours prior to their start times both before and after the Department's June 29, 2000 Time Sheet Policy for the Division of Real Estate and Professional Licensing, effective with the pay period that starts Sunday, July 2, 2000, issued by Superintendent Hengle and Assistant Superintendent Patchen. (In the first paragraph thereof, entitled "Background," it is stated that: "[t]he following is a restatement of the policy of the Division, which has been in place for some time, with additional clarification in some areas.") (Union Exhibit No. 33) Nevertheless, both Patchen and Hengle indicated that no other employee's overtime was analyzed, as was the Grievant's (Management Exhibits 1A through 1E), asserts the Union. Accordingly, argues the Union, paying the Grievant for overtime he did not claim was just another attempt to justify disciplining the Grievant, while

not disciplining others for the same conduct. Based on the foregoing contentions the Union urges that Management Exhibits 1A through 1E be stricken from the record, or, at the very least, be given very little weight.

The Union also makes a "give very little weight" argument with respect to Management Exhibit No. 3, Mr. Downs' extension of keeping the Pre-Discipline Meeting record open until September 11, 2000, for further response from the Grievant. Thus the Union asserts that the Grievant requested documentation and information regarding the charges against him during the Pre-Discipline Meeting of September 5, 2000, and none were provided. After raising objections to the Pre-Discipline Meeting and sending an Email, Mr. Downs' responded back to the Grievant at the end of the workday on Wednesday, September 6, 2000. He gives the Grievant 3 days to submit written reasons why he disagreed with the proposed discipline. The Grievant was on assignment that Thursday and Friday and was unable to respond. Additionally, the Employer did not provide the Grievant with requested information and documentation which could be used to support his position that disciplinary action was being recommended against him without just cause, in a disparate and/or discriminatory fashion.

This is yet another shallow attempt by management to appear to be fair and open. Mr. Downs knew that the Grievant was on assignment for 2 of the 3 days he allowed for the record to remain open. There was no reasonable way for this Grievant to submit written reasons in such a short time frame. The Union continues to

argue that the Pre-D meeting was a violation of his due process rights. There was never full disclosure of the charges or who brought the charges against him. Nor was he given the right to rebut, refute and question those who charged him.

The Union argues this arbitrator should place little or no weight to Management #4, a compilation of several instances where the Grievant's leave requests were granted. The approved leaves go from January of 2000 to January of 2001. The leave that was requested and refused is what is at issue in the instant case. For this to be given any weight it must be compared with every employee at the Department of Commerce over the same time period.

Likewise Management #5, a compilation of employee leave requests reaching the conclusion there were an average of 5.06 requests for leave per Division employee, should not be given any weight. The method in which it was prepared has not been substantiated. The dates January 2000 to June 2000 do not jive with the dates in Management #4. The issue has to do with why the Grievant's request for leave which was denied on July 19, 2000. The Employer includes no testimony or evidence in the record which shows it considered the Grievant's leave request pursuant to Article 13.06 of the Collective Bargaining Agreement.

Ms. Jones testified that Management #4 included all the employees in the Division of Real Estate while under direct examination. She was not in a position to present anything with regard to the employees of the entire Department of Commerce. Then under cross examination she was forced to admit that Management #4

did not include all of the Division of Real Estate employees who were employed by the Division during the time period material to this grievance. Ms. Hendershot (Helen Hendershot's late arrivals, which they admitted to through the testimony of Patchen and Hengle, were not included as a part of their percentages and occasions of approving leave requests). Attendance records relating to approving her late arrivals to work have not been provided to either the Union or the Grievant. In fact, the Employer made reference to Ms. Hendershot's age and use of public transportation as a basis of allowing her to arrive at work after her established start time. No Disability or FMLA materials were presented to support such accommodation. Therefore, the approval of her late arrivals should have but were not included in Dee Jones' calculations. Management Exhibit 4 clearly does not represent what Ms. Jones claims it is—a chart of leave approval.

There may be other employees in the department not listed. Furthermore there was no supporting documentation attached that could provide evidence and justification that her percentages are correct. Furthermore, the Union was never provided a copy of this evidence even though it had been requested. Ms. Jones also testified that she had in her possession, all of the instances in which leave requests such as the one submitted by the Grievant on July 19, 2000 were disapproved. Those materials were not provided to the Union as requested. Other than Ms. Jones' conclusions, how is there to be a comparison made to the Grievant, when all of the materials she reviewed in doing her calculations where not

presented to the Union/Grievant prior to arbitration or during the hearing?

Fundamental fairness requires the exclusion of these exhibits. The only value of these documents, certainly Management Exhibits 4 and 5, is that they show how the Union/Grievant's request for attendance records and leave records were truly relevant to this grievance. Had the Employer provided the requested information and materials, the Union would have been in a position to respond to Ms. Jones' assessment of the leave request and approval.

Finally, the Union sets forth contentions and arguments as to how, in its view, the Department's discipline of the Grievant under scrutiny here, was violative of various provisions of the parties' Agreement, to wit: Article 2; Article 5; Article 13; and Article 24. The specifics and particulars of these contentions and arguments are set forth in Appendix II.

By way of remedy the Union urges that the Arbitrator make the Grievant whole in terms of his status as an employee and citizen of the State of Ohio; rescind any and all discipline associated with this grievance; remove any and all reference of this discipline from Grievant's personnel file; compensate the Grievant any and all lost wages and benefits; issue an order that the outcome of this grievance be imposed upon the Employer effective October 13, 2000 and that the Employer be ordered to comply with the Collective Bargaining Agreement from that date forward consistent with the decision issued in this case.

Following the exchange of post-hearing briefs, and pursuant to the Arbitrator's direction at the hearing, the parties filed Reply Briefs.

c.) The Department's Reply Brief

In its Reply Brief the Department asserts that the Grievant's claim that he did not know why he was being disciplined is unfounded. It asserts that the Grievant was not denied his due process rights and he was disciplined for just cause. The Department contends that all of the documents used to support the disciplinary action were in the Grievant's possession prior to the Pre-Discipline Meeting and hence the Department's obligations under the parties' Agreement at Section 24.04 were met. The Department notes that the pre-disciplinary record remained open for three days in order to allow the Grievant to question, refute and rebut all allegations, as per the parties' Agreement. It is the Department's contention that the Grievant knew exactly why he was being charged with Insubordination, and hence discipline for same was for just cause. The Department takes the position that the Grievant willingly acted in a way that he knew would not be construed as good behavior, with the consequence that his discipline for Failure of Good Behavior in violation of Department Policy 201.0 #4 was for just cause. As for the Grievant's tardiness, he knew such was unacceptable, with the consequence that his discipline for Unexcused Tardiness was for just cause, asserts the Department. Similarly, states the Department, the Grievant knew the ramifications for taking leave without first obtaining

authorization, with the consequence that his discipline for AWOL was for just cause. The Department additionally asserts that the Grievant knew the proper policy and procedure for taking a proper lunch break and that he could be disciplined for not doing so, with the consequence that the Grievant was properly and for just cause disciplined for Exercising Poor Judgment in violation of Policy No. 201.0 #3.

The Department further asserts that the Grievant's defense that the Department forced him to use poor judgment and to act in a manner properly characterized as a failure of good behavior, is unsupported. The Grievant's defense that the Department's interpretation of the Fair Labor Standards Act (FLSA) forced him to not follow policies is unsupported. Matters pointed out by the Department in support of the foregoing points, arguments, positions, and statements, and assertions are set forth in Appendix III.

d.) <u>The Union's Reply Brief</u>

The Union's Reply Brief is occasionally essentially redundant of points made and argued in its post-hearing brief. Set forth hereinafter are principally additional points the Union argues. Thus the Union asserts in its Reply Brief that after reviewing the Department's Post-Hearing Brief the Department appears to be requesting the Arbitrator to uphold the Grievant's October 13, 2000 discipline, which is under scrutiny here, by new allegations and/or theories to support said disciplinary action. Thus the Union states that while the Pre-Discipline Notice (Joint Exhibit No. 3C)

states that discipline is being contemplated in part because the Grievant allegedly "failed to report to work prior to his 8:00 a.m. start time," the Department now contends that said discipline is because "the Grievant repeatedly arrived to work after his scheduled start time," (emphasis supplied), a different theory. In a similar vein the Department in its percentages-of-tardies analysis appears to argue that the Grievant was habitually and/or excessively tardy, again, a new theory, asserts the Union, in that such is not spelled out in the Pre-Discipline Notice or the Notice of Discipline. Furthermore, argues the Union, this percentage analysis includes the false premise that the Grievant was tardy on July 18, 30, and 31, whereas he was not at work at all on these dates.

In regard to the foregoing the Union renews its contention that it is not within the jurisdiction of the Arbitrator to consider allegations of employee misconduct which were not presented at the September 5, 2000 Pre-Discipline Meeting or found by John Downs' Pre-Discipline Report and Recommendation (Joint Exhibit No. 3B). In this same vein the Union asserts that the Department's contention in its Post-Hearing Brief that "the Grievant demonstrated that he is unwilling to submit to authority and the Grievant failed [therefore] to act in a good behavior," and that the Grievant acted "inconsistent with the Employer's expectations of professional behavior," are concepts which simply fail to reflect the definition of Failure of Good Behavior set forth in the then current Department Policies; to wit, "Behavior

Not Already Specified Within the Policy Manual." In any event, the Department's reliance on Ohio Revised Code Section 124.34, in addition to, again, raising a "new issue" and theory, is patently inapplicable, asserts the Union, inasmuch as Joint Exhibit No. 2B, the Department's Disciplinary Policy and Policy No. 201.0, expressly states that "Ohio Revised Code Section 124.34 is the current statute that governs the discipline of civil service employees not under the collective bargaining agreement," whereas of course the Grievant is employed "under the collective bargaining agreement." (Emphasis supplied).

The Union states that the Department's Brief makes no argument to support its unwillingness to agree to the statement of issues as proposed and urged by the Union. This unwillingness; its refusal to accept into the Record records which it had itself provided to the Union/Grievant; and the alleged lack of a clear and separate statement of each alleged Department of Commerce Policy violation juxtaposed with the Department's evidence in support of each alleged policy violation, warrant the Arbitrator adopting the Union's proposed issues as the issues in the case. On this latter point the Union independently contends that a clear and separate statement of each alleged Department Policy violation and the Department's evidence which was used on September 5, 2000 to support disciplining the Grievant should be required in order to consider whether the Department had just cause to discipline the Grievant at that time. Likewise, argues the Union, a clear and

separate statement of each allegation of managerial misconduct must be required and addressed.

Concerning the allegation that the Grievant was AWOL in violation of Department Policy 201.0 #21, the Union notes that the Department argues in its Brief the Grievant not being at his assigned work station at his scheduled start time on July 19, 2000, and not being on approved leave for the period of his tardiness, constitutes AWOL. But this theory of what constitutes AWOL has recently been rejected by Arbitrator Robert G. Stein (Union Exhibit No. 1). The Union urges the Arbitrator to follow and adopt Arbitrator Stein's rationale. The Union further contends that the Grievant was treated disparately in this matter because the record evidence fails to disclose any instance in which the Department had considered any employee (other than the Grievant), who arrived to work less than thirty (30) minutes after his start time, and who was not on approved leave, as being AWOL, albeit numerous employees arrived to work less than 30 minutes after start time and were not on approved leave. (See Union Exhibit No. 37 up to and including Union Exhibit No. 52, and Union Exhibit No. 18). Still further with respect to the allegation of AWOL On July 19, 2000, in light of the Grievant's testimony that he did not receive notice of his leave request being denied until September 1, 2000, the date the Grievant received his Pre-Discipline Meeting Notice, the delay in initiating said disciplinary action is unwarranted and unexplained and hence untimely and violative of Article 24.02. Additionally, argues the Union, the Department's brief does not disclose who

recommended disciplining the Grievant for AWOL or explain why he or she was not present at the September 5 Pre-Discipline Meeting. By not appearing at the Pre-Discipline Meeting, the Employer Representative avoided being questioned relating to his/her allegation and the dates involved in violation of Section 24.04 of the Agreement. To the extent that the Arbitrator determines that Blaine Brockman is the individual who accused the Grievant of AWOL, Tardiness and Failure of Good Behavior, Mr. Brockman has acted as both Accuser and the Final Decision Maker in imposing the 10-day suspension, in violation of the Grievant's due process rights and the disciplinary process expressed in Article 25 of the Agreement.

The Union notes that in response to their claim that the Grievant was treated disparately vis-à-vis being charged with AWOL, the Department's Advocate suggests that the number of times the Grievant arrived to work late, justified any difference in treatment he received. Yet, neither the Department nor its Policies and Procedures Manual express a number of late arrivals, which triggers the application of its "new" interpretation of its AWOL/Tardiness Policy.

The Union also argues as follows:

"Was the Grievant the only Department of Commerce Employee who arrived to work after his established start time? If not, what happened to the other employees' leave forms and the explanations for their late arrival along with the action taken? Dee Jones [testified] she used that information to come up with Employer Exhibit #5. The only value of Mrs.

Jones' testimony in this area was that she had reviewed some attendance records other than employees' timesheets to determine the number of emergency leave requests which had been granted. The supporting documentation for the other employees' leave forms was not provided to the Union. Those records were in the Division of Real Estate's possession. Therefore neither the Union nor this Arbitrator has any way of knowing whether Mrs. Jones' assessment of the records and circumstances is accurate. Furthermore, to allow the Employer to present claims about records and/or information which it refused to provide to either the Grievant or the Union is at a minimum unfair and would taint this entire Arbitration."

The Union further asserts that while the Department's Advocate claimed that a bargaining unit employee had been denied emergency leave and disciplined for being AWOL, Ms. Jones' testimony and Union Exhibit No. 99 indicate that all of Ms. Eggerton's leave requests had been granted.

Finally, the Union asks rhetorically: what portion of the ten (10) day suspension imposed against the Grievant was due to a finding that he violated the Department's AWOL Policy 201.0 #21. There is no such indication and the Union asserts that the parties' Agreement requires that disciplinary actions be progressive. Without being informed of the severity of the discipline which was imposed upon the Grievant for allegedly violating the AWOL policy, how can the Arbitrator find that the discipline for this offense was progressive and pursuant to the mandate of Article 24, Section

24.02? Further with regard to the issue of whether the Department's disciplinary action is progressive, the Arbitrator must consider the fact that at the time this discipline was imposed the Grievant had received an oral and a written reprimand for allegedly violating Commerce Policy 201.0 #21. Both of these disciplines were grieved by the Grievant. Additionally, the Grievant had been fined one day and two days. The one-day fine was for allegedly violating Commerce Policy 201.0 #21—the two-day fine was for allegedly violating Commerce Policy 201.0 #21 and #19. Thereafter, the Grievant was suspended for five days for allegedly being AWOL, Tardy and Insubordinate. This was the disciplinary record, which is claimed to have been considered in imposing the subject ten (10) day suspension upon the Grievant (No mention of the Grievant's prior disciplinary record is mentioned in John Downs' Pre-Discipline Report and Recommendation).

Subsequent to the imposition of this ten- (10) day suspension the oral and written reprimands, along with the one-day fine were addressed through the NTA process of Article 25 Section 25.10 of the Collective Bargaining Agreement. Contrary to Mr. Woodrow's statements otherwise, these matters were resolved as stated in Joint Exhibit #11. They are not precedent setting. The two-day fine was withdrawn and Arbitrator Stein has reduced the five-day suspension to a two-day suspension for arriving to work late on May 30, 2000. Therefore, a reasonable person would think that the mandated change in the Grievant's disciplinary record and Arbitrator Stein's ruling and nothing more is enough to have

justified a reduction in this ten (10) day suspension. By not reducing this ten (10) day suspension, the Employer is essentially increasing the discipline associated with the Grievant's alleged misconduct for the period beginning July 7, 2000 to August 2, 2000 in violation of Article 24, Section 24.05.

The Union argues with respect to the alleged violation of Policy 201.0 #4 - Failure of Good Behavior, that when in its Brief, the Department rationalizes the propriety of its allegation that the Grievant violated said Policy, that the Grievant, by his overall conduct "demonstrated that he is unwilling to submit to authority" and "chose to act in a way that was inconsistent with the employer's expectation of professional behavior," the Department, again, reframes the issue and comes up with a "new" theory; a theory not included/articulated in any previous statement as the basis for the Grievant's discipline. The Union takes the position that before a decision can be made on whether or not, in disciplining the Grievant, the Employer complied with the provisions of the Collective Bargaining Agreement, a number of questions must be answered. We believe those questions are as follows:

1. What is the Department's Policy relating to Failure of Good Behavior, Commerce Policy 201.0 #4?
2. Who recommended that the Grievant be disciplined for violating Commerce Policy 201.0 #4?

3. Was the individual who recommended the Grievant be disciplined for violating Commerce Policy 201.0 #4 present at the September 5, 2000 Pre-Discipline Meeting?

4. Is the basis of this allegation stated in the text of the August 30, 2000 Pre-Discipline Notice in terms which would permit a reasonable response?

5. What evidence or testimony was presented at the September 5, 2000 Pre-Discipline Meeting in support of the claim that the Grievant had violated Commerce Policy 201.0 #4?

6. Was the Policy even-handedly enforced?

The Union takes the position that in order for the undersigned to find that the Employer's imposition of discipline for violating Policy 201.0 #4 was appropriate, he must first have the answers to all of the above-stated questions.

Question #1's answer is found in Joint Exhibit No. 2A, which defines Failure of Good Behavior at #4 as "Behavior Not Already Specified Within the Policy Manual." The answer to question no. 2 cannot be found in the record, asserts the Union, because thus far no Supervisor or Manager will admit to have put forth this allegation. The closest indication which we have of who recommended disciplining the Grievant for Failure of Good Behavior is that Blaine Brockman drafted the Pre-Discipline Notice and John Downs signed it.

With respect to the allegation that the Grievant was insubordinate in violation of Policy 201.0 #2, the Union asserts

that in its Brief the Department retreats from its original allegation that there were instances, plural, of insubordination. However, asserts the Union, once evidence was produced to show that while employees Ted Williams and Greg McGough were not disciplined for being insubordinate as the disciplinary progression after being counseled, the Department now wants to put forth a "new" basis for the Grievant's discipline for insubordination.

As a result of Diana Jones pointing out that the times on the Grievant's timesheets were not used for payroll purposes, the Employer has apparently abandoned relying on the Fair Labor Standards Act to justify disciplining the Grievant. Additionally, Lynne Hengle's testimony confirmed that other employees had worked beyond their approved hours and had not been disciplined. Saying the Grievant worked through parts of his lunch hour even if true is simply another way of saying he worked beyond his scheduled hours without approval. By simply stating the charge differently, the Employer is trying to justify different treatment of its employees relating to the same alleged misconduct.

Once again, the Union asserts that the Department has violated certain Articles and Sections of the parties' Agreement. Once again, the specifics and particulars of the Union's positions in this regard are set forth in an appendix hereto, to wit: Appendix IV.

Discussion and Opinion:

I note at the outset certain arbitral principles which have a bearing here. Thus it is widely accepted in arbitration that certain minimal due process requirements are inherent and imbedded in the "just cause" standard for discipline or discharge, as the parties' Agreement provides here. The Arbitrator adheres to this concept. The concept of due process and discipline or discharge is discussed by the Elkouris in their learned arbitration treatise How Arbitration Works, BNA Books, Inc., 5th Edition, 1997, at pages 918 to 920. As the Elkouris correctly observe: "Arbitrators will, in many cases, refuse to uphold management's [disciplinary] action [as assessed and imposed by Management] where [Management] failed to fulfill some procedural requirement specified by the Agreement [including, perforce the "minimal" due process standards inherent and imbedded in the "just cause" concept]. If, however, an arbitrator feels the company has complied with the spirit of the procedural requirement and the employee was not adversely affected by management's failure to comply, the company's action may be deemed sufficient. Arbitrators have, in a few cases, refused to disturb management's decision even though the Company failed to comply with even the spirit of the requirement. (Case citations omitted)." In other words, the consequences of a failure of due process can only be determined on a case by base basis; due process failings may warrant a voiding of the discipline, or a reduction of the discipline, or an affirmance of the discipline Management imposed.

