

#1085

SUSAN GRODY RUBEN, Esq.  
Labor & Employment Arbitrator and Mediator  
30799 Pinetree Road, No. 226  
Cleveland, OH 44124

IN ARBITRATION PROCEEDINGS PURSUANT TO THE  
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

RECEIVED / REVIEWED

JUL 18 2011

DCSEA-OFFICE OF  
GENERAL COUNSEL

ARBITRATOR'S  
OPINION AND AWARD

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES  
ASSOCIATION, Local 11, AFSCME

and

OHIO BUREAU OF WORKERS'  
COMPENSATION

Grievance # 34-21-100727-0136-01-09

Grievant: Doug Hunter

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME ("the Union") and OHIO BUREAU OF WORKERS' COMPENSATION ("the State") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties agreed there are no impediments to a final and binding decision by the Arbitrator pursuant to the Agreement.

Hearing was held January 25, February 17 and 23, and March 18, 2011 in Columbus, Ohio. Both Parties and the Grievant were represented by representatives

who had full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Both Parties submitted post-hearing briefs.

**APPEARANCES:**

On behalf of the Grievant:

**DIANNE D. EINSTEIN, Esq., Einstein & Poling, LLC, 5940 Wilcox Pl., Suite F, Dublin, Ohio 43016.**

On behalf of the Union:

**MICHAEL MARTIN, OCSEA Staff Representative, 390 Worthington Rd., Westerville, Ohio 43082.**

On behalf of the Employer:

**BRADLEY A. NIELSEN, BWC Labor Relations Officer 3, 30 West Spring St., L-28, Columbus, Ohio 43215.**

**STIPULATED ISSUE**

**Did the Ohio Bureau of Workers' Compensation possess just cause to remove BWC Fraud Investigator Doug Hunter from employment? If not, what shall the remedy be?**

**RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT**

**April 15, 2009 – February 29, 2012**

...

**ARTICLE 2 – NON-DISCRIMINATION**

**2.01 – Non-Discrimination**

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation or veteran status....

**2.02 – Agreement Rights**

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be

made for these purposes.

...

...

## ARTICLE 5 – MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees....

...

## ARTICLE 24 – DISCIPLINE

### 24.01 – Standard

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

...

### 24.02 – Progressive Discipline

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

Disciplinary action include:

- a. One (1) or more oral reprimand(s) (with appropriate notation in employee's file);
- b. One (1) or more written reprimand(s);
- c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.
- d. One (1) or more day(s) suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;

e. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to the begin the disciplinary process.

...

...

**24.04 – Investigatory Interview**

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

When employees have a right to and have requested a steward, stewards shall have the right to be informed of the purpose of the interview and to receive a copy of any documents the Employer gives to an employee to keep, during an investigatory meeting. Employees who are interviewed or testify during an investigation have no right to a private attorney, Ohio Revised Code (ORC) 9.84, notwithstanding.

**24.05 – Pre-Discipline**

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following notification to the employee....Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee prior to the meeting. In the event the Employer provides documents on the date of the meeting, the Union may request a continuance not to exceed three (3) days. Such request shall not be unreasonably denied. The Employer representative or designee recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

...

**24.06 – Imposition of Discipline**

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended

disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation....

...

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

...

## ARTICLE 25 – GRIEVANCE PROCEDURE

### 25.01 – Process

...

- D. The word “day” as used in this Article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

...

### 25.07 – Time Off, Meeting Space and Telephone Use

...The steward shall be given reasonable time off without loss of pay during his/her working hours to investigate grievances....The steward shall not leave his/her work to investigate, file or process grievances without first notifying and making mutual arrangements with his/her supervisor or designee as well as the supervisor of any unit to be visited. Such arrangements shall not be unreasonably denied.

...

...

### 25.09 – Relevant Witnesses and Information

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

This Section applies to all steps of the grievance procedure....

...

...

