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 not under the collective bargaining agreement." (Emphasis supplied). By clear implication the Policy therefore recognizes that the Collective Bargaining Agreement, and not 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" (Downs' 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 <u>each</u> 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 vis-à-vis 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 all 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. Genie Co., supra; Alan Wood Steel Co., supra. 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 all 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 all 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 most

relevant records, but I am unable to find that they were the only 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 all 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, all 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 - Pre-Discipline, I find that the Union is confusing the document production requirements of the Department after 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 it 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
77 South High Street • 23rd Floor
Columbus, OH 43266-0544
(614) 466-3636 FAX (614) 644-8292
www.com.state.oh.us

Bob Taft
Governor

Gary C. Suhadolnik
Director

J 3 A

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-7 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
John:
Go ahead and draft a letter
for Blaine & sign for 10 day suspension
Jack

APPENDIX "C"

P. 1 of 1

Ohio Department of Commerce

77 South High Street • 23rd Floor
Columbus, OH 43266-0544
(614) 466-3636 FAX (614) 644-8292
www.com.state.oh.us

Bob Taft
Governor

Gary C. Suhadolnik
Director

MEMORANDUM

TO: Randy Burley, Investigator

FROM: John Downs, Labor Relations Administrator

DATE: August 30, 2000

RE: Notice of Pre-Discipline Meeting

J3C

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"

P1 of 1

Ohio Department of Commerce

77 South High Street • 23rd Floor
Columbus, OH 43266-0544
(614) 466-3636 FAX (614) 644-8292
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

P1 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
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 11

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	—	—	—	—				
6/19	8:00a	[illegible]	[illegible]	[illegible]				
6/20	7:45a	[illegible]	[illegible]	[illegible]				
6/21	8:03a	12:45p	1:29p	[illegible]				
6/22	7:46a	12:35p	1:20p	5:[illegible]				
6/23	7:51	12:50p	1:42p	[illegible]				
6/24	—	—	—	—				

	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	—	—	—	—				
6/26	7:55a	4:02p	4:30p	5:[illegible]				
6/27	8:[illegible]	11:35a	11:50a	6:[illegible]				
6/28	8:00a	12:00p	1:00p	5:[illegible]				
6/29	7:55a	12:40p	1:29p	5:07p				
6/30	7:58a	1:30p	1:50p	5:06p				
	—	—	—	—			2-Week Total	

0 8 8 8 8 8 8 0

0 8 8 8 8 8 8 0

80

s (V-Vacation, S-Sick, P-Personal, C-Comp Time, A-Administrative, ML-Military, J-Jury, BV-ement, LWOP-Administrative Leave Without Pay, H-Holiday)
time must be approved in advance by the Director, verification must be attached to Time Sheet.
al 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.

[illegible] 7/5/2000
Employee Signature

[illegible] 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.

Exhibit "C"

Page 9 of 16

MEMORANDUM

To: File

From: Robert W. Patchen, Assistant Superintendent

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
ed.	7/19	8:02a	12:30p	1:10p	5:00p					7.8
urs.	7/20	8:02a	12:30p	1:30p	5:00p	1:30p	5:00p	EV - 3.5		8
day	7/21					8:00a	5:00p	BV - 8		8
at.	7/22	—			—					0

*lunch in field

ek f 3/ to	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	
n.	7/23	—			—					0
on.	7/24					8:00a	5:00p	BV - 8		8
es.	7/25					8:00a	5:00p	BV - 8		8
ed.	7/26	8:03a	12:40p	1:30p	5:00p					8
urs.	7/27	8:00a	12:30p	1:30p	5:00p					8
day	7/28	8:00a	12:30p	1:20p	5:00p					8
at.	7/29	—			—					0
								2-Week Total		79.8

aves (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.

Employee Signature

7-1-00

Supervisor Signature

Exhibit "D"

DEPARTMENT OF COMMERCE
l of Hours Paid

: Rady 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	5:00p					8
7/18	8:03	—	—	5:00p					8
7/19	8:02a	12:30p	1:10p	5:00p					7.8
7/20	8:00a	12:30p	1:30p	5:00p	1:30p	5:00p	EV - 3.5		8
7/21					8:00a	5:00p	BV - 8		8
7/22	—			—					0

*lunch in field

	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	
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

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

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

Employee Signature

Supervisor Signature 8-1-00

Exhibit "E"

Page 13 of 16

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.

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 ocedure is that overtime eligible staff members should not be on the FLOOR any nore 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"

Page 15 of 16

MEMORANDUM

TO: Rob Patchen

FROM: Kristin Rosan

DATE: August 3, 2000

RE: Documentation of activity in violation of office procedures

---

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.

[illegible] 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"

Page 169 16

MEMORANDUM

To: File

From: Robert W. Patchen, Assistant Superintendent

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. <u>The Employer violated Article 5 of the Collective Bargaining Agreement by:</u>

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. <u>The Employer violated Article 13 of the Collective Bargaining Agreement by:</u>

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. <u>The Employer violated Article 24 of the Collective Bargaining Agreement by:</u>

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) 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.

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) <u>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.</u>

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) <u>The Grievant knew that his tardiness was unacceptable. Therefore, the discipline for Unexcused Tardiness was for just cause.</u>

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

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).

[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) 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.

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

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.