Other arbitral concepts which have a bearing here were alluded to by the undersigned in a recent decision for the State and the Union in the matter of Ohio Department of Youth Services -and- OCSEA AFSCME Local 11, AFL-CIO, Grv. #OCB Case No. 35-17-2001 0510-0011-03 (Lynda Madison Discharge), decided April 30, 2002, and hereinafter referred to as "the Lynda Madison case." One such arbitral concept was well put by Arbitrator John M. Gradwohl in Iowa Power & Light Co., 76 LA 482, at 487, wherein Arbitrator Gradwohl observed:

> "Relying on . . . three stated grounds, the Company suspended [the Grievant] for fifteen days. . . . Since the Company relied on all three stated grounds in imposing the fifteen-day suspension, the suspension should be reduced in view of the determination herein that one of them was not proper. The Company did, in fact, take all three allegations into account in fixing the discipline at a fifteen-day suspension. Considering all of the evidence, particularly the severity of the two proper grounds upon which the Company acted, it is determined that the length of the suspension should be reduced from fifteen to twelve days."

But, as noted in the Lynda Madison case, there is a caveat or exception to the principle espoused by Arbitrator Gradwohl. Thus in Lamar Construction Co., 98 LA 500 (1992) Arbitrator Richard L. Kanner cogently observed:

> "I am in agreement with the Union that where there are two minor charges underlying discipline and one fails by lack of proof or withdrawal by the Employer, the amount of discipline is thereby affected. . . . [I]n cases where the several charges are so egregious that each one could arguably sustain the discipline . . . such proposition is not valid. (Emphasis supplied)."

Additionally, as also noted in the Lynda Madison case, there is the arbitral principle that so long as the "proven facts" for

which the discipline was based, in themselves constitute an offense, the Arbitrator is not bound to void the discipline and set it aside merely because the facts fail to prove that the Grievant was guilty of the precise offense charged. Esso Standard Oil Co., 19 LA 495, 498 (McCoy, 1952). This principle of course is confined to lesser or equivalent offenses subsumed within the offense charged.

Then too there is the arbitral principle that absenteeism or other attendance related problems, such as tardiness, if habitual and/or excessive, even if caused by circumstances beyond the control of the Grievant, and hence not properly regarded as misconduct, can nonetheless, in certain circumstances, result in discipline, up to and including discharge. Arbitrator Benjamin M. Shieber put it well in his decision in Kimberly-Clark Corp., 62 LA 1119 (1974), at page 1121, wherein he observed that: "[I]n these cases, [the discipline or discharge] of the employee is based on the claim that the interests of the Employer and of the other employees in efficiently and economy of operations requires that an employee with an excessive absenteeism rate which will probably continue in the future be [disciplined or discharged]."

Also noted are the Elkouris' quotations from Arbitrator Jonathan Dworkin and Arbitrator J. Charles Short: these quotes succinctly state the arbitral principle with respect to unequal and/or disparate and/or discriminatory treatment. As the Elkouris notes at pages 935 and 936 (How Arbitration Works, 5th Edition):

"Discrimination is an affirmative defense, and, therefore the Union . . . has the burden of proving [it].

. . . In a case where a Union attempted to show that the Grievant was disciplined more severely than other employees, Arbitrator Jonathan Dworkin described the burden as follows:

> 'In order to prove disparate treatment, a Union must confirm both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties. Genie Co., 97 LA 542, 549 (1991).'

The variations in penalties assessed do not necessarily mean that management's action has been improper or discriminatory [or disparate] was persuasively elaborated upon by Arbitrator J. Charles Short:

> 'The term "discrimination" connotes a distinction in treatment, especially an unfair distinction. The prohibition against discrimination [inherent in the just cause standard] requires like treatment under like circumstances. In the case of offenses the circumstances include the nature of the offense, the degree of fault and the mitigating and aggravating factors. There is no discrimination, or no departure from the consistent or uniform treatment of employees, merely because of variations in discipline reasonably appropriate to the variations in circumstances. Two employees may refuse a work assignment. For one it is his first offense, there being no prior warning or misconduct standing against his record. The other has been warned and disciplined for the very same offense or numerous occasions. It cannot be seriously contended that discrimination results in identical penalties are not meted out. Alan Wood Steel co., 21 LA 843, 849 (1954)."

Needless to say, given the sheer volume of the record evidence; the multiple charges against the Grievant; and the numerous arguments and contentions put forth by the parties, the matter at hand is complex and determining its proper outcome has proven to be a daunting task.

Taking up seriatim, the arguments made by the Department, first in its post-hearing brief, and subsequently in its reply brief, first addressed is the Department's contention and argument that the Grievant was "repeatedly" tardy and as later characterized, "habitually tardy"; and, additionally, the Grievant "repeatedly" ignored directives given to him by supervisors, i.e., was repeatedly insubordinate. In my view these repeatedly and/or habitual allegations are a different concept from the simple tardiness and insubordination charged here. And, self-evidently, repetitions and/or habitual tardiness and repetitious insubordination are more serious matters than simple "Unexcused Tardiness" and "Insubordination." Thus reliance on the Esso case, supra, would be inappropriate. But nowhere in Appendix "A", "B", or "C" is the Grievant put on notice that he is accused of these more serious offenses, as is required by the elemental due process requirement imbedded in the "just cause" standard applicable here. In a similar vein the Department's argument that the Grievant chose to be late for work, chose to ignore direct orders and to be willingly insubordinate, appears to seek to enhance the seriousness of the Grievant's alleged offenses of tardiness and insubordination, to which the Grievant was put on notice he needed to defend. And characterizing the Grievant's alleged tardiness and insubordination as "destroying the employer-employee relationship" is simply unhelpful over-the-top

rhetoric. Indeed, if the Department truly concluded that the Grievant's conduct had destroyed the employer-employee relationship, presumably the Department would have terminated the Grievant's employment. Having failed to do so, I find unpersuasive its contention that the justifiable discipline here could have been removal.

In defense of its "suspension" of the Grievant, and the quantum thereof, ten (10) days, the Department asserts that it was justified in doing so because it only issues suspension of 5 or 10 days, and that since the Grievant had previously been suspended, its only choice was a ten-day suspension or discharge. But this contention would elevate the Disciplinary Policy's guidelines to an inflexible mandate, contrary to the applicable contractual "just cause" standard, which requires discipline, including perforce suspensions, commensurate with the offense, which here, may or may not be a ten (10) day suspension. Additionally, this justification of the Department if sanctioned would clearly be at odds with Article 24 - Discipline, Section 24.02 - Progressive Discipline - E's standard of "one or more day(s) suspensions." (Emphasis supplied). Thus the Department's argument that it had no choice but to issue a ten (10) day suspension is found to be without merit.

The Department, relying on Section 13.02, points to July 19, 2000, as an AWOL, because the Grievant was not authorized to take any form of leave, and was not at work when scheduled,

i.e., 8:00 a.m., indeed, he was twelve (12) minutes late for work. However, I agree with Arbitrator Stein that this interpretation of what constitutes AWOL is a misapplication of the Department's own policy. As Arbitrator Stein noted (Union Exhibit No. 1) the Department's Tardiness Procedure - Policy #313.0, provides in pertinent part as follows:

> "Tardiness with Extenuating and Mitigating Circumstances: For incidents with extenuating and mitigating circumstances, the supervisor may choose to address this incident with any of the following actions or combination of actions, at the same time maintaining consistency.
>
> 1. The supervisor may allow the employee to take leave time for the time missed; or
> 2. Recommend the approval of excused leave without pay for the time missed.
>
> Tardiness without Extenuating and Mitigating Circumstances: If it is determined that there are not extenuating and mitigating circumstances surrounding the incidence of tardiness, it is up to management to address this with the employee as a discipline issue. The following actions must be taken:
>
> - Conduct a formal investigatory interview with the employee and his/her Union steward (if applicable) to officially establish that there were no extenuating mitigating circumstances.
> - Dock the pay of over-time eligible employees for the amount of an unexcused leave . . .
>
> Absence beyond 30 minutes is not considered a tardiness issue but is considered absence without approved leave and should be addressed as such." (Emphasis supplied).

Arbitrator Stein went on to correctly observe and find that: "[C]ertain provisions of the [Tardiness] Policy are explicit. One . . . is the definition of an absence beyond thirty minutes. I find the Employer erred in application of its own policy and acted arbitrarily when it considered the Grievant

to be both AWOL and tardy. . . . The policy . . . unequivocally defines an AWOL as an absence of more than 30 minutes. The policy does not provide for an employer to be both tardy/without extenuating circumstances and AWOL for the same tardiness of 30 minutes or less."

The record fails to reflect any tardiness in excess of 30 minutes on July 19, 2000, or indeed on any other date identified in the critical paper work, i.e., Appendix "A", "B" and "C" and of which the Grievant was put on notice he needed to defend. Hence I find no evidence to support any AWOL charge against the Grievant.

The Department makes a valid point when it notes that the Grievant's tardiness under scrutiny here was not the first time he was disciplined for tardiness, the point being that his recidivism with respect to his tardiness, notwithstanding previous discipline for same, serves to enhance the seriousness of the tardiness offenses here. The Department notes that the disciplinary grid provides that a preceding suspension for tardiness, as here, can result in a major suspension or removal for subsequent tardiness.

Acknowledging in effect that the Grievant might not have been tardy every one of the days the Department is claiming, the Department argues that it "is only disciplining the Grievant for the days that reflect tardiness on the time sheets . . . prepared, signed, and dated by the Grievant . . ." However, Downs' Pre-Discipline Meeting Report upon which decision-maker Brockman relied, made no finding that the Grievant was properly faulted and being disciplined for submitting inaccurate time sheets. Thus,

again, this belated claim by the Department improperly interjects a "new" theory of wrongdoing not previously relied upon.

The Department, pointing to the Grievant's counseling of July 6, 20000, concerning the fact that policy and rules applicable to him called for him to take a full hour for lunch and for him to take it at the midpoint of his workday, correctly notes that when he thereafter failed to take a full hour for lunch and take it at the midpoint of the day, the Department was justified in characterizing those failures, several in number, as violative of Policy 201.0 #3 - "Exercising poor judgment in carrying out . . . policies and procedures; and/or work rules." Downs, in his Pre-Disciplinary Meeting Report erroneously references #2, but he goes on to describe #2 as "poor judgment." Accordingly, the Grievant was on notice of what Policy, namely #3 - Exercising poor judgment, etc., his lunch hour variations were viewed as violating. Moreover, this notice must be said to be "timely" within the intendment of Article 24 - Discipline, Section 24.04 - Pre-Discipline. Thus Downs' Pre-Discipline Meeting Report (Appendix "B") recites without contradiction that Assistant Superintendent Patchen stated at the September 5, 2000 Pre-Discipline Meeting that the Grievant's lunch hour shortcomings were viewed as violative of Policy 201.0 #3 - Exercising poor judgment, etc. Furthermore, this September 5th notice to the effect that his lunch time misconduct was violative of #3 must, in view of Downs' 3-day extension of time for the Grievant to respond to the allegations against him, be regarded as timely and within the 3 days prior notice intendment of

Section 24.04. Moreover, this same Section expressly provides that the Grievant could have asked for an additional 2 days (48 hours), a request which could not be unreasonably denied, and still further on this point, extended even beyond 2 days "if mutually agreed to by the parties." However, no such request was made by the Grievant. In essence, therefore, by extending the Grievant's response time, any "due process" shortcoming by the Department with respect to the contract's Section 24.04 three (3) days prior notice requirement was "cured." Additionally, the Grievant cannot be heard to complain about an equitable "due process" notice issue with respect to the charges against him involving #3, in any event, inasmuch as he could not just stand by and not invoke his still further extension right. He who seeks equitable (fairness) relief must come with clean hands in the matter, a maxim well established in the law and by derivation, in labor arbitration as well.

Turning its attention to the matters of July 18, 2000, the Department contends that the Grievant was insubordinate when he failed to call his afternoon appointment and tell them he'd be late, and when he failed to go to lunch after being instructed to do so by his immediate supervisor, McGough, and Assistant Superintendent Patchen. In this regard, strictly speaking, the record reflects that McGough did not expressly direct the Grievant to go to lunch before his appointment, but rather informed the Grievant that he, McGough, did not have any authority to authorize him to not take lunch first, and rather take lunch at the end of the day. Nonetheless the Grievant failed to take lunch as normally

expected to, i.e., at the mid-point of his work day, and as McGough indicated he had no authority to alter, and in that sense when the Grievant went ahead and did not take his lunch at the mid-point in the day, the Grievant was insubordinate vis-à-vis McGough's instructions. As for the Grievant's failure to follow Patchen's instruction to call his afternoon appointment and tell them he would be late, and to go ahead and take his lunch before reporting to his afternoon appointment, when the Grievant failed to do so such was a classic and textbook case of insubordination, violative of Policy 201.0 #2. He was given clear instructions as to what to do and he did not do as he was instructed. As the Department has put it, "he took it upon himself to go directly to his afternoon appointment." The Department persuasively and correctly argues that the fact that the Grievant, as he testified, did so because he did not agree with Patchen, is clearly no defense at all. The Grievant was clearly insubordinate in violation of Policy 201.0 #2 with respect to his conduct on July 18, 2000. Furthermore, any reliance on Selegue's prior indication that inspectors in the field had discretion concerning their lunch hour, or any reliance on any "old" policy or sanction such discretion is misplaced. Patchen's instruction simply supersedes any such prior indication or practice. The Grievant was obliged to "obey now and grieve later." In any event the Grievant and the Union never articulated this prior indication and/or practice as a basis for the Grievant failing to follow Patchen's clear instructions.

The Department also contends that the Grievant was in clear violation of Policy 201.0 #4 - Failure of Good Behavior in that the Grievant, in a number of ways, and almost every day, demonstrated that he is unwilling to submit to authority and in this manner failed to maintain good behavior. The Department points to examples of conduct on the Grievant's part which constitutes Failure of Good Behavior as follows: his repeated failure to take a full one-hour lunch; his refusal to fill out a time sheet properly; his habitual tardiness; his clear insubordination on July 18, 2000; his argumentativeness with managers and supervisors in general and his conduct at the third step hearing in this matter, in particular. The Department also points to the voicemail left by the Grievant for Patchen on July 18, 2000, informing Patchen that he'd not done as instructed and that the Department could simply "donate his lunch back to the State," and argues that the "only purpose [i.e., motivation] of this voicemail was to show the supervisor that he could not force the Grievant to do anything that the Grievant did not want to do." On this latter point, any consideration of the Grievant's motivation is speculative at best, and, in any event, this characterization of the Grievant's conduct is, once again, over-the-top, and hence not helpful to a sound analysis of the case. In support of the appropriateness of the aforesaid examples of the Grievant's conduct supporting the Department's allegation that the Grievant was in violation of #4 - Failure of Good Behavior, the Department relies, among other things, on Ohio Revised Code, Section 124.34, which in effect

defines "Failure of Good Behavior" as a generalized concept addressing all acts of poor or otherwise "non-good" behavior. However, in my judgment, the Department's reliance on O.R.C. 124.34 is misplaced. Thus, in the parties' Contract at Article 44 - Miscellaneous, Section 44.01, the parties have provided that their Agreement takes precedence over "conflicting State statutes," if the Agreement addresses the subject matter of the statute, which it clearly does here at Article 24 - Discipline. Furthermore, the Department's Disciplinary Policy specifically recognizes this reality, when it expressly provides that "Ohio Revised Code Section 124.34 is the current statute that governs the discipline of civil service employees <u>not</u> under the collective bargaining agreement." (Emphasis supplied). By clear implication the Policy therefore recognizes that the Collective Bargaining Agreement, and <u>not</u> O.R.C. 124.34, governs the discipline of non-exempt bargaining unit employees such as the Grievant. Still further in the matter, had Management viewed O.R.C. Section 124.34 as applicable at the time of its pre-discipline notice, and notice of discipline being imposed, presumably both notices would have cited and charged the Grievant with a violation of Policy 201.0 #32 - "Violation of Revised Code Sec. 124.34 - . . . failure of good behavior." But the Department's notices did not do so. Accordingly it is clear that these O.R.C. 124.34 arguments are an afterthought and an improper "new" theory of the case, which, for the reasons noted above is inappropriate here. As the Union has argued, the arbitration hearing "is not intended to be an open forum for the

Department to reform. . . [It's suspension] decision . . . for the first time at arbitration." Additionally, the record reflects that the decision both as to what conduct of the Grievant was worthy of discipline, and the amount of discipline to be meted out for such, was made by Manager Brockman and concurred in by Manager McDonald. Brockman in turn relied on Downs' Pre-Discipline Meeting Report (Appendix "B"), as previously noted. It was further Brockman's testimony that he viewed the Failure of Good Behavior allegation as a "catch-all" provision. In this regard, a review of Appendix "C", the Pre-Discipline Notice and Appendix "B", Downs' Pre-Discipline Meeting Report, read together, reveals that the narrative on the Pre-Disciplinary Notice identifies all of the Grievant's alleged misconduct. And this narrative accounts for violations of: #2, #3, #19, and #21 of Policy 201.0, thereby confirming that #4, Failure of Good Behavior could only be supported if one views #4 - Failure of Good Behavior as being a "catch-all" provision, as did Brockman. Thus Downs' Pre-Discipline Meeting Report, Appendix "B" upon which Brockman relied, identifies the Grievant's alleged lunch hour offenses as violative of #3 - "Exercising poor judgment, etc." (Patchen's view that these alleged offenses were additionally also violative of #20 - ". . . [W]orking in excess of scheduled hours without required authorization," never made it into either the Pre-Discipline Meeting Notice or the Notice of Discipline, Appendix "D" and "A" respectively, with the consequence that any alleged violation of #20 of Policy 201.0 is out of the case). Additionally, it identifies the Grievant's conduct on July 18, 2000

as self-evidently violative of #2 - Insubordination. The last two paragraphs of Appendix "B" (Dowhs' Report) reveal that it was the twelve (12) minute absence of July 19, 2000, which was regarded by Management and the Grievant alike as the allegation involving #21 - Unauthorized Absence Without Leave (AWOL). This tardiness, and the other instances of tardiness alleged and alluded to in Appendix "C" and "B", are the alleged violations of #19 - "unexcused Tardiness." Put another way, while perhaps logic would warrant concluding that "all" of the Grievant's behavior outlined in Appendix "B" and "C" constituted a violation of #4 - "Failure of Good Behavior," since all of this behavior was viewed as violative of one or another "specified" Policy Manual provision [i.e., Policy 201.0 #2, #3, #19, and #21], the February 2, 2000 revision to the disciplinary grid proscribed reliance on that same behavior, already alleged as violative of a specified policy standard, as here, as additionally violative of the proscription against "Failure of Good Behavior." In this manner then, the record fails to support any violation by the Grievant of Policy 201.0 #4 - "Failure of Good Behavior." In my view, the only reasonable inference to be drawn is that Management simply overlooked or lost sight of the "revision" to #4 - Failure of Good Behavior,' which only shortly preceded the contemplation, and subsequent imposition, of discipline under scrutiny here, and mistakenly followed the pre-revision practice of some supervisors, which the record reveals, namely, alleging and disciplining employees for <u>both</u> a specific policy manual provision <u>and</u> #4 - Failure of Good Behavior, as logic allowed. Thus, the

record reflects that some supervisors believed that both unexcused tardiness and AWOL could be charged and others did not. But it was precisely this practice which the revision to Policy 201.0 #4 was designed to prohibit. This mistake phenomenon of applying the "old" standard in the time frame shortly after the effective date of a "new" standard, occurs frequently in arbitration.

Finally, and additionally, several of the "examples" of Failure of Good Behavior upon which the Department relies are improper "new" allegations not asserted prior to the imposition of discipline or spelled out as the grounds for the discipline, e.g., alleged violations of Policy No. 303.0; alleged argumentativeness; alleged discourteous and disruptive behavior at Step #3 of the grievance procedure in the instant case; and habitual tardiness.

The Department next contends that the Union failed to produce persuasive evidence of either discrimination based on the Grievant's race or gender or disparate treatment, I agree. Given the complexity of these matters, however, they will be more fully addressed hereinafter.

I find that the Department makes a valid point when it points out that the Grievant was previously disciplined at the time of the discipline under scrutiny here for tardiness and AWOL, and that given the additional alleged serious misconduct here of Failure of Good Behavior and Insubordination, progressive, i.e., greater discipline, was warranted here, if said more serious allegations are established.