**STIPULATED FACTS**

1. The grievance is properly before the Arbitrator.
2. The Grievant began employment with the State on March 9, 1992 as a Correction Officer at the Ohio Department of Rehabilitation & Correction.
3. The Grievant transferred to BWC on December 5, 1999 to work as a Workers' Compensation Claims Assistant.
4. The Grievant was promoted to BWC Fraud Investigator on February 20, 2005.
5. BWC placed the Grievant on paid administrative leave on June 22, 2010.
6. BWC removed the Grievant from employment on July 20, 2010.
7. At the time of his removal, the Grievant's active discipline was:

**1 Day Suspension**

**December 3, 2009**

**Insubordination:**

**b) Failure to follow a written policy of the Employer; and**

**Neglect of Duty:**

**c) Failure to perform the duties of the position or performance at substandard levels.**

**Synopsis:**

**Conducted an interview with a subject without presence of a second Fraud Investigator as required by SID policy. Conducted an interview with a subject without being in possession of the proper documentation from the claim file.**

**2 Day Suspension**

**March 20, 2010**

**Insubordination:**

**b) Failure to follow a written policy of the Employer; and**

**Failure of Good Behavior:**

**c) Discourteous and/or rude treatment of fellow employee, manager, or customer.**

**Synopsis:**

**Verbal altercation with fellow employee which included yelling and the use of menacing and berating language in the presence of other staff and internal/external stakeholders present at the Lima Service Officer.**

## ADDITIONAL FACTS

The Grievant participated in an undercover surveillance operation at a bar on Friday night, January 23, 2009. He remained in the parking lot of the bar providing security while Fraud Analysts Rebecca Roach and Bev Hasty entered the bar where an injured worker allegedly was running a karaoke business. Roach and Hasty engaged the injured worker in conversation and obtained some of her karaoke business cards. Roach made a videotape of the interaction with the injured worker from a hidden camera in her purse.

The record is murky regarding exactly what happened to the videotape and business cards once Roach and Hasty left the bar.<sup>1</sup> Neither Roach, Hasty, nor the Grievant were on duty Saturday, January 24, 2009 or Sunday, January 25, 2009. On Sunday, January 25, 2009, the Grievant accessed the video from his BWC-assigned laptop at his home. Having been apprised he did that, the Grievant admits he must have had custody of the video during the weekend, though he contends he does not have independent recollection of it. The Grievant did not place the video into secure temporary storage during the weekend. On Monday, January 26, 2009, at the office, the Grievant made an entry into the BWC Special Investigations Department Fraud Management System that on January 26, 2009, "The video was placed in temporary storage."

On February 3, 2009, Roach entered into FMS:

FA Roach on this date obtained the video tape from the 1-24-2009 UC from the temporary storage container located in the Dayton SIU office. The evidence log does not reflect the fact that the evidence was placed and

---

<sup>1</sup> On February 3, 2009, Hasty entered into FMS that on January 24, 2009:

At approximately 9:45 PM, FA Hasty and FA Roach exited the premise[s] [of the bar] with[out] incident. The video file was immediately secured.

remained in the Temporary Storage from 1-26-2009, when placed there by SA Hunter until it was removed to be placed in the evidence cabinet by FA Roach on this date.

The matter was discussed with ASAC Pandilidis on how to properly correct the chain of custody. It was determined that the chain could not be modified, so ASAC Pandilidis recommended Roach enter a detailed note.

Roach accepted the evidence prior to updating the custody screen reflecting the fact the evidence had been in the temporary storage container from 1-26-2009 to 2-3-2009 and that she had obtained the evidence from temporary storage rather than SA Hunter.

Also on February 3, 2009, Roach electronically filled out an Evidence Control Document regarding the custody of the videotape. Before finishing the Evidence Control Document entry, however, she inadvertently pushed the submit button, which apparently erased the Grievant's Evidence Control Document entry. The record is unclear regarding what the Grievant's entry said. Roach's recollection is the Grievant made an entry on January 26, 2009 stating the videotape was in "Temporary Storage – Evidence control."