Once again the Department argues that the Grievant "repeatedly chose" not to obey and "repeatedly chose" to be tardy. The reader is referred to my previous observations with respect to these contentions, and, additionally, to the fact that the important paperwork here, Appendices "A", "B" and "C", all fail to spell out and put the Grievant on notice that he needed to defend "insubordination" allegations other than for his conduct on July 18, 2000, namely, the failure to follow Patchen's instructions to call his afternoon appointment, tell them he'd be late, and to proceed to take his lunch.

Another valid point made by the Department is that the tweaking of the Division's time sheet policy (Union Exhibit No. 33) was essentially a clarification and reiteration of the old and pre-existing policy (Union Exhibit No. 34), such that it is simply not clear that the Department's failure to first discuss said tweaking and its implementation was violative of the requirement of Section 44.03 of the Contract to first "discuss" any "new" work rule with the Union, before implementation.

Next addressed is the Department's contention that, contrary to the Union's contention to the effect that the Department "unreasonably denied" the Union's requests for documents and witnesses, in violation of Section 25.08 of the Contract, the Department has complied with said section. Its denials, argues the Department, were not unreasonable, inasmuch as the Union's requests were so voluminous, broad, non-definitive, redundant, and duplicitous of documents the Grievant already had as a result of

prior arbitrations, as to be "unreasonable," and, therefore, reasonably denied. I agree. As an unreasonable request it was reasonably denied. As for the Pre-Discipline Meeting packet of documents, Joint Exhibit No. 3L II, the Grievant received same at the end of the Pre-Discipline Meeting, which in light of the fact that the Grievant was given three (3) additional days to respond, and the potential, as noted hereinabove, for a still greater extension, it is clear that the Grievant received these documents timely and within the intendment of Section 24.04.

Next addressed is the point made by the Department in the conclusion of its post-hearing brief, to the effect that it was the Grievant, and not the Department who was in violation of the parties' Contract by way of his "negligence" to follow established policies and procedures. Yet again, however, the Grievant was never put on notice that he needed to defend a Policy 201.0- #1 Neglect of Duty allegation.

Turning to the Union's arguments seriatim, as previously indicated, the Union makes a valid point when it argues that the arbitration hearing is not intended to be a forum for presenting justifications for the Grievant's discipline for the first time in the arbitration hearing itself. I disagree, however, that putting the critical issue in terms of whether or not the Grievant was disciplined for "just cause," as the Department would have it, opens up the arbitration hearing to just such first-time justifications. Rather, in my view, to the extent that the Department violated or failed to live up to certain of its

contractual obligations, and to the extent such failures served to prejudice the Grievant's case and/or his defense, such Contract violations are properly addressed here under the umbrella of "due process," which as noted hereinabove, is imbedded in the "just cause" standard. Put another way, contrary to the Union's contention, such alleged Managerial misconduct is not beyond, and separate from, the "just cause" framework applicable here. Furthermore, contrary to the Union's argument, framing the issue in "just cause" terms does not relieve the Department from the obligation to prove by a preponderance of the evidence each act of misconduct alleged. Accordingly, I disagree with the Union's construct as to how the issues herein should be framed. As the Union contends, each act of alleged misconduct must be put in such a way as to identify and give notice to the Grievant concerning the specific allegations against him and the policies purportedly violated by his alleged misconduct. As noted, hereinabove, I find that the narrative set forth in the Pre-Discipline Meeting Notice and the content of the meeting itself served to do so. Since the Grievant was accorded an additional three days after the September 5th Meeting to rebut and answer the allegations, and could likely have received an even longer extension, as previously found hereinabove I find that this "notice" to the Grievant was contractually timely. Accordingly I find no merit in the Union's contention that the Grievant was not put on notice as to which date he was purportedly AWOL in violation of Policy 201.0 #21. To the contrary he was put on notice that he was viewed as AWOL on

July 19, 2000. And any due process "notice" problem with respect to the allegation that the Grievant was in violation of Policy 201.0 #4 – "Failure of Good Behavior" is moot in light of the findings hereinabove that the Department did not establish any such violation.

Next addressed is the Union's lack of "due process" contention with respect to the AWOL allegation. This contention is grounded on the purported "facts" that, contrary to the provisions of Section 24.04, the Grievant was not provided a list of witnesses with the Pre-Discipline Meeting Notice, nor was the Employer representative recommending discipline present at the Pre-Discipline Meeting. Assuming, without deciding, that such "facts" are true, the Union has not so much as pointed out how it is that the Grievant was prejudiced by these alleged "due process" shortcomings, and, perforce, it has not established that the Grievant was prejudiced by these alleged due process shortcomings. Indeed, as found hereinabove, the Arbitrator has determined that there is no substantive merit to the AWOL allegation against the Grievant, thereby definitively rendering moot any due process issues. Accordingly, no merit is found in the Union's "due process" contentions <u>vis-à-vis</u> the AWOL allegation against the Grievant.

With respect to the Union's argument that the totality of the record establishes the Department's disregard of the Grievant's "constitutional" rights, in the absence of so much as an identification by the Union of just what "constitutional" rights

(State and/or Federal) were violated, no merit can be found to this argument.

Concerning the Union's failure of "due process" contention to the effect that, contrary to Section 24.04, the Grievant was not given "the opportunity to ask questions" at the Pre-Discipline Meeting, there is somewhat of a conflict in the evidence on this point, the Grievant asserting that he was not allowed to ask questions, and Downs asserting in essence that the Grievant was given the opportunity to ask questions, and as is reflected in his Pre-Discipline Meeting Report (Appendix "B"). In my view the Grievant and the Union appear to be attempting to invest the Pre-Discipline Meeting with more trial and arbitration-like adversarial features than Section 24.04 appears to me to provide. Asking questions in a Pre-Discipline Meeting context is not the equivalent of cross-examination. In my view, Section 24.04 does not establish an adversarial process, but rather a process more in the nature of fact finding, designed to set forth the fact basis for Management's perception as to how it is that Management views certain conduct on the Grievant's part to be "misconduct," and thereby put the Grievant on notice of what it is he must defend himself in the event Management follows through and imposes the discipline it indicates it is inclined to impose. And again, one must ask whether, even assuming arguendo that the Grievant was denied the opportunity to ask questions, was he prejudiced by such denial. In this regard it is noted that the evidence upon which the Department grounds its discipline of the Grievant is by and large documents

and/or voicemails originated by the Grievant himself. Thus it is difficult to see how, again, the Grievant was prejudiced by the purported denial of the opportunity to ask questions. To the contrary, it is clear from the arbitration hearing itself that the Grievant and the Union were fully aware of the evidence upon which the Department was relying, and the theoretical view of this evidence the Department was taking in order to make out the Grievant's alleged policy violations, and, therefore, what they had to defend. Accordingly, the due process failure alleged is not made out.

Addressing the specifics of the Grievant's failure to take his lunch break properly, alleged to be violative of Policy 201.0 #3 – Exercising poor judgment, etc., the Union correctly notes that this allegation regarding July 3, 5, and 6, 2000 was withdrawn at the Pre-Disciplinary Meeting. With respect to July 7th, the Union relies on the Grievant's testimony to the effect that he was using part of his lunch hour for personal business and not claiming said period as time worked, as exculpatory. But the counseling of June 6, 2000, was clear: he was to take (and perforce record) a full hour's lunch midday. This he didn't do. He was therefore properly disciplined for #3 – "Exercising poor judgment in carrying out policies." The same must be found with respect to July 10th, July 11th, July 19th, July 26th, July 28th, and August 2nd. The Grievant was simply second-guessing Management's goals and priorities, and acting contrary to his clear counseling. As for the Union's "disagreement" with Management's perception of the

requirements of the FLSA, directly to the point, the Union failed to set forth any legal analysis, or call to the stand any witness familiar with the workings of the FLSA to rebut the testimony of Management witnesses to the effect that lunch time not taken raises a presumption under the FLSA that indeed the Employee is working. And FLSA requirements clearly take precedence over any arguably contrary provision in Policy 310.0 relied on by the Union. Hence, on the record made before me, I have no reason to not accept Management's view of the FLSA consequences. As for the Grievant's recorded time taken for lunch entry on August 1st, it's clear enough that such was erroneous, inasmuch as he was at an "all hands" meeting during that time frame. However, it is unclear as to whether the Grievant transgressed the lunchtime policy on that occasion.

The Union asserts that the Department appears to contend that the Grievant's alleged faulty lunch recording conduct led to the necessity to pay him additional monies to satisfy the FLSA, and that the Grievant should therefore be disciplined for the necessity to pay him additional monies. However, the Union contends, such a basis for discipline was not specified in the Pre-Discipline Meeting Notice nor in the imposition of discipline letter of October 13, 2000 (Joint Exhibit No. 3A). In my view however, the Department's contention with respect to the FLSA consequences of the Grievant's failure to follow lunch time policies and procedures of the Contract and the Department's Manual was only to show that there were meaningful adverse monetary consequences to the

Grievant's alleged failures to follow prescribed lunch time policies, and that his alleged failure to do so was therefore not merely an inconsequential "technical" breach of the policies. It follows from this viewpoint that no merit can be found in the Union's contention, and unsupported rank speculation, that the Grievant was paid for working through his lunch hour only to justify disciplining him at all for his alleged failure to follow lunch time policies.

As for the tardiness for which the Grievant was disciplined, the Union correctly notes that the allegation that the Grievant was tardy on July 18, 2000 was withdrawn at the Pre-Discipline Meeting.

Concerning the Grievant's tardiness on July 19, 2000, the record reflects that Management faulted the Grievant for not providing a Police Report which would tend to bolster his claim that he was tardy because his van had been vandalized in the night and the delaying consequences of such. Normally the party filing a Police Report is required to swear to the allegations therein made. But the record also shows that the Grievant was never asked by Management to provide a Police Report. By way of contrast, in similar circumstances, employee Bryant had been asked to provide a Police Report, and doing so, Bryant's tardiness was "excused." In my view, before the Department was entitled to <u>not</u> excuse the Grievant's tardiness on the grounds that his transportation had been vandalized, an unusual and traumatic event that can only fairly be characterized as "extenuating and mitigating," the Department was obliged to confront the Grievant with their concerns

that a Police Report was necessary to substantiate his claim, as it did with Employee Bryant. But the Department failed to do so, and in effect arbitrarily concluded that because the Grievant did not on his own produce a Police Report, his vandalism claim was bogus. In my judgment in these circumstances it must be found that the Department was in violation of its Section 13.06 of the Contract's obligation to take into consideration extenuating and mitigating circumstances which the Grievant might well have been able to establish, if the Grievant had been confronted, as was employee Bryant, with Management's doubts as to the veracity of his proffered excuse for being tardy and that said doubts could likely be resolved by submitting a Police Report of the vandalism. This breach by the Department of its Section 13.06 obligations toward the Grievant before designating his July 19, 2000 tardiness as "unexcused," constitutes a "due process" failure significant enough to not be sanctioned by the "just cause" standard applicable here. Additionally, the Department's designation of the Grievant's tardiness on July 19, 2000, as "unexcused," resulted in the Grievant being treated disparately vis-à-vis employee Bryant, contrary to the "just cause" standard. Accordingly, the Department's designation of the Grievant's tardy on July 19, 2000, as "unexcused" is found to be improper and without "just cause."

With respect to the Department regarding the Grievant's tardiness of July 26, 2000, as "unexcused," the Grievant in effect asserts that it should have been regarded as "excused" due to the mitigating ongoing traffic problems he encountered on Brice Road.

In this regard I believe Arbitrator Stein made some observations in his decision for the parties involving the Grievant (Union Exhibit No. 1, decided August 13, 2001), which are equally applicable here, namely, that "traffic congestion and construction in Columbus are well known to commuters" and although they "can provide a valid excuse for being late for work on occasion," in the face of the Grievant's prior poor record of tardiness, the Department was justified in regarding his tardiness as unexcused and in disciplining the Grievant for his tardiness on this occasion. (Emphasis supplied) The Union's point that disciplining the Grievant on this occasion was "disparate" because others have not been disciplined for being five (5) minutes late, however, is not persuasive. The Grievant had at the point of the imposition of discipline under consideration here already been seriously disciplined for tardiness. (And at the time of the commencement of the hearings here, the Stein Award, upholding two days of suspension for tardiness had issued.) This history of prior tardiness served to rightly put the spotlight on the Grievant with respect to attendance issues, and, in any event, the Union has not established that the tardiness of other employees with similar records of discipline and recidivism with respect to tardiness, have gone undisciplined. Genie Co., supra; Alan Wood Steel Co., supra.

Concerning the Grievant's alleged tardiness on July 30, 2000, the Union relies on an alleged failure of "due process" contention, i.e., a violation of Section 24.04 of the parties' Contract

requirement to the effect that the employee be furnished notice of the allegations against him three days prior to the Pre-Discipline Meeting, inasmuch as this allegation was added at the discipline meeting. I disagree. Thus as previously noted and found, this same Section of the Contract provided a mechanism for the Grievant to extend the Pre-Discipline Meeting an additional three days or more, yet the Grievant never sought such an extension to rebut etc. this July 30, 2000 tardiness allegation as improper.

With respect to the Grievant's alleged tardiness on July 31, 2000, the Union makes a valid point that the Grievant was simply not at work on July 31st and hence could not be faulted for being tardy. The Union is also correct that the Department's Policy called for the Grievant's inaccurate time sheet to be returned to him for correction. Indeed Supervisor McGough acknowledged that he made a "mistake" and failed to follow the Department's Policy calling for return of the time sheet to the Grievant for correction. In light of the record evidence that the Grievant did not work on July 31st, it cannot be found that the Grievant was "tardy" on July 31st, and the Department's reliance on the purported fact that he was is without foundation. In sum, no "just cause" exists for disciplining the Grievant for tardiness on July 31st, as the Department nonetheless did. Accordingly, the Union's disparate treatment argument, and its "due process" contention grounded on the Department's failure to follow its own Policy to return the Grievant's time sheet to him for correction, need not be, and are not addressed.

As for the Grievant's alleged tardiness on August 2, 2000, the Union asserts such must be in error because although his time sheet reflects he was five minutes late, the Grievant does not recall being late to work on August 2nd. In my judgment, this negative recollection is simply insufficient to overrule the time the Grievant signed off on and certified on his time sheet. As for the allegation that the Pre-Discipline Meeting Notice fails to reference this tardy, the Union is simply wrong. It does. As for the contention that the failure to spell out tardiness on August 2, 2000, in the Notice of Discipline, Joint Exhibit 3A, creates a fatal "due process" shortcoming with respect to this allegation, I find such an argument to be specious. This is so because the same can be said with respect to <u>all</u> of the specifics of the allegations against the Grievant In Joint Exhibit 3A. But it is clear that a reading of Joint Exhibit No. 3 "A", along with Joint Exhibits Nos. 3 "B" and 3 "C" readily reveals just what the Department contends constitutes the misconduct for which the Grievant was disciplined. Nor has the Union shown disparate treatment. This is so because the Union has not shown that another bargaining unit employee possessed the same or "substantively like" record of recidivist tardiness, in subordination, and exercise of poor judgment, as the Grievant as of August 2, 2000, and escaped the same discipline. But the existence of such a circumstance is necessary to establish disparate treatment. <u>Genie Co.</u>, <u>supra</u>; <u>Alan Wood Steel Co.</u>, <u>supra</u>. At this juncture it's important to elaborate upon the impact of the finding hereinabove that the Union's document requests and/or

subpoenas for documents was "unreasonable," and that said documents were "not reasonably available" within the intendment of Section 25.03 and 25.08 of the parties' Contract, and hence not unreasonably denied, i.e., reasonably denied by the Department. This is so because the Union virtually sought the discipline records of the entire work force concerning violations of the same Policies of which the Grievant was accused. Given the fact that the work force was approximately 800 in number, and that of those 800, approximately 600 were bargaining unit employees, in my judgment it is patently obvious that such a request was not reasonable, given the time and expense involved in providing such documents. Significantly, the Union never formally backed away from its request for all of said documents inasmuch as the Union continues to argue in its briefs that the failure of the Department to produce <u>all</u> of the documents it requested creates a "due process" shortcoming, which taints the arbitration process. I disagree. As long as the Union persisted in seeking <u>all</u> of the requested documents, the "unreasonableness" of such a request remained, and the Department was therefore not contractually obliged to comply with the Union's request. The Department took the position that only the disciplinary records of employees in the Division of Real Estate and Professional Licensing were relevant and thereby hinted that it might be willing to furnish all of those records, but the Union never conceded this point. In this regard, clearly the disciplinary records of the Division of Real Estate and Professional Licensing bargaining unit employees were the <u>most</u>

relevant records, but I am unable to find that they were the <u>only</u> relevant records of discipline inasmuch as the record clearly shows that the Policy, Procedure and Information Manual and its rules governing employee misconduct and applied to the Grievant, were applicable to <u>all</u> employees of the Department.

In any event, as previously indicated, a great volume of documentary evidence came into the record. This was the result of the Department furnishing many of the documents requested by the Union; by stipulation; and by the fact that the Union already had in its possession many of the documents it requested. In any event, the documentary evidence of record shows that with respect to virtually every Policy in the Department's Manual, which the Discussion and Opinion herein finds were valid accusations of breach of Policy, offenses and/or misconduct, if you will, namely, Policy #2 - Insubordination; #3 - Exercising Poor Judgment In Carrying Out . . . Written Policies and Procedures and/or Work Rules; and #19 - Unexcused Tardiness; the Union has established that the Grievant was treated differently with respect to the discipline received for each of these offenses. Thus, for example, other employees, such as Inspector Ted Williams, Division of Real Estate etc., and others, were charged with insubordination (or could have been and weren't) and not disciplined as severely as the Grievant; other employees in the Division of Real Estate etc. were tardy and/or stayed over after work, contrary to Policy, and were disciplined less severely, or, only counseled, or, "excused" whereas the Grievant was not so leniently treated; and the

Grievant's lunch hour offenses are clearly analogous to his tardiness offenses: both concern time keeping and time accounting problems. Thus the Union met its burden of proof with respect to the first part of the equation necessary to establish disparate treatment implicitly proscribed by the "just cause" standard applicable here, namely, that the Grievant was treated differently from others. Genie Co., supra. But the Union has failed to establish the requisite second part of the equation necessary to establish disparate treatment, namely, that the circumstances surrounding the Grievant's offense were substantively like those of the individuals who received more moderate penalties, or, put another way, it was not shown and established that those others who received more moderate or no penalties, shared the same or "substantially like" prior disciplinary records as possessed by the Grievant, or shared the same convergence of offenses in a similarly small time frame as did the Grievant at the time of his discipline under scrutiny here. Genie Co., supra; Alan Wood Steel Co., supra. Thus, "[I]t cannot be seriously contended that discrimination result[ed] if identical penalties [were] not meted out [to the others]." Alan Wood Steel Co., supra.

Furthermore, since, as found hereinabove, the Union never brought its "all documents" request within the reasonableness mandate of the Contract, it simply cannot rely on any inference to the effect that had the Department been required to furnish all of the documents that the Union requested, it might have been able to establish that there existed other employees or an employee who did

share the Grievant's circumstances vis-à-vis past discipline and/or his convergence of offenses over a small period of time. Put another way, because, as found herein, the Department was well within its rights to deny the Union's "all documents" request, there is no wrongful denial of documents to the Union, from which the Union could argue that, at a minimum, an ambiguity exists as to whether there is an employee or employees who shared the Grievant's circumstances at the time of their more moderate penalties, which ambiguity must be resolved against the party creating same, here the Department, who is withholding the documentation. Resolving the ambiguity against the Department, the argument goes, the Union, by inference, has established the requisite second part of the disparate equation, and hence thereby established disparate treatment. In any event, even if the Department's denial of all of the documentation were "wrongful" (which it is not), in my view it would not automatically follow that the Union argument just referenced would be persuasive. Thus I note that the parties' Contract at Section 24.05 - Imposition of Discipline, expressly provides inter alia, that "[I]f a final decision is made to impose discipline, the employee and the Union shall be notified in writing. (Emphasis supplied)." Thus the Union was presumptively in possession of, and perforce on notice of, the discipline imposed on all other bargaining unit employees prior to the discipline of the Grievant under scrutiny here. Put another way, the Union was not solely reliant on the Department for disciplinary records of the Grievant's peers, and the Union was therefore presumptively

privy to information and data from which it could have, independent of its document requests of the Department, demonstrated and established disparate treatment. But the Union did not avail itself of this approach. This circumstance creates an adverse inference, namely, that indeed there was no employee who was in the same or substantively like circumstances surrounding the Grievant, and hence the second part of the equation for establishing disparate treatment cannot be established.