On May 27, 2009, BWC supervisor Shawn Fox conducted a case review with the Grievant on the karaoke case. Fox listed in FMS the items the Grievant needed to do to close the case. There was no discussion regarding any videotape custody issues.

On February 24, 2010, Fox and BWC supervisor Kim Pandilidis met with the Grievant regarding his karaoke case report. Among the items discussed was to add the business cards obtained during the undercover operation to the report. Again, there was no discussion regarding any videotape custody issues.

On February 26, 2010, the Grievant could not find the business cards in the evidence envelope. He asked Roach and Hasty to look for them; they, too, could not find the cards. The Grievant informed Pandilidis the business cards were missing. The BWC was concerned about the missing cards and on March 4, 2010, asked the Inspector General to investigate.

On March 30, 2010, Joe Montgomery, the Ohio Deputy Inspector General assigned to the BWC and a second Deputy Inspector General, Rick O'Claire, attempted to interview the Grievant about the business cards. The Grievant requested a Union Steward be present for the interview; Deputy Inspector General Montgomery told the Grievant he was not entitled to Union representation at an IG interview. The Grievant thus declined to be interviewed at that time.

On April 5, 2010, Deputy Inspector General Montgomery issued a subpoena pursuant to ORC 121.43 to the Grievant, ordering him to appear April 7, 2010 to testify in an IG investigation. On April 7, 2010, the Grievant e-mailed Deputy Inspector General Montgomery, asking if the testimony was "needed as a witness or am I the subject of the investigation?" Deputy Inspector General Montgomery told the Grievant he was a witness. The IG investigatory interview was held April 19, 2010. The Grievant again asked for a Union Steward and was again denied Union representation.

On Friday, April 23, 2010, the Grievant observed a State Industrial Commission hearing regarding the target of the karaoke case. He made an FMS entry regarding the hearing on Thursday, April 29, 2010.

The Office of the Inspector General issued its report May 27, 2010. In the preamble to the Report, readers are notified in pertinent part:

...

The Inspector General is authorized by state law to investigate alleged wrongful acts or omissions committed by state officers or state employees involved in the management and operation of state agencies. Statutory authority for conducting such investigations is set forth in Ohio Revised Code § 121.41 through 121.50....

...It is the purpose of this office to restore...trust in government by providing impartial investigations of matters referred for investigation, offering objective conclusions based upon those investigations....

**The Inspector General does not serve as an advocate for either the Complainant or the agency involved in a particular case. The role of the Office is to ensure that the process of internal investigations within state agencies is conducted fully, fairly, and impartially. As an independent fact finder, the Inspector General may or may not find wrongdoing associated with a particular investigation. However, the Inspector General always reserves the right to make administrative recommendations for improving the operation of state government or referring a matter to the appropriate agency for review.**

...

**The body of the report provides in pertinent part:**

...

**The evidence control document...had one custody log entry. While the Evidence was obtained on January 24, 2009, the single entry stated that the evidence was released by Hunter and received by Roach on February 3, 2009. This is in contrast with an entry in the department's Fraud Management System in which Hunter reported that he placed the evidence in the temporary evidence mailbox on January 26, 2009. Roach, as the evidence custodian who retrieved this evidence from the temporary evidence mailbox, was required to make at least two entries into the custody log: 1) evidence was placed in the temporary evidence mailbox by Hunter on January 26, 2009, and 2) the evidence was moved from the temporary evidence mailbox to the evidence locker on February 3, 2009. Missing from any investigative reports in their fraud database is any mention of the evidence being transferred from Roach to Hunter between January 24, 2009 and January 26, 2009.**

**We...found that the evidence control document...attached to the evidence envelope had been altered. The single entry dated February 3, 2009, had a line through it and two handwritten entries had been made. The first entry showed that Hunter placed the evidence in temporary storage on January 26, 2009, and the second entry showed that Roach moved the evidence into the permanent evidence storage on February 3, 2009. We found that the envelope contained a video cassette, but no business cards.**

...