In sum then, <u>all</u> of the Union's "disparate treatment" contentions are found to be without merit. Similarly, I find no merit to the Grievant's and the Union's discriminatory, i.e., race, and apparently gender as well, treatment claims. Directly to the point, the record reflects that some African-American female employees escaped discipline, just as did white women employees or received more moderate discipline than the Grievant, and for the same offenses. But this disparity in treatment as has been seen, was justified, due to different surrounding circumstances. This evidence indicates that the Department treated white and black employees alike. As for gender-based discrimination, I note that the most relevant comparison with respect to the Grievant would be with his fellow Inspectors in the Real Estate Division. In this regard, all were Caucasian males except the Grievant, and they too were disciplined and/or counseled from time to time. And the Department's female employees were also. This circumstance is indicative that the Department treated all employees alike,

disciplining misconduct without regard to the gender of the employee.

On both race and gender, a word concerning Helen Hendershott, an elderly Caucasian female, is in order. Understandably given her race and gender, the Union relies heavily on the lack of discipline of her for tardiness, stayovers, and lunch hour offenses. But the record shows that she was an extremely senior employee, elderly, and infirm. Moreover, she was frequently cajoled to abide by the time related policies, and encouraged to retire from employment with the Department, which she eventually did. In my judgment it is simply self-evident that like circumstances did not exist between the Grievant and Ms. Hendershott. Why is it that I'm confident that the Union would be claiming that strict enforcement of time policies against Ms. Hendershott would be without just cause in light of the mitigating circumstances of her great age and infirmity, factors not present in the Grievant's case.

With respect to the Grievant staying over on July 31, 2000, the Union makes a valid point when it points out that since the Grievant was not in fact at work, he self-evidently cannot be found to have improperly stayed too late at work. However, I find too strained the Union's contention that the Report-In Time Procedure Clarification of July 28, 2000 (Joint Exhibit No. 3S) purportedly allowing for a five-minute grace period, should be extended to Report-Out situations as well. Had this been Management's intent, presumably the July 28th memo would have been entitled The Report-In and Report-Out Time Procedure Clarification; but it was not so

entitled. As for his improper stay over on August 1, 2000, this charge was withdrawn at the arbitration hearing.

As for the alleged "due process" flaw with respect to the Pre-Discipline Meeting Notice indicating the Grievant's insubordination with respect to Patchen and McGough's instructions on (erroneously) July 6th, rather than, as amended at the Pre-Discipline July 18th, as violative of the three days prior notice provision of Section 24.04, as noted hereinabove given the three day extension of time to respond extended to the Grievant and the likelihood of an even longer extension had the Grievant sought one, such alleged due process flaw is in any event deemed "cured."

As for the Union's contention that in any event disciplinary action for insubordination on July 18th, 2000, was not timely within the intendment of Section 24.02, I disagree. In my judgment, given the specifics with respect to said insubordination, the erroneous citation of July 6th is without consequence, and it must be found that the Grievant was put on notice of said insubordination charge on or about August 30, 2000. In any event, the correction of the date to July 18 a mere five days later on September 5th at the Pre-Discipline Meeting is not at all persuasive that the initiation of discipline on September 5, 2000, was not "as soon as reasonably possible" and therefore untimely, contrary to the provisions of Section 24.02.

With respect to the Union's reliance on Union Exhibit No. 78 as belying the observation of Downs in his Pre-Discipline Meeting Report (Joint Exhibit No. 3B) that the Grievant admitted to

"insubordination" at the Pre-Discipline Meeting, this point is rendered moot by the fact that in any event, at the arbitration hearings, the Grievant admitted to "facts" which clearly establish insubordination.

As for any Department reliance on the Grievant's alleged "failure to properly fill out [his] time sheet as instructed," the Union is correct that it appears that this charge was abandoned inasmuch as it was not explored at the September 5th Pre-Discipline Meeting or thereafter. This being so, no finding need be made, and none is made, with respect to the Union's additional contention that in any event the time sheet itself was "faulty."

As for the Union's contention that only the evidence presented at the Pre-Discipline Meeting can be used to support a finding of "just cause," I disagree. It is all the proper relevant evidence presented at the arbitration hearing, which is looked to by the undersigned in resolving the question of whether the Grievant was disciplined for "just cause."

As for the Department's alleged failure to provide documents which the Grievant and/or Union requested for the Pre-Discipline Meeting, to establish the Grievant's affirmative defenses of disparate and/or discriminatory evidence, and hence breach of Section 24.04 - <u>Pre-Discipline</u>, I find that the Union is confusing the document production requirements of the Department <u>after</u> discipline is imposed and a grievance challenging same has been filed, Section 25.03 and 25.08, with the Department's obligation to furnish the documents upon which <u>it</u> relies in its contemplation of

imposing discipline and before it imposes discipline, Section 24.04 Accordingly, I find that the Union has simply misread the Contract and that the Department has not breached its Section 24.04 obligations in this regard.

As for the alleged inability of the Grievant to prepare a response during the three-day extension Management granted following the Pre-Discipline Meeting of September 5, 2000, due to his work schedule, such is in any event unpersuasive, in light, as previously referenced, the Grievant's ability pursuant to Section 24.04, to seek a still greater extension. If the Grievant truly needed more time to respond, why did he not ask for an extension.

As for the Union's opposition to consideration by the undersigned of Management Exhibit #4, a compilation of many instances where the Grievant's requests for leave were in fact granted, I find said opposition unpersuasive. This Exhibit is additional evidence that the Department is not discriminating against the Grievant because of his gender or race.

The Union makes a valid point with respect to the unpersuasiveness of Management Exhibit No. 5, a compilation of employee leave requests, vis-à-vis the Grievant's tardiness on July 19, 2000, in light of the fact that, in any event, as in effect previously noted, and found hereinabove, the Department did not properly take into consideration "the extenuating and mitigating circumstances surrounding [the Grievant's] tardiness on this date, to wit, the vandalism of his van, as required by Section 13.06 of the parties' Contract.

In light of the previous disposition, i.e., dismissal, and the grounds therefore, of the Union's claim of the disparate and/or discriminatory nature of the Grievant's suspension, I need not and do not reach the Union's argument to the effect that Management Exhibit No. 4 was improperly withheld from the Union prior to the arbitration and in any event flawed, and therefore not a persuasive counterpoint to the Union's disparate/discriminatory treatment claims.

Most of the arguments concerning the Department's alleged violations of various Contract provisions set forth in Appendix II, have already been, or, remain to be addressed, herein. A few are specifically addressed at this juncture. Thus the Union contends that Article 2 - Non-Discrimination was violated by the Department in that the Grievant's start time, lunch time, and end time were monitored more stringently than other employees, including changing the Grievant's work place cubicle to just outside the Supervisor's office. (See Appendix II A. #9 and #10). However, the short of the matter is that the Grievant clearly invited close scrutiny and monitoring of his timekeeping habits by virtue of: his repeated tardiness; his close-in-succession tardiness and lunch hour rule violations, and his failure to improve his tardiness record even after being previously disciplined for same, i.e. his recidivist tardiness. In these circumstances no inference of disparate and/or discriminatory treatment can properly be drawn.

In Appendix II, paragraph B, #5, the Union alleges that the Department abused and violated Article 5 - Management Rights, by

"stacking" charges against the Grievant, that is, by relying on the same occurrence or conduct to support an allegation that the Grievant thereby committed more than one offense as set forth and differentiated in Disciplinary Policy No. 201.0, and presumably therefore, violative of the "just cause" standard. There may be validity to this proposition to the effect that the "just cause" standard implicitly prohibits such "stacking," but such a sweeping finding by the undersigned here is not herein made. This is so because the particular circumstances here give support on a narrower basis to the Union's contention that "stacking" in this particular case, is in any event in effect prohibited. Thus, as previously noted hereinabove, reading Joint Exhibit No. 3 "A", "B", and "C" together, it is clear that in imposing discipline on the Grievant the Grievant was advised and put on notice by the narratives in "B" and "C", of what certain specific conduct was violative of what policy. Thus, to reiterate, he was put on notice of the dates on which he purportedly violated the "unexcused tardiness" policy (#19); the single date on which he was purportedly AWOL (#21), i.e., July 19, 2000; that his alleged lunch hour offenses were violative of the "Exercising Poor Judgment etc." policy #3; and that, on July 18, 2000, he was in violation of policy #2 - Insubordination. He was never put on notice of what conduct he had to defend vis-à-vis #4 - Failure of Good Behavior. But the revision to #4 - Failure of Good Behavior (Joint Exhibit No. 2A), as noted above, in effect required specific identification of what conduct amounted to violation of #4. Since as noted above,

the revision to #4 was specifically designed to preclude and prohibit the contention the Department makes and argues for here, namely, that "Failure of Good Behavior" is a "catch-all," and therefore all "non-good" behavior, such as the conduct alleged to be violative of Policies #2, #3, #19, and #21, are also, by definition, as it were, also violative of #4 - Failure of Good Behavior, in this manner the revision to #4 (Joint Exhibit No. 2A) forces and requires an allegation of separate facts making out misconduct of a nature not otherwise alleged and identified as violative of some other Policy. But no such allegation of separate facts was set forth in Appendix "C" or "B", and the imposition of discipline instrument Appendix "A" was based on "B". Much the same must be said concerning the Grievant's lunch hour offenses. Thus, while the Pre-Discipline package Joint Exhibit No. 3 II (Appendix "E") shows that Patchen viewed the Grievant's lunch time offenses as Insubordination (#2) as well as Exercising Poor Judgment" (#3), it's not clear from Appendix "B" whether Downs so viewed it that way also. And since Appendix "A", Brockman's imposition of discipline, concededly relied on Appendix "B", it cannot be found that the Grievant was charged with, or found to be in violation of #2 - Insubordination vis-à-vis his lunch hour offenses, in addition to #3 - Exercising Poor Judgment etc., which latter was made clear in Appendix "B". This ambiguity in Appendix "B" is significant because Patchen also recommended that the Grievant's lunch hour offenses were violative of #20, but such was ultimately not cited and relied upon. The aforesaid is just another way of putting the

finding hereinabove alluded to, namely, that the Department was obliged to identify the specific conduct which purportedly violated what specific policy in order to fulfill its due process "notice" obligations under the applicable just cause standard. The Department was not free to impose discipline for violating identified Policies, and not set forth the specifics, as it did in Joint Exhibit 3A (Appendix "A"), and then argue in arbitration theories as to how it was that the Grievant's conduct violated said Policies, when said theories had not previously been advanced. Indeed, in my view, reading Appendix "C" and "B" together, it must be found that the Department did identify the specific conduit of the Grievant which is viewed as being violative of specific Policies, and under the due process "notice" requirement imbedded in just cause, the Department cannot now expand its case against the Grievant by now arguing as to how some of this conduct is allegedly, redundantly violative of policies other than the Policy or Policies that Grievant was previously put on notice of having violated.

In my view, as noted hereinabove, paragraph B.6 of Appendix III concerning Article 44, is without merit.

As for Appendix II's Paragraph C., to the effect that the Department did not consider the Grievant's extenuating circumstances surrounding his late arrivals, in violation of Section 13.06, as noted hereinabove I agree with the Union's contention in this regard with respect to July 19, 2000. Otherwise however, it appears that the Department did take into

consideration, but found, correctly so, that the Grievant's circumstances were not "extenuating" or "mitigating" within the intendment of Section 13.06, such as the Grievant's Brice Road traffic excuse, referenced hereinabove.

In light of the undersigned's declining to find any disparate or discriminatory treatment of the Grievant, for the specific reasons hereinabove set forth, the Union's arguments concerning Management Exhibit No. 4, and the apparent failure of Ms. Hendershott to ever claim ADA or FMLA protection, these arguments are moot.

With respect to Appendix II, excerpts from the Department's Reply Brief, the Department makes a valid point when it asserts that the Grievant knew for what, and why, i.e., what policy he purportedly violated, he was being disciplined, inasmuch as it is found hereinabove that Appendix "B" and "C" read together imparted that information.

In its Reply Brief the Union advances its proscribed "new theories" contentions on the part of the Department. As noted hereinabove, these contentions are found in large measure to have merit. The Union's alleged impropriety of the Department relying on O.R.C. 124.34 has also previously been addressed hereinabove.

I find the disposition of the AWOL allegation as hereinabove determined, namely, the finding that it is without merit, renders moot the Union's "due process" arguments concerning the AWOL allegation, such as Brockman allegedly improperly acting as both Accuser and Final Decision Maker with respect to the Grievant's

alleged AWOL, and the failure of the AWOL accuser, Brockman, to be present at the Pre-Discipline Meeting for questioning. This same result, mootness, applies with equal force with respect to the Union's "due process" allegations vis-à-vis the "Failure of Good Behavior" allegation which also has been found herein to be without merit.

Next addressed is the Union's contention that saying that the Grievant worked through parts of his lunch hour, as the Department contends, even if true, is simply another way of saying that the Grievant worked beyond his scheduled hours without approval. It's the Union's contention that since other employees worked beyond their approved hours and weren't disciplined, that the Grievant was thereby treated disparately. I disagree. In my view the Union's premise that working through his lunch hour was just another way of saying he worked beyond his scheduled hours of work without the required authorization is flawed. Thus, if this were so, the Grievant would have been disciplined for violation of Disciplinary Policy #20, as Patchen recommended, but the record shows that this recommendation was not followed, apparently consciously rejected. Then too the Grievant was specifically counseled about following the Contract and Policy Manual's provisions that he not work through his lunch hour and, as found herein, disciplined for nonetheless doing so under Policy #3 - Exercising poor judgment . . . in carrying out policies and procedures. Thus, in urging that the Grievant be regarded as in effect also in violation of Policy #20, the Union is urging the very "stacking" of charges it

otherwise decries and condemns. And, in any event, as heretofore noted, the Union has not established the second element of proof necessary to establish disparate treatment with respect to this alleged, or indeed any other, misconduct.

Revisited at this juncture is the Union's challenge to the "due process" adequacy of the Pre-Discipline Meeting, alleging in essence that he did not have an opportunity to question his accuser with respect to certain allegations and his requests for "documents" were not honored. However, as the Department points out, all of the allegations against the Grievant were granted in "documents" which he generated, and the inability to question his accuser related only to allegations found to be substantively without merit, i.e., "Failure of Good Behavior" and "AWOL." Thus, assuming without deciding that the Union makes a valid point, the Union has failed to establish how the Grievant was prejudiced thereby.

The case thus comes down to the Union's contentions concerning the Department's determination that the Grievant's conduct was deserving of a suspension in the amount of ten (10) days. As has been seen the Union contends that the Contract mandates "progressive" discipline and that there can be no determination as to whether it was "progressive" or not in the absence as here, of any allocation of what aliquot part of the ten (10) day suspension imposed was attributable to what misconduct. The Union also contends that the contractual "just cause" standard mandates that the Employer assign a quantum of discipline for each occasion of

the Grievant's alleged misconduct in order for any judgment to be made concerning whether or not the discipline imposed is appropriate and commensurate with the Grievant's offenses. The Department disagrees, stating that no such allocation is required by either the Contract (be it its "progressive" discipline principle or its "just cause" principle) or the Law, I agree with the Department. Nonetheless, the Department's failure to assign what portion of the ten (10) day disciplinary lay off was attributed to what misconduct does pose some difficulties, as will be seen hereafter.

As has been seen, the Union also in effect invokes the Iowa Power, supra concepts of Arbitrator Gradwohl with respect to: the withdrawal of allegations by the Department subsequent to the Pre-Discipline Notice of Hearing and/or subsequent to the Pre-Discipline Meeting; any failure on the Department's part to establish any of the allegations of misconduct on the Grievant's part; and the setting aside of certain "prior discipline," i.e., discipline imposed prior to the misconduct under scrutiny here, which "prior discipline" was nonetheless taken into consideration prior to the imposition of the ten (10) day disciplinary lay off here.

In my view, the circumstances present here demonstrate the validity of the maxim that each arbitration case stands on its own facts. Thus, in my judgment, the circumstances present here require application of elements from both the Iowa Power case, supra, and the Lamar Construction case, supra. Thus when Human

Resources Chief Brockman first testified, he indicated that in assessing the appropriate level of discipline at a ten (10) day disciplinary suspension he gave "significant" weight to the Grievant's serious insubordination; the instruction given to the Grievant was clear, yet he just did not do what he was told to do. Brockman acknowledged that at the time of the discipline involved in this case, he also took into account that the Grievant had previously been disciplined for insubordination. Brockman noted that even a first instance of insubordination could warrant a major suspension, i.e., five (5) days and up. Brockman noted that here there were charges of violation of four (4) other disciplinary policies in addition to the repeat of an insubordination offense charged and that some of those offenses, namely, unexcused tardiness and AWOL, were also repeat offenses. In other words, the Grievant's recidivism with respect to unexcused tardiness, insubordination and AWOL enhanced the seriousness of those offenses here. This testimony is highly credible since any assessment of an appropriate quantum of discipline, of necessity involves a "weighing" process. It must therefore be concluded that in arriving at the level of discipline Brockman, on behalf of the Department, took into account all five (5) charges against the Grievant, viewed each of them as serious, either due to their inherent seriousness (insubordination) or the Grievant's recidivism (unexcused tardiness and AWOL), and determined that "clearly the disciplinary grid allowed for a 10 day suspension. It's noted, however, that subsequent to the imposition of the discipline

involved here, Arbitrator Stein voided the Grievant's prior discipline for Insubordination and AWOL. When subsequently called to the stand by the Union, the Human Resources Chief testified that the ten day suspension was not arrived at by assessing one day for tardiness, two days for AWOL, etc., and by tallying up the numbers, thereby getting ten days. Indeed Brockman testified that there was no weighting of each offense by him; that the process and mechanism and/or methodology of arriving at the ten-day suspension decision did not work that way. On its face this testimony appears to be contradictory of his initial testimony, but in context I find that this testimony was merely conveying the concept that there was no conscious weighting by percentages the quantum of ten days to be accounted for by each offense, albeit each of the five offenses charged were taken into account, i.e., "weighed" in arriving at ten days. Accordingly, I do not find Chief Brockman's subsequent testimony to be in conflict with his initial testimony on this matter.

In my judgment Brockman's determination that each of the five charges was "serious" was correct. The tardiness was recidivist; the AWOL and Failure of Good Behavior were inherently more serious than mere tardiness, and arguably even recidivist tardiness; insubordination is always serious, and certainly that of July 18, 2000 fit the serious category; and the Exercising poor judgment was serious because it involved another timekeeping offense like tardiness and is akin, albeit clearly less serious, than insubordination. At this juncture therefore the circumstances are

arguably amenable to the Lamar Construction analysis, supra, namely, that since all the charges are arguably serious, failure of proof or withdrawal of one or more does not necessarily affect the quantum and level of discipline initially meted out by the Employer. Such would be erroneous here, however, because we know that the decision maker's decision took into account all five charges, each of which he viewed, correctly, as serious, in affixing the discipline at a ten-day suspension. But two of these "serious" charged offenses, AWOL and Failure of Good Behavior, have been found to have been improperly leveled against the Grievant. And this finding voids the factor of the enhanced seriousness of these two offenses because of recidivism, which Brockman took into account against the Grievant. And of the three charges remaining, the unexcused tardiness charge is considerably diminished by the facts found herein, namely, that some tardiness charges were simply in error; others were withdrawn; and one was improper. These findings of fact simply diminish the "seriousness" of the unexcused tardy charge from how the decision maker saw it at the time of his decision. In these circumstances, I find that the just cause standard requires, as in Iowa Power, supra, that the 10-day suspension be reduced. In these circumstances it falls upon the Arbitrator to fashion the quantum of discipline to be imposed for the charged offenses which have been established. In my view, Chief Brockman properly gave considerable weight to the established charge of insubordination on July 18, 2000. As previously noted, this insubordination was "classic" and "textbook." An element of

recidivism remains involved in the remaining tardiness charge and given the kinship between both the tardiness and insubordination charge the concededly less serious than insubordination "Exercising poor judgment etc." charge has in the circumstances of this case, namely, the time and attendance shortcoming nature of the Grievant's lunch hour offenses, offenses which followed a specific counseling as to what was expected of him.

In sum, therefore, I find a disciplinary suspension of eight (8) days is appropriate here.

Award:

For the reasons more fully set forth hereinabove, the grievance is sustained in part and denied in part. The Grievant is to be regarded as properly disciplined by way of a disciplinary suspension of eight (8) work days duration for unexcused tardiness, exercising poor judgment; and insubordination. The charges of AWOL and Failure of Good Behavior shall be removed from the Grievant's record. The Grievant shall be made whole for the two (2) days additional suspension he served, and his records shall be revised to reflect an eight (8) day suspension, not a ten (10) day suspension.

Dated: October 28, 2002

Frank A. Keenan
Arbitrator

APPENDIX "A"

p 1 of 1

Ohio Department of Commerce
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www.com.state.oh.us

Bob Taft
Governor

Gary C. Suhadolnik
Director

J3A

October 13, 2000

Randolph Burley
2906 Bannon Court
Reynoldsburg, Ohio 43068

Dear Mr. Burley:

This will serve as notice that you are hereby suspended, for ten (10) days, from your position as an Investigator with the Division of Real Estate and Professional Licensing, Ohio Department of Commerce. This suspension will be served beginning on Monday, October 23, 2000 and end at close of business on Friday, November 3, 2000.

The suspension is being given for violation of Policy 201.0:

- #2 Insubordination
- #3 Exercising poor judgement in carrying out and/or following assignments; written policies & procedures; and/or work rules
- #4 Failure of good behavior
- #19 Unexcused tardiness
- # 21 Absent Without Leave

A copy of this suspension letter will remain in your personnel file for twenty-four (24) months. The letter will be removed after that time if there has been no other discipline imposed during the next twenty-four months.

Sincerely,

Blaine P. Brockman, Chief
Office of Human Resources

Cc: Lynne Hengle, Superintendent
Greg McGough, Supervisor
Noel Williams, Chapter President
File

APPENDIX "B"

P 1 of 4

DEPARTMENT OF COMMERCE

MEMORANDUM

J3B

TO: Gary C. Suhadolnik, Director

FROM: John P. Downs, Designee for the Department John P. Downs

SUBJECT: September 22, 2000

A notice of Pre-Discipline Meeting ("Notice") was issued to Randy M. Burley from myself, on August 30, 2000. A copy of the Notice is attached as Exhibit A. The notice provided a statement of the allegations/charges, the potential level of discipline, and the date, time, and place of the meeting.

The notice provided that the Department was considering disciplinary action against Randy M. Burley based on allegations that he violated Department Policy and Procedures Manual ("Manual") Policy 201.0, #2 insubordination, #3 Exercising Poor Judgement in Carrying out and/or following assignments; written policies & procedures; and/or work rules, #4 Failure of Good Behavior, #19 Unexcused Tardiness, #21 Absent Without Leave. The notice provided that the potential level of discipline is suspension. The actions which resulted in the charges occurred on or about [July 3, 5, 6, 7, 10, 11, 19, 26, 28, August 1, and 2, 2000, in that he did not take the required one hour lunch break. On July 18, 19, 26, 31 and August 2, 2000, he failed to report to work prior to his 8:00 a.m. start time. On July 17, 31 and August 1, 2000, he worked past his 5:00 p.m. end time without prior authorization from his supervisor. On July 6, 2000, he requested from Greg McGough and Robert Patchen to move his lunch period to the end of the day. His request was denied and he was instructed to call his afternoon appointment and tell them that he would be late so he could take his lunch break. He did not call and postpone his appointments, but you did leave a voice mail message for Robert Patchen stating that he had donated his lunch hour to the State. [Finally, he failed to properly fill out his time sheet as instructed.] These allegations may result in a major suspension. At the meeting were Randy Burley, Dennis Broadnax, Kima Carter, Noel Williams, Richard P. Selegue, Greg McGough, Supervisor, Robert W. Patchen and Jason Woodrow, observer.

Noel Williams stated that Mr. Broadnax was going to represent Mr. Burley. She and Kima Carter represented the Chapter. I asked if there were any procedural matters. Mr. Burley objected to Ms. Williams and Ms. Carter being present. Mr. Burley was informed that the State has a contract with OCSEA, therefore, Ms. Williams and Ms. Carter would be allowed to stay.

Mr. Patchen stated some corrections to the charge letter. The dates of July 3, 5, and 6 should not be considered (lunch breaks). Also, July 18 for failure to report

to work before 8:00 a.m. should not be considered. Additionally July 6 is a typo which should read July 18.

Dennis Broadnax stated he objected since the pre-disciplinary notice did not list the witness and the presence of observers. Also Mr. Burley's request for documents was not complete.

Rick Selegue stated that on the dates in question Mr. Burley's lunch times had shown 30 minutes instead of the required one hour, July 7 (12:50 to 1:20), July 10 (2:30 to 3:00), and July 11 (1:30 to 2:00). Rob Patchen stated he reviewed the time sheets and determined that 30 minutes vs 60 minutes is a violation of department policy and procedures 201.0 and recommended discipline.

Rob Patchen said for the period of July 16 to 29 which he reviewed the lunch periods were indicated as July 18 (no lunch break), July 19 (40 minutes taken from 12:30 to 1:10), July 26 (50 minutes for lunch 12:40 to 1:30) and on July 28 (50 minutes taken 12:30 to 1:20). His review of the policy and procedures #2, poor judgment, #20 Fail to notify supervisor, and working hour without approval.

Greg McGough stated that on July 19 Mr. Burley had a late arrival issue and requested personal leave due to his van being broken into, however, no notice was given prior to being late. On August 1 Mr. Burley's lunchtime shows 12:50 to 1:30 which is 40 minutes, and on August 2 again his lunchtime shows 12:30 to 1:20 which is 50 minutes.

Mr. Patchen said for July 16 to August 12 Mr. Burley arrived late the following dates: July 18 at 8:03 am, July 26 at 8:03 am, July 30 at 8:12 am, July 31 at 8:03 am, and August 2 at 8:05 am. Also for July 16 to 29 he left work on July 17 at 5:05 pm. From July 30 to August 12, he left on July 31 at 5:05 pm and on August 1 he left at 5:06 pm. As to the July 18 incident, Randy asked to move his lunch hour to the end of the day and Gregg said no. Randy was told to call the customer and tell them he would be late since another audit ran over. Rob came to Gregg and learned Randy had gone directly to the audit and said the State could have his lunch hour. Rob later checked Randy's time sheets and found no lunch hour indicated for that day.

Randy asked about policy 201.0 #21, what is this #19 for 12 minutes no approved leave disapproved. Next he asked about July 19 which was for unexcused tardiness. He said Rob did not know who recommend discipline nor did Gregg. Also what about #4 Failure of Good Behavior.

I told Mr. Burley that discipline is referred to Human Resources and the charge letter is completed and sent out by Human Resources, therefore, based on the discipline level additional charges may be included.

Rob Patchen said #3 covers the July 18, 19, 26, and 28 as well as July 7, 10, and 11 lunch periods and August 1 and 2 lunch periods. I stated #3 policy is all inclusive. Rob Patchen said the July 6 date was just written wrong, it should have been the 18th.

Randy Burley questioned the charges and said the numbers are stacking. He is just following the contract and started on the pre-disciplinary meeting problems when I told him not to lecture me on a pre-hearing. His response to the charges to insubordination, short lunches, it was not his intent to follow assignments, that he denies #21 absent without leave violation, that it should be tardiness and that a grievance is pending on that matter. He had no comments on the lunch hours. With regards to the insubordination, it was never directed towards Mr. Patchen. That was not his intent. The whole idea of after hours he has never claimed for time or pay. His reason for going to the audit on July 18 was a regional person was in town and he was trying to avoid making this person wait any longer than needed. If he had followed the directions given him by his supervisors, this audit would have gone into overtime after 5:00 pm or had to be rescheduled for the next day.

Mr. Burley said the use of time sheets in disciplinary action is incorrect since the management representative at a labor management meeting stated they would not be used as disciplinary action. He therefore objected and wanted it noted in the record. Mr. Burley stated that since realizing an adjustment can be made by going to lunch late, he lost track of the time on July 18th. He doesn't believe these proceedings are proper and he will move forward in other arenas.

Conclusion:

Based on the foregoing, I find that management has just cause to implement discipline and I recommend a 10 day suspension based upon the information presented and the testimony of Mr. Burley where he admitted he did not do what he was instructed to do.

____________________________ ________________

Gary Suhadonik, Director Date

C: Noel Williams
Kima Carter
Dennis Broadnax
Rob Patchden

Memorandum

To: John Downs, Labor Relations Administrator

From: Blaine Brockman, Chief, Office of Human Resources

Date: October 6, 2000

RE: Concurrence with discipline: Burley

I spoke with Pat McDonald at 11:00 AM today and he concurs with the recommendation made this report.

c:

Oct 6, 2000
Jim:
Go ahead and draft a letter for Blaine to sign for 10 day suspension.
John

APPENDIX "C"

P. 1 of 1

Ohio Department of Commerce
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Bob Taft
Governor

Gary C. Suhadolnik
Director

J3C

MEMORANDUM

TO: Randy Burley, Investigator

FROM: John Downs, Labor Relations Administrator

DATE: August 30, 2000

RE: Notice of Pre-Discipline Meeting

This is to inform you that I will conduct a pre-disciplinary meeting regarding allegations of misconduct made by the Division of Real Estate and Professional Licensing (DREPL) against you. DREPL alleges that violated the following Department Work Rules, as set forth in Policy 201.0 of the Department's Policy and Procedures Manual:

#2 Insubordination
#3 Exercising Poor Judgment in Carrying out and/or following assignments; written policies & procedures; and/or work rules
#4 Failure of Good Behavior
#19 Unexcused Tardiness
 # 21 Absent Without Leave

Specifically, on July 3, 5, 6, 7, 10, 11, 19, 26, 28, and August 1, and 2, 2000, you did not take the required one hour lunch break. On July 18, 19, 26, 31 and August 2, 2000 you failed to report to work prior to your 8:00 a.m. start time. On July 17, 31 and August 1, 2000, you worked past your 5:00 p.m. end time without prior authorization from your supervisor. On July 6, 2000, you requested, from Greg McGough and Robert Patchen, to move your lunch period to the end of the day. Your request was denied and you were instructed to call your afternoon appointment and tell them that you would be late, so that you could take your lunch break. You did not call and postpone your appointments, but you did leave a voice mail message for Robert Patchen stating that you had donated your lunch hour to the State. Finally, you failed to properly fill out your time sheet as instructed. These allegations may result in a major **suspension**.

This meeting will be conducted on **September 5, 2000, at 4:00 PM** in the Human Resources Office at which. At this meeting you will have an opportunity to refute, rebut and comment on the allegations made. You are entitled to union representation. After the meeting I will make a recommendation to the Director regarding any disciplinary action.

This will be the only notice of this meeting. Your failure to attend will constitute a waiver of your right to have this meeting.

Cc: Rob Patchen, Assistant Superintendent
Greg McGough, Supervisor
Noel Williams, President, Chapter 2533
File

APPENDIX "D"

Ohio Department of Commerce
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www.com.state.oh.us

Bob Taft
Governor

Gary C. Suhadolnik
Director

September 20, 2001 Grievance # 07-00-00-10-30-280-01-07

Joint Stipulations

1 Contract between The State of Ohio and OCSEA, AFSCME Local 11, AFL-CIO

2 Ohio Department of Commerce Policy, Procedure & Information Manual (effective July & August of 2000)
2A Addendum to policy manual

(Discipline Packet)
3A 10 Day suspension letter, dated October, 13, 2000
3B Pre-D report
3C Pre-D notice
3D Leave request memo from Randolph, Dated July 19, 2000
3E Leave request form for Randolph Burley, Dated July 19, 2000
3F Time sheet for Randolph Burley, period of 7/30/00 - 8/12/00
3G Time sheet for Randolph Burley, period of 7/16/00 - 7/29/00
3H Memo from Randolph Burley, dated July 17, 2000; RE: Explanation of time sheet
3I Time sheet for Randolph Burley, period of 7/03/00 - 7/15/00
3J Time sheet for Randolph Burley, period of 6/18/00 - 6/30/00
3K Memo from Greg McGough, dated August 18, 2000; RE: Recommendation / Result of investigatory interview of August 16, 2000 with Randy Burley, Investigator
3L Memo from Robert W. Patchen, dated August 7, 2000; RE: Request for the imposition of discipline against Randy Burley
3M Memo from Robert W. Patchen, dated August 3, 2000; RE: Randy Burley
3N Memo from Robert W. Patchen, dated August 3, 2000; RE: Randy Burley
3P Memo from Kristin Rosan, Dated August 3, 2000; RE: Documentation of activity in violation of office procedures
3Q Memo from Greg McGough, dated 08/03/00; RE: Report-In Time Procedure Clarification Memorandum
3R Memo from Greg McGough, dated 08/02/00; RE: Conversation with Randy Burley Requesting Lunch at End of WorkDay
3S Memo from Lynne C. Hengle, dated July 28, 2000; RE: Report-In Time procedure Clarification
3T Memo from Rick Selegue, Dated July 19, 2000; RE: Disciplinary Recommendation
– 3U Memo from Rick Selegue, Dated July 6, 2000; RE: Counseling, Article 13.03- Meal Periods
3V 2 day Suspension Letter
– 3X Written reprimand
3Y Oral Reprimand

(Grievance Trail)
4A Step 3 report
4B Grievance Form

5 Memo from Rob Patchen, Dated July 26, 2000; RE: Report In Location

6 Memo from Rob Patchen, Dated August 14, 2000; RE: Counseling regarding being on the 20th floor beyond allowed period of time

7 Memo from Rob Patchen, Dated August 14, 2000; RE: Reply to email questions & Publications

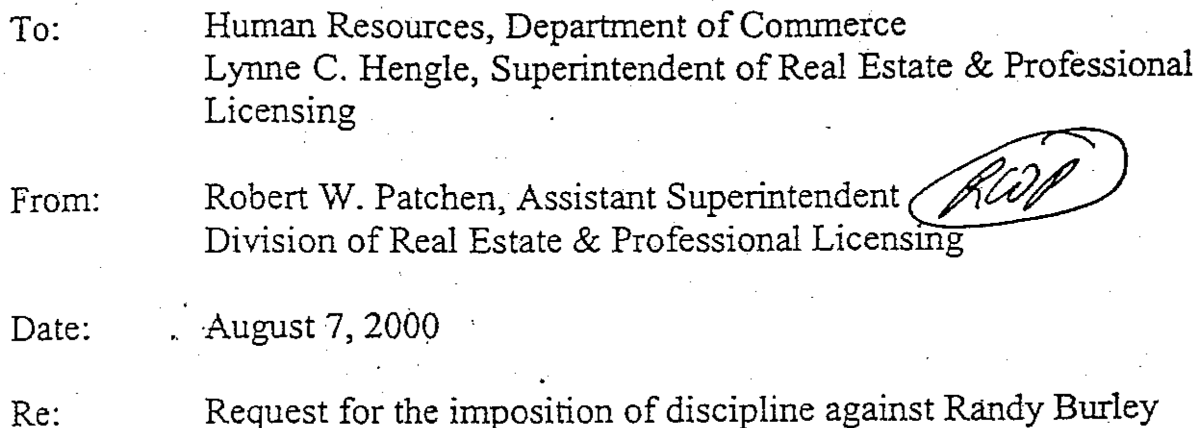
p 1 of 16

APPENDIX "E"

J3L II

Rec'd 2-15-02

MEMORANDUM



To: Human Resources, Department of Commerce
Lynne C. Hengle, Superintendent of Real Estate & Professional Licensing

From: Robert W. Patchen, Assistant Superintendent RWP
Division of Real Estate & Professional Licensing

Date: August 7, 2000

Re: Request for the imposition of discipline against Randy Burley

---

On August 4, 2000, I held an investigatory interview regarding the actions of Randy Burley on five separate occasions. In addition to Mr. Burley and myself, Kristin Rosan was present for Management and Dennis Broadnax, Union Steward, was present as Mr. Burley's representation.

Occasion Number One

On July 6, 2000, Rick Selegue, Enforcement Manager, counseled Mr. Burley on the requirement to take his proper lunch break. See the attached copy of the counseling documentation – Exhibit "A". On July 18, 2000, at approximately 1:00 p.m. Mr. Burley called his supervisor, Greg McGough, and asked for permission to move his lunch break to the end of the day. The reason Mr. Burley wanted to move his lunch break was that he had run approximately 30 minutes long on his morning audit and wanted to make his scheduled time for his afternoon audit. Mr. McGough refused such permission and instructed Mr. Burley to call his afternoon audit appointment and tell them he would be late and take his lunch break. See the attached statement of Mr. McGough – Exhibit "B". Mr. Burley next contacted me with the same request. He did not inform me that he had already made this request of his Supervisor. I informed Mr. Burley that I could not make an exception and that he should call his afternoon audit appointment to inform them he would be a little late and to take his lunch break. At approximately 3:00 p.m. that same day I returned to my office from a meeting and there was a voicemail message from Mr. Burley. The message informed me that

he had gone to the afternoon audit to meet the original time of the appointment and that the State could consider his lunch break "donated". See the attached statement prepared by myself – Exhibit "C". A review of Mr. Burley's timesheet for this date, copy attached – Exhibit "D", indicates that he did not take a lunch break on July 18, 2000. During the investigatory interview Mr. Burley admitted he did not take a lunch break on the day in question. His explanation was that he did not consider it a compensation issue as he does not expect to be compensated and plans to make no claim for any such compensation. Additionally, Mr. Burley indicated that he thought it would reflect poorly upon himself and the Division if he was not on time for the afternoon audit appointment.

The above demonstrates Mr. Burley's violation of a directive issued to him by Rick Selegue regarding the taking of a proper lunch break as documented by the counseling on July 6, 2000. It also demonstrates Mr. Burley's violation of a directive issued to him by his supervisor Greg McGough and a similar directive issued to him by me as the Assistant Superintendent of the Division of Real Estate & Professional Licensing. I consider Mr. Burley's actions to be insubordination in violation of Policy 201.0, Violation 2 – Insubordination;. his actions also demonstrate exercising poor judgement in carrying out and/or following an assignment in violation of Policy 201.0, Violation 3 – Exercising poor judgment in the carrying our and/or following assignments; written policies or procedures; and/or work rules; lastly his actions demonstrate that he worked in excess of his scheduled hours without the required authorization in violation of Policy 201.0, Violation 20 – Failure to notify supervisor of absence within ½ hour of start time; working in excess of scheduled hours without required authorization on the Progressive Discipline Policy grid of the Department of Commerce's Policy, Procedure & Information Manual.

Accordingly, I am requesting that disciplinary action be instituted against Mr. Burley pursuant to Policy 201.0 for his actions of July 18, 2000.

Occasion Number Two

On July 6, 2000, Rick Selegue, Enforcement Manager, counseled Mr. Burley on the requirement to take his proper lunch break. A review of Mr. Burley's timesheet for this date, copy attached – Exhibit "D", indicates that he only took a 40 minute lunch break on July 19, 2000. During the investigatory interview Mr. Burley explained that he was at the office of a company doing

an audit. It was raining that day according to Mr. Burley and he went to the bank while lunch was brought into the place where he was performing the audit. Mr. Burley further indicated that he did not want to just sit in the office of the company, so he went ahead and resumed his duties early. He also indicated that he was concerned about getting to Florida because of a family situation with his grandfather.