**We...found that Roach failed to properly document the chain of custody using agency evidence control forms. As an evidence custodian, Roach was required to make entries into the evidence control system each time the evidence changed hands.**

**We also found that Hunter failed to properly document his handling of the evidence. In fact, Hunter is uncertain as to when he took possession of the evidence. And, like Roach, he could not recall exactly what was in the**

evidence envelope....

We were unable to substantiate that Roach or Hunter made false statements regarding the lost evidence; however, we do not find Roach's explanation of the missing cards to be credible. Roach's March 2, 2010, email to her supervisor stated that she did not recall taking possession of the business cards during the undercover operation....The plausibility of Roach's explanation is undermined by the fact that Roach retrieved the evidence envelope to retrieve the business cards.

Hunter and Roach collected evidence in this investigation and then failed to follow appropriate and required procedures for handling the evidence. Because of the errors, the agency is left without valuable evidence that could be used at trial or in other proceedings. The actions of the investigators are certainly embarrassing to the agency and may cause problems with proving the case against the Target. At the very least, the investigators were unprofessional.

Accordingly, we find reasonable cause to believe that acts of wrongdoing were committed by Fraud Investigator Douglas Hunter and Fraud Analyst Rebecca Roach.

... **RECOMMENDATIONS**

Based upon the results of this investigation, the Office of Inspector General is making the following recommendations and requests that BWC respond to this office within the next 60 days with a plan on how these recommendations will be implemented:

1. BWC should take the appropriate administrative action to address the actions of Fraud Investigator Douglas Hunter and Fraud Analyst Rebecca Roach.
2. BWC should conduct additional evidence handling training for Hunter and Roach.

The BWC conducted an investigatory interview of the Grievant on June 22, 2010.

The Grievant requested the presence of a Union Steward, which the BWC permitted.

During that interview, the Grievant responded to Question # 61 as follows:

- Q. Where was the video from [Saturday] January 24, 2009 until which time it was placed into temporary storage in the Dayton Service Office on [Monday] January 26, 2009?
- A. I don't know.

The State considers that response untruthful. The State also considers untruthful the Grievant's response to Question # 126:

- Q. Have you had anyone else review Craig [Thompson's] cases for you?
- A. Nope. Actually, I had an e-mail ready to go to [a co-worker], but I decided not to send it.

The State placed the Grievant on administrative leave with pay effective June 22, 2010.

In a letter dated July 12, 2010 and given to the Union and the Grievant at approximately 1:30pm July 13, 2010, the Grievant and the Union received notice of a pre-disciplinary hearing. The notice provides in pertinent part:

This letter is to inform you the BWC is considering disciplining you in the form of a removal. You are charged with violating the following provisions of the BWC Discipline Policy: Insubordination (b) Failure to follow a written policy of the employer; (c) Interfering with, failing to cooperate with or providing false information in conjunction with an official investigation or inquiry & Neglect of Duty: (a) General; (c) Failure to perform the duties of position or performance at substandard levels; Dishonesty: (a) Intentionally making false or untrue statements regarding work related matters to management, fellow employees or the public; & (d) intentional misuse, destruction, defacing of state property of another employee (e.g. LEADS).

Specifically, you failed to properly secure evidence as outlined by BWC Special Investigation Department (SID) policy/procedures. You further failed to properly document case activity in the Fraud Management System (FMS) as required by SID policy/procedures.

During your investigatory interview on June 22, 2010, you failed to respond to numerous questions in a truthful manner. When asked if you requested other SID employees to review cases for disparate treatment, you responded in the negative. This is not an accurate response. When asked about the location of evidence from January 24-26, 2009, you stated you did not possess any knowledge of the location of the video of the surveillance. Management has evidence that on Sunday, January 25, 2009, A77444 (D. Hunter's account) you logged into the BWC laptop computer 168312 (assigned to D. Hunter) between the times of 9:00 a.m. and 1:00 p.m. During this time, you accessed the program Windows Movie Maker and the movie file "...UC 012609.wmv," which is 236,965 kilobytes in size, and created or modified the file. You failed to document this action or properly secure the evidence.

From May 28, 2010, to June 22, 2010, you reviewed the work of other BWC employees instead of performing the required duties of your position. You utilized BWC equipment (FMS & V3) to look up approximately 52 cases assigned to other employees within SID.

...

A predisciplinary hearing is scheduled at the Governor's Hill Service Office on July 16, 2010, at 10:AM.

At a predisciplinary hearing, you shall receive the opportunity to tell your side of the story, to refute and/or rebut the charges and to provide any relevant documentation supporting your arguments and position. For reasons of efficiency and economy, parties are encouraged to submit written witness testimony in lieu of personal appearances to the maximum extent practicable.

...

The predisciplinary hearing was held July 16, 2010. The Hearing Officer issued the Predisciplinary Report July 19, 2010, finding just cause for removal.

On July 20, 2010, the Grievant was removed effective that day. The removal letter dated July 20, 2010 provides in pertinent part:

The Ohio Bureau of Workers' Compensation (BWC) is hereby *removing* you from employment effective July 20, 2010.

The BWC determined there is just cause for discipline based upon the violations of the BWC Disciplinary Policy: Insubordination (b) Failure to follow a written policy of the Employer; Neglect of Duty: (c) Failure to perform the duties of position or performance at substandard levels; & Dishonesty: (a) Intentionally making false or untrue statements regarding work related matters to management, fellow employees or the public.

Specifically, you failed to properly secure evidence as outlined by BWC Special Investigation Department (SID) policy/procedures. You further failed to properly document case activity in the Fraud Management System (FMS) as required by SID policy/procedures.

During your investigatory interview on June 22, 2010, you failed to respond to at least two questions in a truthful manner.

From May 28, 2010, to June 22, 2010, you spent at least six (6) work days reviewing the work of other BWC employees without authorization from your supervisor, instead of performing the required duties of your position.

...

The grievance dated July 23, 2010 provides in pertinent part:

Contract article(s) allegedly violated: 24.01, 24.04, 2.01, 2.02

Statement of facts....

Douglas Hunter was removed on July 20, 2010 by the Ohio Bureau of Worker's Compensation for Insubordination (b) Failure to follow a written policy of the Employer; Neglect of Duty: (c) Failure to perform the duties of position or performance at substandard levels; & Dishonesty: (a) Intentionally making false or untrue statements regarding work related matters to management, fellow employees or [the] public.

Remedy sought:

Remove discipline and return Mr. Hunter to position as BWC Fraud Investigator with full [b]ack pay, all leaves accruals, all retirement accruals/payments and cease and desist future intimidation and harassment.<sup>2</sup>

## PARTIES' POSITIONS

### State's Position

1. The Grievant failed to properly secure an undercover videotape in his custody from January 24-26, 2009, breaking the chain of custody. The Grievant's inaction compromised a key piece of evidence in a fraud investigation.
2. The Grievant never entered an FMS note explaining the location of the videotape during the weekend in dispute, and falsely claimed he could not recall the videotape's whereabouts during the weekend. The Grievant claimed he entered the proper FMS note, but Roach mistakenly deleted it. The note is not in the permanent BWC (electronic) Data Warehouse.
3. The Grievant failed to enter an FMS note documenting he accessed the videotape

---

<sup>2</sup> On August 24, 2010, Union Steward Cheryl Giordano emailed Ruth Rehak, BWC Labor Relations Officer. Giordano wrote:

I'd like to request a witness for the Step 3 meeting on September 2: Rebecca Roach.

Rehak responded:

I'll be glad to accept a statement from anyone who has information you want me to consider in hearing this grievance. Unfortunately, we're not set up to permit witnesses at Step 3 and the Bureau's practice is to accept statements instead.

---

and made a working copy on January 25, 2009. Having accessed the videotape over the weekend, it is clear the videotape was in his possession that weekend.