The above demonstrates Mr. Burley's violation of a directive issued to him by Rick Selegue regarding the taking of a proper lunch break as documented by the counseling on July 6, 2000. I consider Mr. Burley's actions to be insubordination in violation of Policy 201.0, Violation 2 – Insubordination; his actions also demonstrate exercising poor judgement in carrying out and/or following an assignment in violation of Policy 201.0, Violation 3 – Exercising poor judgment in the carrying our and/or following assignments; written policies or procedures; and/or work rules; lastly his actions demonstrate that he worked in excess of his scheduled hours without the required authorization in violation of Policy 201.0, Violation 20 – Failure to notify supervisor of absence within ½ hour of start time; working in excess of scheduled hours without required authorization on the Progressive Discipline Policy grid of the Department of Commerce's Policy, Procedure & Information Manual.

Accordingly, I am requesting that disciplinary action be instituted against Mr. Burley pursuant to Policy 201.0 for his actions of July 19, 2000.

Occasion Number Three

On July 6, 2000, Rick Selegue, Enforcement Manager, counseled Mr. Burley on the requirement to take his proper lunch break. A review of Mr. Burley's timesheet for this date, copy attached – Exhibit "D", indicates that he only took a 50 minute lunch break on July 26, 2000. During the investigatory interview Mr. Burley explained that he does not wear a watch and that he simply left late for lunch on that date. Mr. Burley did not think that taking his full hour was an option under these circumstances. He did not indicate that he sought out any supervisory help regarding this matter.

The above demonstrates Mr. Burley's violation of a directive issued to him by Rick Selegue regarding the taking of a proper lunch break as documented by the counseling on July 6, 2000. I consider Mr. Burley's actions to be insubordination in violation of Policy 201.0, Violation 2 – Insubordination;

his actions also demonstrate exercising poor judgement in carrying out and/or following an assignment in violation of Policy 201.0, Violation 3 – Exercising poor judgment in the carrying our and/or following assignments; written policies or procedures; and/or work rules; lastly his actions demonstrate that he worked in excess of his scheduled hours without the required authorization in violation of Policy 201.0, Violation 20 – Failure to notify supervisor of absence within ½ hour of start time; working in excess of scheduled hours without required authorization on the Progressive Discipline Policy grid of the Department of Commerce's Policy, Procedure & Information Manual.

Accordingly, I am requesting that disciplinary action be instituted against Mr. Burley pursuant to Policy 201.0 for his actions of July 26, 2000.

__Occasion Number Four__

On July 6, 2000, Rick Selegue, Enforcement Manager, counseled Mr. Burley on the requirement to take his proper lunch break. A review of Mr. Burley's timesheet for this date, copy attached – Exhibit "D", indicates that he only took a 50 minute lunch break on July 28, 2000. During the investigatory interview Mr. Burley explained that he does not wear a watch and that he simply left late for lunch on that date. Mr. Burley did not think that taking his full hour was an option under these circumstances. He did not indicate that he sought out any supervisory help regarding this matter.

The above demonstrates Mr. Burley's violation of a directive issued to him by Rick Selegue regarding the taking of a proper lunch break as documented by the counseling on July 6, 2000. I consider Mr. Burley's actions to be insubordination in violation of Policy 201.0, Violation 2 – Insubordination; his actions also demonstrate exercising poor judgement in carrying out and/or following an assignment in violation of Policy 201.0, Violation 3 – Exercising poor judgment in the carrying our and/or following assignments; written policies or procedures; and/or work rules; lastly his actions demonstrate that he worked in excess of his scheduled hours without the required authorization in violation of Policy 201.0, Violation 20 – Failure to notify supervisor of absence within ½ hour of start time; working in excess of scheduled hours without required authorization on the Progressive Discipline Policy grid of the Department of Commerce's Policy, Procedure & Information Manual.

Accordingly, I am requesting that disciplinary action be instituted against Mr. Burley pursuant to Policy 201.0 for his actions of July 28, 2000.

Occasion Number Five

On July 28, 2000, the Superintendent issued a clarification to the managers and supervisors about overtime eligible staff only being on the floor no more that 5 minutes prior to their start time and no longer than 5 minutes after the end of their shift. His supervisor gave Mr. Burley a copy of this clarification on August 1, 2000. See the attached statement of Greg McGough – Exhibit "E". On August 2, 2000, Kristin Rosan saw Mr. Burley on the floor at approximately 5:15 p.m. See the attached statement of Kristin Rosan – Exhibit "F". I saw Mr. Burley on the floor on that same date at approximately 5:17 p.m. See attached statement prepared by myself – Exhibit "G". At the investigatory interview Mr. Burley indicated that he was in the process of loading materials into his van for his trip to Toledo the next day to perform audits. He thought this loading should be done on his time, rather than state time, as he considered it convenient for him. Given the newness of this clarification, I will issue a written counseling to Mr. Burley making it clear that such loading is a legitimate work activity and shall be done on state time in the future in a manner to allow for compliance with the other applicable directives. I do not recommend that formal discipline be initiated regarding this incident.

Attachments

CC: Randy Burley

Exhibit "A"

Page 6 of 16

MEMORANDUM

TO: Randy Burley, Investigator Robert Patchen

Cc: Robert Patchen, Assistant Superintendent

FROM: Rick Selegue, Enforcement Supervisor

DATE: July 6, 2000

SUBJ: Counseling, Article 13.03 – Meal Periods

The purpose of this meeting is to council you, Randy Burley, of the Meal Period policy (13.03) as described in the State of Ohio And OCSEA contract. Your timesheet (period of June 16 through June 30, 2000) reflects lunch periods less than an entire one hour as well as times not taken during the midpoint of your shift. Article 13.03 states:

"Employees (including but not limited to Correction Officers, Juvenile Correctional Officers, and MCE Investigators and Load Limit Inspectors in the Department of Public Safety) who currently work eight (8) hours straight without a meal period shall continue to do so, except as otherwise mutually agreed. No other employee shall be required to take less than thirty (30) minutes more than one (1) hour for a meal period. Meal periods will usually be scheduled near the midpoint of a shift.

Employees shall not normally be required to work during their meal period. Those employees who by the nature of their work are required by their supervisor to remain in a duty status during their meal period may, with the approval of their supervisor, either shorten their workday by the length of the meal period or else have their meal period counted as time worked and be paid at the appropriate straight time or overtime rate, which ever is applicable. A supervisor will honor an employee's choice where reasonably possible."

Future violations of this policy may result in disciplinary action taken.

DEPARTMENT OF COMMERCE
of Hours Paid

Division:

Date	Start Time	Out to Lunch	In From Lunch	Out Day End	Leave Out	Leave In	Leave Used V-S-P-C-A-ML-J-BV-LWOP-H	Total Hours Paid	
6/18	—	—	—						0
6/19	8:00a	see attached		[illegible]					8
6/20	7:45a	see attached		[illegible]					8
6/21	8:03a	12:43p	1:24p	[illegible]					8
6/22	7:46a	12:35p	1:20p	5:[illegible]					8
6/23	7:51	12:50p	1:40p	[illegible]					8
6/24	—	—	—						0

	Start Time	Out to Lunch	In From Lunch	Out Day End	Leave Out	Leave In	Leave Used V-S-P-C-A-ML-J-BV-LWOP-H	Total Hours Paid	
6/25	—	—	—						0
6/26	7:55a	4:02p	4:30p	5:[illegible]					8
6/27	8:35a	11:35a	11:50a	5:[illegible]					8
6/28	8:00a	12:00p	1:00p	5:0[illegible]					8
6/29	7:55a	12:40p	1:29p	5:07p					8
6/30	7:58a	1:30p	1:50p	5:06p					8
	—	—	—	—					0
							2-Week Total		80

es (V-Vacation, S-Sick, P-Personal, C-Comp Time, A-Administrative, ML-Military, J-Jury, BV-
ement, LWOP-Administrative Leave Without Pay, H-Holiday)
rtime must be approved in advance by the Director, verification must be attached to Time Sheet.
val for the use of Leave of Absence or Administrative Leave Without Pay must be approved by
rector.

nature certifies that this is an accurate account of the number of hours in an active pay status.

[signature] 7/5/2000
E[m]ployee Signature

[signature] 7-5-00
Supervisor Signature

Exhibit "B"

Page 8 of 16

Memorandum

To: Rob Patchen

CC: Rick Selegue

From: Greg McGough

Date: 08/02/00

Re: Conversation with Randy Burley Requesting Lunch at End of Work Day

---

As I recall, Randy Burley called me from Moling and Associates, where he was completing a compliance exam, and conveyed that since he was just finishing this exam, and had another exam scheduled at Metropolitan Armored Car, that he would like to take lunch at the end of his work day.

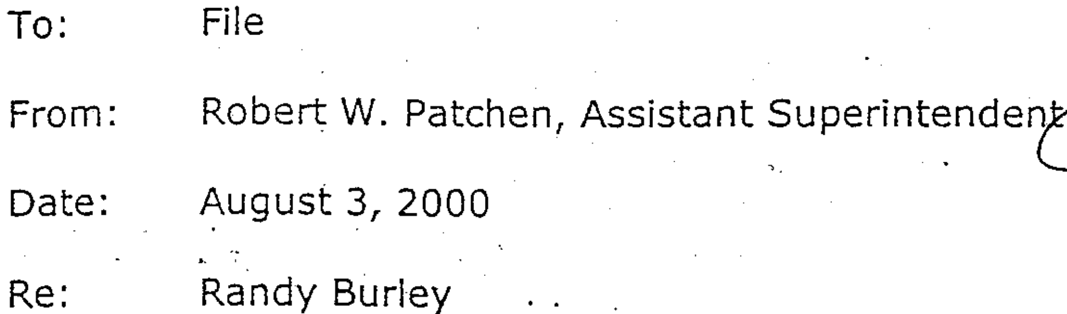
I related to him that this request could not be approved by me, and, recommended to him, that he call the next appointment (Metropolitan Armored) and relay to them that he would be briefly delayed in starting that exam. That would have enabled him to have lunch, prior to starting the exam.

ONFIDENTIAL

Exhibit "C"

Page 9 of 16

MEMORANDUM



To: File

From: Robert W. Patchen, Assistant Superintendent RWP

Date: August 3, 2000

Re: Randy Burley

On Tuesday, July 18, 2000, at approximately 1:00 p.m. I received a telephone call from Randy Burley. Mr. Burley informed me that he had just finished his morning examination and that it had lasted about one-half hour longer than expected. He also informed me that his afternoon examination was schedule for 1:30 p.m. He requested authorization to move his lunch period to the end of the so he could go straight to the afternoon examination. I informed Mr. Burley that I could NOT make an exception for him under these circumstances, or I would have to make exceptions for everyone. I instructed Mr. Burley to call the afternoon appointment and inform them that he was behind schedule and to go take his proper lunch break before going to his next examination. I also advised Mr. Burley that in the future, he should make a call to a later appointment as soon as he realizes that he could not make the originally scheduled appointment time. I had no difficulty with Mr. Burley staying the extra 30 minutes at the morning appointment to finish that particular examination.

At approximately 3:00 p.m. that day I returned to my office and the voicemail indicator light was light on my desk phone. I activated the voicemail feature and there was a message from Mr. Burley. The message informed me that he had decided to go to his afternoon appointment as to meet the originally scheduled time and that the State could consider his lunch break "donated".

Subsequently, I learned that Mr. Burley had inquired with his supervisor, Greg McGough, about moving his lunch to the end of the day and that Mr. McGough gave him directions similar in nature to mine. During my conversation with Mr. Burley he never mentioned that he had discussed this matter with his supervisor.

Mr. Burley's timesheet (copy attached), that includes the day in question reflects that no lunch break was taken.

RWP 8-3-00

IO DEPARTMENT OF COMMERCE
:ord of Hours Paid

ne: Rady Burley Division: Real Estate + Prof. Licensing

ek f /2000	Date	Start Time	Out to Lunch	In From Lunch	Out Day End	Leave Out	Leave In	Leave Used V-S-P-C-A-ML-J-BV-LWOP-H	Total Hours Paid	Total Hours Claimed
n.	7/16	—			—					0
on.	7/17	8:00a	12:30p	1:30p	5:05					8
es.	7/18	8:03	—	—	5:00p					8
d.	7/19	8:12a	12:30p	1:10p	5:50p					7.8
urs.	7/20	8:00a	12:30p	1:30p	5:00	1:30p	5:00p	EV - 3.5		8
day	7/21					8:00a	5:00p	BV - 8		8
t.	7/22	—			—					0

*lunch in field

ek f 3/ to		Start Time	Out to Lunch	In From Lunch	Out Day End	Leave Out	Leave In	Leave Used V-S-P-C-A-ML-J-BV-LWOP-H	Total Hours Paid	
n.	7/23	—			—					0
on.	7/24					8:00a	5:00p	BV - 8		8
es.	7/25					8:00a	5:00p	BV - 8		8
d.	7/26	8:03a	12:40p	1:30p	5:00p					8
rs.	7/27	8:00a	12:30p	1:30p	5:00p					8
day	7/28	8:00a	12:30p	1:20p	5:00p					8
t.	7/29	—								0
								2-Week Total		79.8

ves (V-Vacation, S-Sick, P-Personal, C-Comp Time, A-Administrative, ML-Military, J-Jury, BV-avement, LWOP-Administrative Leave Without Pay, H-Holiday)
vertime must be approved in advance by the Director, verification must be attached to Time Sheet.
roval for the use of Leave of Absence or Administrative Leave Without Pay must be approved by Director.

ignature certifies that this is an accurate account of the number of hours in an active pay status.

[signature]
ployee Signature

[signature] 8-1-00
Supervisor Signature

Exhibit "D"

Page 12 of 1

DEPARTMENT OF COMMERCE
[illegible] of Hours Paid

: Rody Burley Division: Real Estate + Prof. Licensing

Date	Start Time	Out to Lunch	In From Lunch	Out Day End	Leave Out	Leave In	Leave Used V-S-P-C-A-ML-J-BV-LWOP-H	Total Hours Paid	Total Hours Claimed
7/16	—			—				0	
7/17	8:00a	12:30p	1:30p	5:00					8
7/18	8:03	—	—	5:00					8
7/19	8:12a	12:30p	1:10p*	5:00					7.8
7/20	8:00a	12:30p	1:30p	5:00	1:30p	5:00p	BV - 3.5		8
7/21					8:00a	5:00p	BV - 8		8
7/22	—								0

*lunch in field

Date	Start Time	Out to Lunch	In From Lunch	Out Day End	Leave Out	Leave In	Leave Used V-S-P-C-A-ML-J-BV-LWOP-H	Total Hours Paid	Total Hours Claimed
7/23	—			—					0
7/24					8:00a	5:00p	BV - 8		8
7/25					8:00a	5:00p	BV - 8		8
7/26	8:03a	12:40p	1:30p	5:00p					8
7/27	8:00a	12:30p	1:30p	5:00p					8
7/28	8:00a	12:30p	1:20p	5:00p					8
7/29	—								0
							2-Week Total		79.8

[illegible]s (V-Vacation, S-Sick, P-Personal, C-Comp Time, A-Administrative, ML-Military, J-Jury, BV-[illegible]ment, LWOP-Administrative Leave Without Pay, H-Holiday)
[illegible]time must be approved in advance by the Director, verification must be attached to Time Sheet.
[illegible]al for the use of Leave of Absence or Administrative Leave Without Pay must be approved by [illegible]ector.

[illegible]ature certifies that this is an accurate account of the number of hours in an active pay status.

[signature]
Employee Signature

[signature] 8-1-00
Supervisor Signature

Memorandum

To: Rob Patchen

CC: Rick Selegue

From: Greg McGough

Date: 08/03/00

Re: Report-In Time Procedure Clarification Memorandum

I personally hand-delivered a copy of the above referenced document to Randy Burley at 8:10a.m. on Tuesday, 8-1-00.

CONFIDENTIAL

MEMORANDUM

To: Division Managers and Supervisors

From: Lynne C. Hengle, Superintendent

Date: July 28, 2000

Re: Report-In Time Procedure Clarification

There have been some questions raised in light of the procedure that requires that our staff not report to work any earlier than five (5) minutes prior to the start of their scheduled shift. The question is whether the time restriction applies to them being at their workstation or on the floor. After considering the impacts of the Fair Labor Standards Act, the layout of our al work area on the floor, the availability of other locations for waiting, and the impact on staff members with varying start time for their shifts, *I have determined that the proper procedure is that overtime eligible staff members should not be on the FLOOR any more than five (5) minutes prior to the start of their shift.* This procedure will hopefully keep any disruption of already working staff to a minimum and coordinate well with the procedure that requires them to document their arrival time on their timesheets. This will hopefully clarify that by arrival time, for timesheet purposes, arrival time on the floor is what is required to be documented.

Each manager or supervisor is responsible for communicating this procedural clarification to their effected staff members as soon as possible after the receipt of this clarification memo. Except for people off on leave or disability, in no event shall this notice by the manager or supervisor be later than the close of business on Friday, August 4, 2000. Any effected employee who is off on leave or disability when the original notice is given by the manager or supervisor shall be informed regarding this matter no later than two (2) business days after they return to work. Additionally, each manager or supervisor is to document the time and manner in which they conveyed this clarification to their effected staff members. This documentation is to be maintained by the manager or supervisor for use as necessary. FAILURE ON THE PART OF A MANAGER AND/OR SUPERVISOR TO PROPERLY FOLLOW THIS DIRECTIVE AND/OR ENFORCE THIS PROCEDURE WILL SUBJECT THE OFFENDING MANAGER AND/OR SUPERVISOR TO POTENTIAL DISCIPLINE, UP TO AND INCLUDING REMOVAL.

File

Exhibit "F"

MEMORANDUM

TO: Rob Patchen

FROM: Kristin Rosan KR

DATE: August 3, 2000

RE: Documentation of activity in violation of office procedures

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The purpose of this memorandum is to document my observation of activity that is in violation of office procedures.

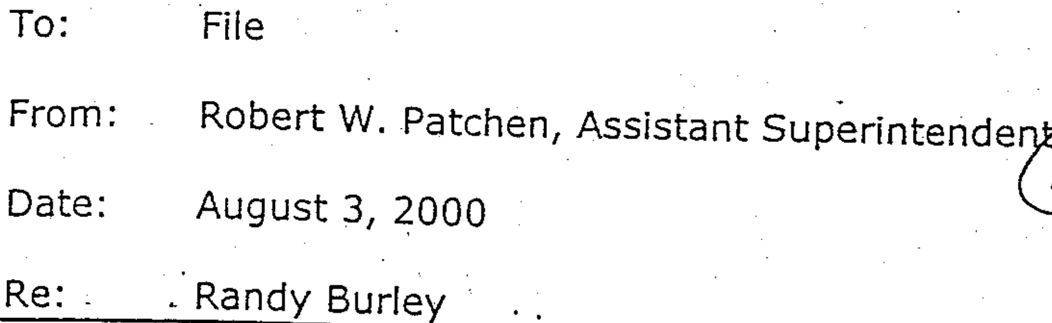
On August 2, 2000 at 5:15 p.m., I personally observed Randy Burley on the 20th floor. He walked from his cubicle, in front of the reception area and headed down the hallway toward the Division's hearing room. I was on my way to the bank of elevators to head home, and did not speak to Mr. Burley.

Upon reaching the 3rd floor of the Riffe, no more than 2 minutes later, I used my cell phone to notify Rob Patchen of Mr. Burley's presence on the 20th floor.

Exhibit "G"

MEMORANDUM

Page 16 of 16



To: File

From: Robert W. Patchen, Assistant Superintendent RWP

Date: August 3, 2000

Re: Randy Burley

On August 2, 2000, at approximately 5:15 p.m. I received a call in my office from Kristin Rosan. She informed me that on her way off the 20th Floor she noticed that Randy Burley was still on the floor. After the call I left my office to check to see if Mr. Burley was still on the floor. Upon walking out of my office, I saw Mr. Burley heading towards the front desk area. He turned past the front desk and I did not see him again. Upon seeing Mr. Burley, I checked my wristwatch and the time was 5:17 p.m.

Each morning I adjust the official clock we use at the front desk for timesheet purposes. I do that by going to the Official U. S. Time Web Site and seeing how my wristwatch corresponds to the official time. I recall that on the morning of August 2, 2000, my wristwatch was within approximately two seconds of the official time. The web site time is accurate to within less than one second. I adjusted the official clock on the morning of August 2, 2000. On the morning of August 3, 2000, I also made an adjustment to the official clock. That adjustment was approximately 15 seconds, and definitely less than 30 seconds. My wristwatch was still within approximately two seconds of the time on the web site on the morning of August 3, 2000. I had made no adjustments to my wristwatch between the morning of August 2, 2000, and the morning of August 3, 2000.