4. The Grievant failed to enter an FMS note regarding an April 23, 2010 Industrial Commission hearing he attended involving the karaoke case.
5. From May 28, 2010 to June 22, 2010, the Grievant accessed the work of other BWC employees on six separate workdays without authorization from his supervisor.
6. During the Grievant's June 22, 2010 Agency investigative interview, he answered at least two questions dishonestly.

#### Union's and the Grievant's Position

1. The State removed the Grievant in retaliation for testifying on behalf of his then supervisor, who had made a whistleblower complaint against the Director of the BWC SID.
2. The reasons for the Grievant's removal were pretextual and did not constitute just cause.
3. The State failed to prove the Grievant was dishonest during his BWC investigatory interview.
4. The State failed to prove the Grievant violated BWC's written policy on collection of evidence.
5. The Grievant's review of his coworkers' case files did not violate BWC policy.
6. The State violated Article 24.02 of the Agreement by failing to initiate disciplinary action as soon as reasonably possible.
7. The State violated Article 24.04 of the Agreement when it denied the Grievant Union representation at his Inspector General investigatory interview and failed to provide the purpose of that interview.
8. The State violated Article 24.05 of the Agreement when it failed to provide the Grievant three days notice of his pre-disciplinary hearing, failed to provide a witness list as part of that notice, and failed to provide copies of all documents it intended to use at the hearing.
9. The State violated Article 25.09 of the Agreement when it denied the Union's request for a witness at the Grievant's Step 3 grievance hearing and failed to provide the Union with all records requested by the Union.
10. The State's bad faith conduct with regard to the removal of the Grievant entitles the Grievant to an award of attorney's fees.

## ARBITRATOR'S OPINION

This case is multi-faceted. On the one hand is the Grievant's failure to properly document the chain of custody of the undercover karaoke videotape and his lack of candor in his Inspector General and BWC investigatory interviews. On the other hand is the State's failure to permit the Grievant to have Union representation at his Inspector General investigatory interview.<sup>3</sup>

### The Grievant's Failures

#### 1. Failure to Document the Chain of Custody

The Grievant and coworker Roach failed to document the complete chain of custody of the undercover karaoke videotape.<sup>4</sup> Though the record is unclear regarding who was the formal "custodian" of the videotape on various dates as that term is used in BWC written evidence handling policy, the State proved the Grievant and Roach made incomplete entries into the Fraud Management System and questionable entries on the Evidence Control Document.

The Grievant's failures in documenting the complete chain of custody of the videotape rendered it unusable as a piece of evidence. This is a serious and obvious breach of the Grievant's duties in his position of Fraud Investigator.

#### 2. The Grievant's Lack of Candor in his Investigatory Interviews

The Grievant stated in the record he had participated in only one undercover operation during the approximate year period in question. That makes it all the more

---

<sup>3</sup> The State also failed to initiate disciplinary action as soon as reasonably possible (Article 24.02), failed to provide a witness list as part of the predisciplinary notice (Article 24.05), and failed to permit the Grievant to have a witness at his Step 3 grievance hearing (Article 25.09). These three sections of the Agreement, however, were not alleged as violations in his grievance. Accordingly, the Arbitrator cannot use these violations as a basis for her Award. She notes, however, the Grievant's failure to adequately document the chain of custody of the undercover karaoke videotape and his lack of candor in his investigatory interviews stand as independent grounds for his removal.

<sup>4</sup> Roach and the Agency parted ways in mid-2010.

unlikely he could not remember if he had the karaoke videotape in his possession January 24, 2009-January 25, 2009, the Friday and Saturday of the Friday night undercover operation.

In his Inspector General interview, BWC interview, and at the arbitration hearing, the Grievant carefully crafted his responses to questions regarding his knowledge of the whereabouts of the videotape during the weekend in question. "I don't remember" can and was used by the Grievant to avoid being caught in an outright lie. "I don't remember," however, is not an impervious defense when there is other evidence establishing what would have been the truthful response. Here, not only was this the Grievant's only undercover operation in the recent past, but the State proved without a doubt the Grievant made a working copy of the videotape on his BWC-issued laptop on the Sunday of the weekend in question. "I don't remember" under these circumstances is not credible.<sup>5</sup>

### The State's Failures

The Parties' Agreement provides in pertinent part:

#### **24.04 – Investigatory Interview**

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

**Note this contract provision does not limit the right of Union representation to investigatory interviews conducted by an employee's "home" agency – here, the BWC. Nor does the language exclude Inspector General investigatory interviews from the right to Union representation.**

---

<sup>5</sup> The Arbitrator was dismayed by how often State witness Fox responded "I don't remember" on cross-examination during the arbitration hearing in circumstances that indicated not remembering was unlikely.

It is difficult, if not impossible, to successfully argue the Inspector General's interview of the Grievant was not "investigatory." The preamble to the Inspector General's report involving the Grievant provides in pertinent part:

...

The Inspector General is authorized by state law to investigate alleged wrongful acts or omissions committed by state officers or state employees involved in the management and operation of state agencies. Statutory authority for conducting such investigations is set forth in Ohio Revised Code § 121.41 through 121.50....

...It is the purpose of this office to restore...trust in government by providing impartial investigations of matters referred for investigation, offering objective conclusions based upon those investigations....

The Inspector General does not serve as an advocate for either the Complainant or the agency involved in a particular case. The role of the Office is to ensure that the process of internal investigations within state agencies is conducted fully, fairly, and impartially. As an independent fact finder, the Inspector General may or may not find wrongdoing associated with a particular investigation. However, the Inspector General always reserves the right to make administrative recommendations for improving the operation of state government or referring a matter to the appropriate agency for review.

...

The words "investigate" and "investigations" are used no less than six times in describing what the Inspector General does, and indeed, what the Inspector General did in the instant case.

The State contends because the Inspector General is an "independent" agency, it is not required to provide Union representation to employees under investigation. Regardless of the status of the Inspector General as an independent agency, however, the Parties' Agreement provides certain rights to bargaining unit employees. Among these rights is the right to:

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

Deputy Inspector General Montgomery told the Grievant he was a “witness” when asked by the Grievant in response to a subpoena if he was “needed as a witness or am I the subject of the investigation?” From the record facts of this case, it is apparent the Grievant was more than a witness in the Inspector General’s investigatory interview. Indeed, when the Grievant requested a Union Steward be present at his Inspector General interview, he had “reasonable grounds to believe that the interview [might] be used to support disciplinary action against him....” See also NASA v. FLRA, 527 U.S. 229 (1999), where the U.S. Supreme Court ruled the federal Office of the Inspector General was acting as a representative for NASA; accordingly, the IG’s denial of the employee’s request for union representation at the interview violated the employee’s Weingarten rights.

The Arbitrator is well aware the BWC did its own investigation of the Grievant’s conduct after issuance of the Inspector General report. The similarity of the two investigations, however, makes it a fiction to contend the BWC investigation was completely independent of the Inspector General investigation on the same matter.

The State’s failure, however, in providing the Grievant with Union representation during his Inspector General interview did not materially change the course of events in this matter. The Grievant had a statutory and contractual duty to cooperate and be truthful during his Inspector General interview. If a Union Steward had advised the Grievant to refuse to implicate himself during the Inspector General interview, and the Grievant followed that advice, there would be additional grounds for removing the Grievant from employment.

**Conclusion**

The State has carried its burden of proving it had just cause to remove the Grievant from employment. The State proved the Grievant failed to adequately document the chain of custody of the undercover karaoke videotape. This was a serious breach of the Grievant's basic duties as a Fraud Investigator. The State also proved the Grievant was untruthful during both his Inspector General and BWC investigatory interviews. Regardless of the Grievant's theory that he was retaliated against for having provided testimony in a previous matter, the Grievant's handling of the undercover karaoke videotape and his subsequent untruthfulness during the related investigations constitute just cause for his removal.

**AWARD**

For the reasons set out above, the grievance is denied.

DATED: July 17, 2011

Susan Grody Ruben  
Susan Grody Ruben, Esq.  
Arbitrator