Union/Grievant's Disparate Treatment Claims

The union showed through the testimony of Rebecca Huffman, Administrative Assistant 3, that *Joint exhibit 2 & 2A, (Department of Commerce Policy and Addendum to the policy)* applied to all employees of the department of Commerce. She also testified that employees must be at work at their scheduled time. Ms. Huffman testified that she supervised 2 employees during the period of July 3, 2000 to August 4, 2000. She testified that those employees were a Helen Hendershot and Debora Dixon.

Ms Huffman also testified that she had the authority to discipline employees. She stated that she could administer oral and written reprimands but was not sure about suspensions.

She also testified that she never had to deal with employees being tardy. When asked about her understanding of the AWOL policy she stated that every leave had to be approved and that she would follow the department's policy. She also stated that she did not have any employees who flexed their time. *Union Exhibit #2 (Records of hour Paid for Helen Hendershot for the period March 13, to 24, 2000).* Ms. Huffman testified that Ms. Hendershot's worked 8:30 A.M. to 5:30 P.M. with a lunch period from 12:30 P.M. to 1:30 P.M. Ms Huffman also testified that she allowed Ms. Hendershot to sometimes flex her lunch period. U#2 clearly shows that for the period of March 13th through 17th, 2000 Ms. Hendershot did not record her Day end time. It also clearly shows that Ms. Hendershot arrived at work at 8:30 A.M. each day and took lunch at 12:30 each day and except for the above mentioned dates she ended her day at 5:30 P.M. each day.

Union #3, (Record of Hours Paid for Helen Hendershot for the period of November 6th through 17th, 2000). This clearly shows that Ms. Hendershot's work schedule changed from an 8:30 A.M. start time to a 9:00 A.M. start with the end time remaining the same. *U#3* clearly shows that Ms. Hendershot's arrival times varied each day as did her lunch hour and end time. On November 6th she stayed until 5:35 P.M. 5-minutes past her scheduled end time. On November 7th she was 5-minutes late. On November 8th she was 5-minutes early for work and added and extra 5-minutes to her lunch hour. On November

13th she arrived 4-minutes early to work and then took an extra 5-minutes for lunch and left work at 5:35 P.M. On November 15th she was 5-minutes late for work and on the 16th she left work at 5:35 P.M.

In reviewing just these two exhibits it is clear that management has treated this greivant differently than it treated other employees in the department. In *J#3B, and J#3C*, this greivant was charged with being tardy 3-minutes on July 18th, 26th, and 31st, 2000 and 12-minutes on July 31st and 5-minutes on August 2, 2000. He was also charged with staying 5-minutes past his scheduled end time on July 17th and 31st. And staying 6-minutes late on August 1st *(Also see J#3F and J#3G).* He was also charged with failing to properly fill out his time sheet.

Ms Hendershot had similar violations of the policies but she received no discipline.

Through the testimony of Mr. Laird Eddie, Administration Assistance 3, it was shown that he supervised 3 employees, two of which were Diane Hillman and Toya Johnson. He further testified that *Joint exhibit 2 & 2A, (Department of Commerce Policy and Addendum to the policy)* applied to all employees of the department of Commerce. He testified that that he did not know the contract well (The Collective Bargaining Agreement). He also testified that he thought any thing over 5-minutes was considered late and that AWOL was more than 30-minutes late. He stated that he has the authority to administer discipline at the oral and written levels only. *Union exhibit #4 (Record of Hours Paid for Diane Hillman for the period July 2nd to July 15th, 2000)* shows that on July 3rd, 6th and 11th Ms. Hillman worked 5-minutes past her scheduled end time (4:35 P.M.). On July 7th she worked 7-minutes past her scheduled end time (4:37 P.M.). Ms. Hillman's scheduled lunch hour was 11:30 A.M. to 12:00 P.M. but on July 12th she took lunch from 1:30 P.M. to 2:00 P.M. On July 13th she took her lunch period from 12:00 Noon to 12:30 P.M.

Ms Hillman received no discipline for working past her scheduled end time. And she was allowed to basically flex her lunch schedule. This grievant received discipline for working past his scheduled end times and was not allowed to flex his lunch schedule.

Union exhibit #6 (Record of Hours Paid for Toya Johnson for the period July 2nd to July 15th, 2000. Shows that Ms. Johnson shortened her lunch break by 5 minutes on July 6th, 2000. Mr. Eddie also testified that he allowed his employees to flex their lunch period.

Once again the union has shown that this grievant was being treated differently than other employees in the department of Commerce. See _J#3B and J#3C_. This grievant was charged with being tardy, taking less then his scheduled lunch period and staying at work past his scheduled end time while other employees engaged in the same or similar practice and received no discipline.

In _Union Exhibit #15 (Record of Hours Paid, Numerous employees for the period July 2nd to July 15th, 2000)_

> _On Page 4,_ Christine Broz did not properly fill out her time sheet; she left off the lunch times from July 11th to July 14th, 2000. The grievant was disciplined for not properly filling out his time sheet.
>
> _On Page 14,_ Karla Edgerton arrived late on several dates. On July 3rd and 12th she was 5 minutes late. On July 13th she was 4-minutes late. No leave was used for the tardy.
>
> _On page 16,_ Helen Hendershot did not properly fill out her time sheet. She did not include any end times for the period of July 10th through the 11th, 2000. She received no discipline.
>
> _On Page 31,_ Roger Jones was tardy 5-minutes on July 13th, 2000 and 3-minutes on July 14th. He also pretty much flexed his lunch period as well. He took his lunch anywhere between 11:30 A.M. till 1:00 P.M. and ending it between 12:30 P.M. till 2:00 P.M. No leave was used for the tardy. Please note this grievant was not allowed that flexibility but apparently other employees where.

On Page 34, Stacy Madison, an interim employee was allowed to come to work any time between 8:00 A.M. till 9:30 A.M. This grievant was not allowed that flexibility.

On Page 51, Darlene McDowell did not fill out her time sheet properly she did not write down the actual times she worked. She was not disciplined.

Departmental work rules must be uniformly enforced. They must apply to all employees equally regardless of classification or work area. This grievant was treated disparately in the enforcement of the departmental policies.

This is further proved through _Union exhibit #16 (Records of Hours Paid, Numerous employees for the time period of July 17 through 28, 2000)._

On Page 3, Christine Broz, worked 4-minutes past her end time on July 21st and 27th. And 5-minutes past her end times on July 28th. She was not disciplined for working past her scheduled end time.

On Page 4, Paul Bryant start time changed from 7:30 A.M. to 8:00 A.M. on July 28th.

On Page 7, Frank Cellura returned from lunch 5-minutes early on July 26th. He was not disciplined.

On Page 8, Seleda Cockell was tardy 5-minutes on July 19th and 3-minutes on July 25th and she indicated that no leave was used for the tardy.

On Page 13, Karla Edgerton was 5-minutes tardy on July 14th and 26th no leave was used. She stayed 7-minutes past her end time on July 24th and 5-minutes past it on July 27th. She was not disciplined.

On Page 15, Helen Hendershot's time sheet was questioned by Rebecca Hoffman, her supervisor and Rob Patchen because of discrepancies. No discipline was issued.

On Page 19, Jim Hilad was tardy 3-minutes and worked 3-minutes past his scheduled end time on July 24th and 28th. No leave was used for the tardy and he was not disciplined for working past his end time.

On Page 20, L. B. Hodge stayed 5-minutes past his scheduled end time. He was not disciplined.

On Page 29, Roger Jones was tardy 5-minutes and stayed 5-minutes past his end time on July 24th no leave was used for the tardy and he was not disciplined for working past his end time.

On Page 33, Willetta Marcum was tardy 3-minutes and stayed 3-minutes past her scheduled end time on July 26th, no leave was used for the tardy and she was not disciplined for working past her end time.

On Page 41, Jodi Phillips was tardy 5-minutes and stayed 5-minutes past her scheduled end time on July 24th. On July 25th she stayed 5-minutes past her end time. No leave was taken for the tardy.

On Page 53, Theodore Williams returned from lunch 5-minutes early on July 19th and 28th. He received no discipline.

The union is unclear how many instances we must show to prove disparate treatment. But to ensure that we provide this arbitrator with sufficient evidence I direct your attention to *Union exhibit #17 (Records of Hours Paid for numerous employees for the period of July 31st to August 11th, 2000)*

On Page 2, Dennis Broadnax was tardy 3-minutes on August 8th and he worked 3-minutes past his end time. Leave was not used for the tardy nor was he disciplined for working past his end time.

On Page 3, Christine Broz was 5-minutes tardy on August 7th. No leave was used. She left work past her scheduled end time the entire period. She received no discipline.

On Page 5, Diane Burke's start time changed from 7:30 A.M. to 8:00 A.M.

On Page 11, Pearlie Durrah, was tardy 5-minutes on August 3rd and 4-minutes tardy on August 11th. No leave was used for either tardy.

On Page 13, Karla Edgerton was tardy 4-minutes on July 31st and 7-minutes tardy on August 1st. No leave was used for either tardy.

On Page 14, Beth Frabott was tardy 20-minutes on July 31st. She used personal leave to cover the tardy. On August 4th she was 2-minutes tardy and no leave was used. On August 11th she was 10-minutes tardy and use personal leave.

On Page 21, Theodore Hornyak returned 10-minutes early from lunch on August 2nd. He was not disciplined.

On Page 23, Rodney Hutton stayed past his end time the entire period. No discipline was issued.

On Page 25 Judile Jefferies was 3-minutes tardy on August 3rd and 4-minutes tardy on August 4th; 5-minutes tardy on August 8th and 4-minutes tardy on August 9th. No leave was used. She stayed 15-minutes past her scheduled end time on August 11th. She was not disciplined. She did however use 20-minutes personal time on August 11th to cover being tardy.

On *Page 28,* Roger Jones was 3-minutes tardy on August 9th. No leave was used. He left work 5-minutes past his scheduled end time on August 4th, 10th, and 11th. He was not disciplined.

On Page 40, Jodi Phillips was 3-minutes tardy on July 31st, August 7th and 11th. No leave was used. She worked 5-minutes her scheduled end time on August 3rd. She was not disciplined.

On Page 41, Yolandia Poole stayed 4-minutes past her scheduled end time on August 9th. She was not disciplined.

On Page 52, Rebecca Watson's lunch period moved from 1:00 P.M. to 11: 25 P.M. to 12:55 P.M. On August 3rd she stayed 5-minutes past her end time. She was not disciplined.

On Page 53, John Wiles was 3-minutes tardy on august 11th. No leave was used.

On Page 55, Robert Yee stayed from 3-minutes to 6-minutes past his scheduled end time the entire week. He was not disciplined.

Again the Department of Commerce Policies must apply to all employees and they must be enforced fairly and consistently. These exhibits prove other wise. The policies were in fact not consistently enforced. Management has the obligation and duty to enforce all policies fairly, equitably and consistently. Clearly this is a violation of *Article 24* of the collective bargaining agreement.

While we do not dispute the fact that management has the right to manage. We do argue that management violated *Article 5* by ignoring the inconsistent and unfair enforcement of their own policies while stringently enforcing those same policies on this grievant. This is an unabridged abuse of power and authority. Article 5 ensures that Management Rights ..."shall be exercised in a manner which is not inconsistent with the collective bargaining agreement"... The union believes that the manner in which these policies were enforced was a conscience and deliberate act committed by management against this greivant.

Article 2

The Employer violated Article 2 Non-Discrimination Section 2.01 by treating the Grievant, a Black Male, differently and less favorably than it did similarly situated white males and females, and Black Females employed by the Ohio Department of Commerce in violation of Federal and State Laws such as Title VII. See Connie D. Gray v. Toshiba America Consumer Products, Inc. This is a Sixth Circuit Court of Appeals case which was decided August 30, 2001. We believe it addresses the issues of this case relating to discrimination based upon the Grievant's race and sex.

The Employer's brief does not mention Helen Hendershot at all. Rather than explain the difference in treatment she received when compared to the Grievant, the Employer simply acts as though she did not exist. The evidence and testimony in this case shows that Mrs. Hendershot was allowed to come in on a regular basis after her established start time, take no leave, and leave work after her established ending time. In fact, when Mrs. Jones presented testimony about granting the Grievant's emergency leave in comparison to other Real Estate employees, Mrs. Hendershot's information was not included at all (Management Exhibit #5). The Employer admits to having taken Mrs. Hendershots "age", health and use of public transportation in consideration in allowing her to adjust her schedule as she desired. Yet, no record was maintained of Mrs. Hendershot ever being late or being granted leave. Additionally, there was no documentation presented to show that Mrs. Hendershot was under a FMLA agreement.

It is important to note that the Union believes that there is a difference between disparate treatment for purposes of "just cause" and discrimination in violation of Article 2 of the Collective Bargaining Agreement. Disparate treatment is treating Bargaining Unit employees differently regardless of their race or sex.

Discrimination in this case relates to the difference in the treatment of employees based upon race and sex among other things.

Further, the record of this case needs to indicate that this Arbitrator has not allowed any presentation relating to the establishment of the Grievant's work schedule or the changing of white and female employees' work schedules to later arrival times while refusing to do so for the Grievant. This was said to be the jurisdiction of another Arbitrator.

Article 5

The Employer violated Article 5 **Management Rights** by exercising its managerial rights in a way which was inconsistent with the Collective Bargaining Agreement. Article 5 of the Collective Bargaining Agreement states in part:

> **"Except to the extent expressly abridged only by the specific articles and sections of this Agreement,** the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. **Such rights shall be exercised in a manner which is not inconsistent with this Agreement."...**

The COLLECTIVE BARGAINING AGREEMENT unambiguously prohibits discriminatory (Article #2) or disparate treatment (Article 24 Section 24.01). Article 2 prohibits discrimination based upon "**race, sex,** creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status. Section 24.01 prohibits imposing discipline upon a Bargaining Unit Employee without "just cause". A basic and widely accepted tenet of just cause is there is to be no disparate treatment of employees. The Employer's policies must

be even handily enforced. These examples are just two of the many limitations placed upon the Employer's managerial authority by the COLLECTIVE BARGAINING AGREEMENT which have been exceeded by the Managers and Supervisors of the Ohio Department of Commerce.

The Employer claims that there are not any expressed terms in the COLLECTIVE BARGAINING AGREEMENT which places any limitations upon its right to appoint a Designee to conduct Pre-Discipline and Step-3 Grievance Meetings. We disagree.

1. **Appointment of Pre-D Designee who was bias and not willing to uphold terms of Collective Bargaining Agreement.**
2. **Pre-D Notice inadequate**
3. **Refused to provide information**
4. **Provided for Employer witnesses while not allowing witnesses on the Grievant's behalf**
5. **Pre-D Hearing Unfair etc.**
6. **Step-3 Designee was the Subordinate of the Pre-Discipline Designee and unlikely to reject his Supervisor's disciplinary recommendation, thus the Grievant had no real appeal of the Employer's adverse disciplinary action.**

Article 13

The Employer violated Article 13 **Report-In Location** Section 13.06 of the Collective Bargaining Agreement when it failed to take the Grievant's extenuating and mitigation circumstances surrounding his tardiness on July 19, 2000 in consideration in dispensing discipline against him.

Further the Employer violated Article 13 **Meal Periods** Section 13.03 by not honoring the Grievant's choice to shorten the length of his workday after he worked through his lunch in order to complete his pre-assigned work related duties.

Union/Grievant's List of Employer's Violations Of Article 24

The Employer violated Article 24 Section 24.01 when it imposed a ten day suspension upon the Grievant without "just cause" for allegedly violating Commerce Policy 201.0 #2, #3, #4, #19, and #21.

The Employer violated Article 24 **Progressive Discipline** Section 24.02 when it failed to follow the principles of progressive discipline in imposing a 10 day suspension upon the Grievant.

The Employer violated Article 24 **Progressive Discipline** Section 24.02 when it imposed discipline upon the Grievant which was not commensurate with his alleged violation of Department of Commerce's Policies.

The Employer violated Article 24 **Progressive Discipline** Section 24.02 when it failed to initiate disciplinary action against the Grievant in a timely fashion. (July 19 AWOL) (July 18 Insubordination)

The Employer violated Article 24 **Pre-Discipline** Section 24.04 when it failed to provide the Grievant and the Union with a list of witnesses to the events or act known of at that time and documents known of at that time used to support the possible disciplinary action. Further, the Employer failed to provide the Grievant and the Union with additional documents which it intended to rely upon in justifying discipline against the Grievant.

The Employer violated Article 24 **Pre-Discipline** Section 24.04 when the Employer Representative recommending the imposition of discipline upon the Grievant for allegedly violating Commerce Policy 201.0 #4 Failure of Good Behavior, Policy 201.0 #19 Tardy, and Policy 201.0 #21 was not present at the Grievant's September 5, 2000 Pre-Discipline Meeting.

The Employer violated Article 24 **Pre-Discipline** Section 24.04 when the Pre-Discipline Meeting Designee refused to allow either the Grievant or his Co-Steward to ask questions at the during the September 5, 2000 Pre-Discipline meeting.

The Employer violated Article 24 **Pre-Discipline** Section 24.04 when its Pre-Discipline Designee refused or otherwise failed to provide the Grievant with materials and information which he could use to ask questions, comment, refute or

rebut the allegations being made against him in the August 30, 2000 Pre-Discipline Notice and during the September 5, 2000 Pre-Discipline Meeting.

The Employer violated Article 24 **Imposition of Discipline** Section 24.05 when someone other than the Agency Head or designated Deputy Director or equivalent made the final decision to impose a ten day suspension upon the Grievant.

The Employer is violating Article 24 **Imposition of Discipline** Section 24.05 by attempting to increase the disciplinary action taken against the Grievant.

The Employer violated Article 24 **Imposition of Discipline** Section 24.05 by imposing a ten day suspension against him solely for punishment.

Article 25

The Employer has not complied with either the letter or spirit of the grievance process. Refused discovery of relevant information and materials, which were available to it and requested, by the Union and Grievant.

Article 44

The Employer violated Article 44 Section 44.03 of the Collective Bargaining Agreement in that its work rules relating to the Grievant being disciplined for being AWOL and Tardy for the same occurrence is unreasonable and should have been rescinded.

ARBITRATION HEARING

BEFORE Frank Keenan

Grievance #07-00-00-10-30-280-01-07
Randolph M. Burley, Grievant

STATEMENT OF GRIEVANCE

Supporting Materials and Claims

A. **The Employer violated Article 2 of the Collective Bargaining Agreement by:**

1. Table of Organization for the Division of Real Estate and Professional Licensing shows other Bargaining Unit Employees who are similarly situated with the Grievant

2. The Employer disciplined the Grievant for violating Policy 201.0 #19 and #21 for the same incident and did not do so to any other Commerce Employee **(Other Employee Discipline Not Provided)**

3. The Employer did not dock other Employee's pay, charge them with being tardy and AWOL for the same occurrence **(Time Sheets and Payroll Summary Sheets for Division of Real Estate and Payroll Summary Sheets for the Division of Securities)**

4. The Employer disciplined the Grievant for violating Policy 201.0 #4 Failure of Good Behavior while not doing the same thing to a White Female Employee **(Melanie Braithwaite-Pre-Discipline Notice)** No #4 Failure of Good Behavior; Blaine Brockman is the Pre-Discipline Designee; Mrs. Braithwaite was allowed to ask questions-Compared to Burley's Pre-Discipline notice which did not afford him the opportunity to ask questions.

5. Ted Williams was given a written reprimand for violating Policy 201.0 #2, #3 and #4, yet the Grievant has been suspended for some unknown portion of a.10 day suspension relating to these charges.

6. The Employer issued an oral reprimand to the Grievant relating to alleged misconduct which was not supported with any facts and then refused to remove the reprimand from the Grievant's file.

7. The Employer allowed the White Bargaining Unit employees of the Grievant's section to flex their work schedules while not allowing him the same privilege. Had the privilege which was extended to the Grievant's White Co-Workers been extended to him his work schedule would not have started before 8:30am. Therefore, there would not have been any late arrival at all.

8. The Employer allowed a White Female of the Division of Real Estate to even come in at 9:00am, a schedule which was not on the list of "approved schedules", while not affording the same opportunity to the Grievant.

9. The employer has monitored the Grievant's start time, lunch hours and ending time in a more stringent manner than what was done in terms of his White Co-Workers

10. In order to monitor the Grievant more closely than his White Co-Workers, the Employer moved other employees of the Division in order to assign the Grievant a cubical right outside his Supervisor's office, while placing his White Co-Worker's cubicles on the other side of the work area.

11. Thus far the Employer has not presented **any** explanation of the difference in treatment.

B. The Employer violated Article 5 of the Collective Bargaining Agreement by:

1. The fundamental purpose of the Collective Bargaining Agreement is to ensure that the Employer exercises its authority in a reasonable, fair, and equitable manner. The Employer has not done so in this case.

2. Depriving the Grievant of his substantive and procedural due process rights during the Pre-Discipline and Grievance Processes. To allow supervisors unbridled discretion to distinguish between

Tardiness and AWOL, as in the Grievant's case invites disparate and/or discriminatory treatment, which is prohibited by the Collective Bargaining Agreement.

3. The Employer discipline the Grievant for alleged violations of Departmental Policies which its Representatives knew to be false (Policy 201.0 #4 Failure of Good Behavior)

4. The Employer misapplied its own policies in dealing with the Grievant

5. The Employer stacked charges against the Grievant

6. The Employer unilaterally changed its policies and procedures in violation of Article 44 of the Collective Bargaining Agreement. (I.e. new definition for AWOL- New timesheet policy.

C. **The Employer violated Article 13 of the Collective Bargaining Agreement by:**

1. The Employer did not consider the Grievant's extenuating and mitigating circumstances surrounding his late arrivals to work as required by Article 13 Section 13.06.

D. **The Employer violated Article 24 of the Collective Bargaining Agreement by:**

1. The Employer imposed discipline upon the Grievant without just cause.

2. The Employer does not evenhandedly enforce the policies it disciplined the Grievant for allegedly violating.

3. The Employer's policies are not reasonable (i.e. AWOL and Unexcused Tardiness are the same-John Downs)

I. The Grievant's claim that he did know why he was being disciplined is unfounded. Therefore, the Grievant was not denied his due process rights and he was disciplined for just cause.

A) <u>All documents used to support the disciplinary action were in the Grievant's possession prior to the pre-disciplinary meeting. Therefore, the contractual obligations were met and the Grievant was disciplined for just cause.</u>

The only document used to support this discipline, not authored by the Grievant, was a copy of a memorandum regarding a counseling issued to the Grievant by Rick Selegue (Joint Ex. 3U). This counseling was given on July 6, 2000, and it addressed the appropriate time period for taking a lunch break. However, Rick Selegue was present at the pre-discipline meeting to verbally state that he counseled the Grievant on this subject matter and that he gave a copy to the Grievant during the counseling. Furthermore, throughout this arbitration, the Union did not impeach Rick Selegue and the Grievant did not provide any testimony or evidence in the contrary. The Grievant acknowledged that the counseling took place, that it pertained to the memorandum, and that it was given to him on the day stated on that memorandum.

Rick Selegue's testimony about the counseling, along with this memorandum, supported the fact that the Grievant knew when he was supposed to take a lunch break and it supported that he knew that the lunch break had to last a full one-hour. Therefore, the counseling was used to support the Employer's allegations of violating policy 201.0 #3 *Exercising poor judgment in carrying out and/or following assignments; written policies & procedures; and/or work rules.*

This also supported the Employer's allegations of violating policy 201.0 #4 *Failure of Good Behavior.*

All of the other documents used to support the disciplinary action were authored and presented to the Employer by the Grievant. The Employer used copies of the Grievant's time sheets to support the allegation of violating policy 201.0 #19 *Unexcused Tardiness.* The timesheets were completed and submitted by the Grievant in order to reflect the actual time that he worked. There were four timesheets used to support discipline (Joint Ex. F, G, I, and J). The timesheets covered the four pay periods reflected during the time frame of June 18, 2000 through August 12, 2000. The Employer also used the Grievant's request for personal leave, dated July 19, 2000, to support the allegation of violating policy 201.0 #19 *Unexcused Tardiness* (Joint Ex. E). This exhibit was also used to support the allegation of violating policy 201.0 #21 *Absent Without Leave (AWOL).*

Neither the Union nor the Grievant disputed whether or not the timesheets were anything other than the timesheets that were actually were completed and submitted by the Grievant (Joint Ex. F, G, I, and J). Neither the Union nor the Grievant disputed whether or not the leave request was anything other than the leave request that was completed and submitted by the Grievant (Joint Ex. E). Therefore, the Union and the Grievant acknowledge that they had all of these documents prior to the pre-disciplinary meeting.

B) The pre-discipline record remained open for three days meeting in order to allow the Grievant to question, refute and rebut all allegations against him. Therefore, the contractual obligations were met and the Grievant was disciplined for just cause.

During the pre-disciplinary meeting, the Union alleged that all documents used to support the proposed disciplinary action were not given to the Grievant three days prior to the pre-disciplinary meeting. The Union argued that the pre-disciplinary notice did not list those

documents that were used to support the possible disciplinary action and therefore it was a procedural flaw. The Union alleged that because of this procedural flaw, the Grievant was not given proper notice of the proposed disciplinary action and he was denied his due process rights.

We heard testimony, from Robert Patchen, Assistant Superintendent of the Division of Real Estate and Professional Licensing, that he provided the Grievant a copy of the request for discipline packet (Joint Ex. 3L). Mr. Patchen also testified that his practice is to always provide the employee a copy of the request for discipline when it is submitted to the Office of Human Resources. Therefore, the Grievant would have received the documents used to support the discipline when he received the request for discipline packet (Joint Ex. 3L). The discipline packet contains copies of counseling memorandum, the leave request for July 19, 2000, and copies of the four timesheets covering the pay period of June 18, 2000 through August 12, 2000 (Joint Exhibits E, F, G, I, J and U). However, within the request for discipline packet, the documents listed above were given labels that differ from the ones that were given to the joint exhibits for this arbitration (Joint Ex. 3L). Nevertheless, the request for discipline packet identifies each of the documents, as well as, why the document should be used to support discipline.

The Union's claim that the Grievant did not receive these documents prior to the pre-disciplinary meeting should be considered moot. The pre-disciplinary notice provides the reasons why the Employer believes there should be discipline imposed and the time period that it covers. As stated earlier, the time sheets and leave request used to support this discipline were created by the Grievant. Nevertheless, the grievant was given additional copies of all of the documents at the beginning of the pre-disciplinary meeting. Furthermore, we heard testimony and evidence that show that the pre-discipline record was left open for three days in order to give

the Grievant the opportunity to question, refute and rebut all allegations in a written format. This three-day extension was given in order to clear up any confusion with the documents and to clear up any procedural error. This agreement was acceptable to the Grievant and the Union at the conclusion of the pre-disciplinary meeting. Since then, the Grievant has alleged that this was not enough time to respond because of his work responsibilities.

Three days notice is all that is required by the contract (Joint Ex. 1). A three-day extension was acceptable by the Grievant, the Union and the Employer at the end of the pre-disciplinary meeting. Furthermore, three days is more than enough time for the Grievant to refute or rebut whether or not he was tardy, whether or not he was absent from work without being on approved leave, and whether or not he actually took a full one-hour lunch as he was instructed. The Grievant should have been able refute, rebut and question his own time sheets well within those three days.

C) The Grievant knew exactly why he was being charged with Insubordination. Therefore, the discipline for insubordination was for just cause.

The allegation that the Grievant violated policy 201.0 #2 *Insubordination* was proven with the testimony of Greg McGough, the Grievant's immediate supervisor, and Robert Patchen. Both, Mr. McGough and Mr. Patchen testified during the pre-disciplinary meeting and during the arbitration how they gave the Grievant explicit instructions and how they knew that he did not follow those instructions. Furthermore, during the pre-disciplinary meeting, as well as throughout the course of this arbitration, the Grievant admitted that he received the instructions from the individuals listed above and that he chose not to follow those instructions. The Grievant also provided an excuse for why he chose to be insubordinate. The Grievant stated that he believed that it should be his decision to decide whether not he is going to take a lunch break

as long as he intends to donate the time back to the State. Therefore, it was very clear that the Grievant understood why he was being disciplined, as well as, all the factual information used to support the allegation of insubordination.

D) The Grievant willingly acted in a way that he knew would not be construed as good behavior. Therefore, the discipline Failure of Good Behavior was for just cause.

The Grievant has argued that he should not have been disciplined for Failure of Good Behavior because he does not agree with the wording. The Grievant has stated, and proven, that the policy manual should read "Failure of Good Behavior, Behavior not already specified within the policy manual." This is an undisputed fact. The addendum to the policy manual clearly adds the sentence "behavior not already specified within the policy manual." However, this does not change the facts of this discipline.

The Grievant was disciplined for failing of good behavior, because he fails to act in way that can be construed as good behavior on a daily basis. Furthermore, there are not enough disciplinary grids to cover every possible act of bad behavior. The disciplinary grid within policy 201.0 neither has a number that specifies discipline for an employee not taking a full one-hour lunch nor does it have one that covers an employee who blatantly violates the policy over and over again. The disciplinary grid does not have a number that specifies discipline for an employee that callously leaves a voice-mail in order to mock the Assistant Superintendent of the Division. Just as the disciplinary grid does not have a number that specifies discipline for an employee who repeatedly refuses to follow simple mundane instructions, but instead becomes argumentative and belligerent.

One example of this type of bad behavior was demonstrated each time the Grievant filled out a timesheet. Filling out a time sheet is a simple task. The employee is expected to write in

the time they start working, time they go to lunch, the time they come back from lunch and the time they go home for the day. There are also three columns to document leave used (Leave out, leave in and type of leave). The last column is used to account for the total hours worked along with the total hours of paid leave. The Grievant refused to fill in this column because he felt that he did not have to claim all hours that he worked. He would create a new column within the right hand margin and then title it "hours claimed" (Joint Ex. F, G, I and J). The Employer had instructed the Grievant not to fill out the timesheet in this manner, just as the Employer explained why it was unacceptable. The Employer had instructed the Grievant, on numerous occasions, on the proper way for filling out a timesheet. The Employer had previously disciplined the Grievant for being insubordinate when he failed to re-fill out a timesheet the proper way (Union Ex. 1).

Neither the Union nor the Grievant produced any evidence that would support that the Grievant had a pattern of demonstrating behavior that could be characterized as "good behavior." However, the Employer has shown numerous examples of behavior that can be characterized as bad or other than good behavior. Because the Employer cannot be expected to draft an infinite number of policies in order to address every possible scenario, the charge of *"Failure of Good Behavior"* addresses any and all scenarios that are not already addressed within the policy manual. The charge of *"Failure of Good Behavior"* addresses all behavior that cannot be described as good behavior and cannot be better characterized by another section within the discipline grid.

E) The Grievant knew that his tardiness was unacceptable. Therefore, the discipline for Unexcused Tardiness was for just cause.

The Grievant fully admits that he arrived to work after his scheduled start time a number of times between the dates of June 18, 2000 and August 12, 2000. The Employer calculated that the Grievant was tardy, or late to work, approximately 28.6% of the time.[1] Therefore, the Grievant admits that he was habitually tardy. However, the Grievant stated that it was not his fault, because uncontrollable outside factors kept him from arriving to work on time.

The Grievant alleged an excuse for every incident of tardiness. However, the excuses do not change the fact that the Grievant regularly did not arrive to work on time. Some of the Grievant's excuses included his van being vandalized[2], road repairs, and he mistakenly wrote in the wrong time on his timesheet because he was confused on whether or not he actually worked that day. As believable as the excuses may sound, the Employer did not excuse the tardiness. Furthermore, the Grievant has a two-day suspension on record for his unexcused tardiness (Joint Ex.3V).

F) <u>The Grievant knew the ramifications for taking leave without first obtaining authorization. Therefore, the discipline for AWOL was for just cause.</u>

The Grievant was absent from work without leave on July 19, 2000, and the Grievant knew he was required to be on approved leave or he would be disciplined. Therefore, the Grievant filled out a request for personal leave to cover the time he was away from work (Joint Ex. 3E). However, he did not request this personal leave did not meet the Division notification requirements and it did not meet the contractual notification requirements (Joint Ex. 1, Sec. 27.04). Therefore, the request for leave was denied and the Grievant is considered to be Absent Without Leave (AWOL).

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[1] Calculation for tardiness is addressed in the Employer's initial brief.
[2] To this date the grievant has never produced any evidence that his van was actually vandalized.

The Grievant argued that he should have been allowed to take the personal leave because it was an emergency. However, he did not believe that he should have to provide any evidence to support the emergency. The Grievant also did not believe that he should be required to call in and tell his supervisor(s) that he is going to be late for work because of an emergency. The Grievant argued that it is not possible to be AWOL under thirty minutes, however he admitted that he knew he had to request leave to be away from work for time periods under thirty minutes. The Grievant knows the proper procedure for taking leave and he knows the notification requirements. Just as he knows that if he is planning on claiming "emergency," then he will need to provide documentation. The Grievant knows all of these things because he has been approved, on numerous occasions, to take various types of leave including those identified as emergency leave. Furthermore, the Grievant has been disciplined many times for failing to provide sufficient notification and for failing to provide sufficient "emergency" documentation (Joint Ex. 3X and 3Y; Mgnt. Ex. 2).

G) <u>The Grievant knew the proper policy and procedure for taking a proper lunch break and that he would be disciplined for not doing so. Therefore, the charge of Exercising Poor Judgment was for just cause.</u>

The Grievant fully admits that he did not take a full one-hour lunch 62.5% of the time between the dates of July 6, 2000 and August 2, 2000. The Grievant fully admits that he did not take a full one-hour lunch, but that he was prevented from doing so from uncontrollable sources. The Grievant presented a long list of excuses for why he was prevented from following a simple policy[3]. This list of excuses includes: he was preparing for other disciplinary grievances, he didn't think it was an issue, his grandfather was ill and because of that taking a full one-hour

[3] All of the excuses listed come directly from the Grievant's initial brief (pg 9-11).

lunch would have put him into overtime, it was raining outside so he ate his lunch indoors, and the last being that he simply came back too early and was confused about the time.

This list of excuses does not support that the Grievant was not aware of the proper policy and it does not excuse the Grievant from deciding to not follow that policy. Furthermore, none of the excuses clarifies any misunderstanding the Grievant would have had in determining how to follow such a simple policy. Whether or not the Grievant was preparing for another grievance is his prerogative, it is his lunch and he may do whatever Union work he chooses. However, this is not time that he is permitted to claim as hours worked. The same would apply to the Grievant decision to drive. The Grievant should not be using his lunch hour to drive, however if he choose to do so than he choose not claim it as hours worked. The fact that it was raining outside, and the Grievant choose to eat lunch inside, is irrelevant. The rain did not hinder the Grievant from taking a forty-minute lunch, therefore it would not have hindered him from taking the full one-hour for lunch. The Grievant does not get paid for duration of time where he is signed out for lunch, therefore taking a full one-hour lunch will never put him into an overtime status. To conclude, if the Grievant truly became confused on the length of his lunch hour then he would not have so clearly documented that he came back early. It is possible that he wrote down the wrong time, however it would be more believable if his judgment would have been to document the wrong "out to lunch time" along with the wrong "in from lunch time." At least then his judgment would have been to take the required one-hour time period. The Grievant may have valid excuses. However, regardless of the excuse it was the Grievant's judgment not to follow a simple policy and to subject himself to possible disciplinary actions.

II. The Grievant did not establish that the Employer acted in a way that was discriminatory or disparate in nature. Therefore, the Grievant was disciplined for just cause.

A) <u>The discipline issued to the Grievant was not disparate in nature. Therefore, the Grievant was disciplined for just cause.</u>

The Union produced a substantial amount of documents in order to show how other employees were treated differently than the Grievant. The Union produced over 350 timesheets, over 40 of payroll summary reports, an excess of 125 of request for leave forms and hundreds more pieces of paper in order to show how the Employer's actions were disparate in nature. Nevertheless, none of these documents support the claim that similarly situated employees were treated differently than the Grievant. These documents also do not show that other employees are treated better because their race, color, religion, gender, national origin or political affiliation is different than that of the Grievant.

The Union argued that the Employer applied its rules in a disparate nature because the Employer allowed Helen Hendershot to arrive to work after her scheduled start time. The Union argued that the timesheets reflected that Ms. Hendershot might have been late up to five minutes on a few occasions. Rob Patchen and Rebecca Huffman both testified about the physical and mental condition of Ms. Hendershot. Mr. Patchen and Ms. Huffman testified that Ms. Hendershot was an elderly woman, approximately eighty-four years of age, who was extremely small and very sickly. Mr. Patchen and Ms. Huffman testified that Ms. Hendershot had worked for the Department of Commerce, Division of Real Estate and Professional Licensing, for approximately forty-four years and that she was a Secretary the entire time. Mr. Patchen testified that, at times, he would have to remind Ms. Hendershot that it was time to go home and that at other times he would have to "check in on her." Mr. Patchen further stated that Ms. Hendershot and the Grievant do not have similar job duties, they do not have the same supervisor, and seeing that the Grievant worked in the "field" a majority of the time, they would

not have the same work location. Therefore, it is undisputed that the Employer did not recognize the Grievant and Ms. Hendershot as being similarly situated employees.

The United States Court of Appeals, Sixth Circuit, states:

> Michell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992). "As this Court first explained in Mithcell, "[i]t is fundamental that to make a comparison of a discrimination plaintiff's *611 treatment to that of non-minority employees, the plaintiff must show that the **'comparables' are similarly situated in all respects."**

B) The discipline issued to the Grievant was not discriminatory in nature. Therefore, the Grievant was disciplined for just cause.

As stated in the initial brief, which was submitted by the Employer, the Union did not produce any evidence or testimony to support the claim of discrimination. Just as the Grievant may have been allowed to take "emergency" leave or be allowed to arrive to work late on occasion, other employees were given a limited amount of leeway. The amount of leeway was not determined by the employee's race, color, gender, national origin, or political affiliation. The amount of leeway was determined on a case-by-case basis, and if the Employer determined that it was in excess than discipline was issued.

III. The Grievant's defense that the Employer forced him to use poor judgment and to act in a poor behavior is unsupported. Therefore, the Grievant was disciplined for just cause.

A) The Grievant's defense that the Employer's interpretation of the Fair Labor Standards Act forced him to not follow policies is unsupported. Therefore, the Grievant was disciplined for just cause.

The Grievant's brief stated "the Employer claims that the Fair Labor Standards Act (FLSA) considers such time as time worked." Therefore, I would like to clarify what the FLSA states:

> 29 U.S.C. 201, *et seq.*, Sec. 7 (a) (1) "Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or *is employed in an enterprise engaged in commerce or in the production of goods for commerce,* for a workweek longer than forty hours less such employee receives compensation for his employment in excess

of the hours above specified at a rate not less than hone and one-half times the regular rate at which he is employed."

Therefore, it is determined by the Employer that any time that an employee is working should be documented on the employee's timesheet. All employees are expected to be truthful and accurate in completing their timesheet. Therefore, the columns on the timesheet that are labeled "Start Time," "Out to Lunch," "In From Lunch," "Out Day End," "Leave Out," and "Leave In" must have accurate times in order for the number in the "Total Hours Paid" column to be accurate. The Employer may not permit any employee to waive the rights provided under the FLSA. If the Employer chose to allow this to happen, it would be subject to the penalties provided under the FLSA.

> 29 U.S.C. 201, *et seq.*; PENALTIES; Sec. 16. (b) "Any employer who violates the provisions of section 6 or 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in the additional equal amount as liquidated damages."

The Grievant has subjected the Employer to possible punitive liability by attempting to waive his rights under the FLSA. The Employer has established clear policies and procedures to prevent any misinterpretation of the FLSA and reduce the possibility of violating the Act and being subjected to the listed penalties. Therefore, whether or not the Grievant agrees with the Act or the Employers interpretation thereof, he must follow the established policies and procedures. If the Grievant does not adhere to the policies and procedures then the Employer must be permitted to issue discipline in order to correct the behavior.